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Problems in the Code

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Higher Education in the COVID Era



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The past year was unkind to U.S. higher education.¹ On Feb. 7, 2020, Concordia University-Portland's board of trustees voted to close the institution by the end of the spring semester. Following that announcement, COVID-19 battered the U.S. economy, including higher education. As COVID-19 spread, colleges and universities scrambled to move instruction online, an expensive transition, particularly at institutions that had previously offered little, if any, online instruction.

As a result, many students sent home during the spring semester demanded *pro rata* refunds of room and boarding charges. Although well-endowed institutions were able to issue refunds without serious financial problems, the refunds reduced the already depleted cash reserves of many small to medium-sized private nonprofit institutions.

Following the declaration of the COVID-19 emergency, several small private nonprofit institutions elected to curtail or cease operations. Notre Dame de Namur University and the San Francisco Art Institute did not admit first-year undergraduate classes in the fall of 2020.² Notre Dame de Namur University currently plans to operate primarily as an online graduate institution, but has entered into agreements to transfer its three viable graduate programs to nearby institutions in the event of a closure.³ The San Francisco Art Institute now plans to

offer graduate programs and undergraduate degree completion programs.⁴ MacMurray College⁵ and Holy Family College⁶ closed in 2020. In addition, Wesley College agreed to be acquired by a nearby university,⁷ and Pine Manor College has merged with another institution.⁸

Pre-pandemic, these six institutions were financially vulnerable and shared one or more traits. These conditions included (1) declining enrollments; (2) substantial reliance on tuition for revenue, combined with significant tuition discounting; (3) modest to small endowments and investments providing little or no alternative to tuition discounting for financial aid; and (4) the disruption and expense inherent in the market-driven transition at many institutions to a focus on job-ready professional and/or online programs.

COVID-19 has increased the uncertainty surrounding higher education enrollments and tuition revenues, and enrollments declined at many, if not most, colleges and universities. Overall, undergraduate enrollment declined 4 percent from the 2019-20 academic year,⁹ and the enrollment of first-year students declined by 16.1 percent.¹⁰ In response, many institutions have proposed or engaged in radical measures.

Canisius College is laying off 94 faculty and staff, and eliminating nine undergraduate majors.¹¹

1 Like 2020, 2021 continues to present challenges. Within the first month, one college announced that it will close. See "Concordia College New York to Close," Press Release (Jan. 28, 2021), available at concordia-ny.edu/about/news/1701180/concordia-college-new-york-to-close (unless otherwise specified, all links in this article were last visited on March 22, 2021).
2 See "The Future of Notre Dame de Namur University," Press Release (Jan. 25, 2021), available at www.ndnu.edu/future-of-ndnu. See Brian Boucher, "Amid Turmoil, SFAI Will Resume Offering Classes in the Fall, Leaving Staff with Concerns," ARTnews (Aug. 13, 2020), available at artnews.com/art-news/news/sfai-resumes-offering-classes-staff-concerns-1202696748.
3 *Id.* See "A Message from President Carey to the NDNU Community," Press Release (Jan. 25, 2021), available at www.ndnu.edu/future-of-ndnu/message-from-president-carey-to-the-community; Zachary Clark "Notre Dame de Namur President Unveils New Plan for School's Future," *The Daily Journal* (July 27, 2020), available at smdailyjournal.com/news/local/notre-dame-de-namur-president-unveils-new-plan-for-school-s-future/article_90e17c1c-cfb6-11ea-a897-4f63eb587fd8.html. Marylhurst University (closed in 2018) and Marygrove College (closed in 2019) attempted, but were unsuccessful, in making similar transformations.

4 See "Apply Now," San Francisco Art Inst., available at sfai.edu/admissions/apply-now; reference to Marygrove and Marylhurst in n.3.
5 See "MacMurray College Closure," Press Release, available at mac.edu.
6 See "Holy Family College in Manitowoc to Close Its Doors," WBAY (May 4, 2020), available at wbay.com/content/news/Holy-Family-College-in-Manitowoc-to-close-its-doors-570176111.html.
7 See "Wesley College Is Proud to Join Delaware State University," Press Release, available at wesley.edu/wesley-college-is-proud-to-join-delaware-state-university.
8 See "Pine Manor College, Boston College Announce Institutional Agreement," Press Release, available at bc.edu/bc-web/bcnews/campus-community/announcements/pine-manor-institutional-agreement.html.
9 See Todd Sedmak, "Fall 2020 Undergraduate Enrollment Down 4% Compared to Same Time Last Year," Nat'l Student Clearinghouse (Oct. 15, 2020), available at studentclearinghouse.org/blog/fall-2020-undergraduate-enrollment-down-4-compared-to-same-time-last-year.
10 *Id.*
11 See "A Message from President John J. Hurley," Press Release, available at canisius.edu/message-to-alumni.

The University of Evansville plans to eliminate 17 undergraduate majors.¹² The board of trustees for Guilford College proposed the elimination of 15 majors, as well as 30 percent of its full-time faculty positions,¹³ although that decision was “paused” in response to significant stakeholder opposition.¹⁴ Ohio Wesleyan University has eliminated 18 majors and 44 non-faculty staff positions.¹⁵ Only four years after eliminating a significant number of programs, the College of Saint Rose is eliminating 16 undergraduate programs, six graduate programs, and 33 tenured and tenure-track faculty positions.¹⁶ Marquette University’s administration has proposed eliminating 225 faculty and staff positions over 18 months.¹⁷ Programs in the humanities and social sciences have been most vulnerable to elimination,¹⁸ but STEM programs (even engineering) have not been spared,¹⁹ nor have signature programs.²⁰

Existing COVID-Related Relief Does Not Address Systemic Weakness

Is there a way forward for private, nonprofit colleges and universities impacted by COVID-19 that does not require the aforementioned radical steps? The relief provided by the Coronavirus Aid, Relief and Economic Security (CARES) Act²¹ focused almost entirely on providing financial support for the immediate response to the emergency. As such, that relief did not solve the underlying conditions bedeviling many colleges and universities. The higher-education provisions of the Consolidated Appropriations Act of 2021 (H.R. 133) similarly provided no resources for addressing those conditions. Analysts with Fitch Ratings have concluded that the relief package “will not be sufficient” to address *even the COVID-related revenue losses* suffered by colleges and universities.²² Therefore, more cuts to “programs, staff capital and other discretionary items” should be expected.²³

Even the higher-education funding initially proposed by President Joe Biden did not address the underlying conditions impacting higher education. The COVID-19 relief plan includes \$40 million in relief for higher education. However,

that relief was generally unavailable to private, nonprofit colleges²⁴ as it was limited to public institutions and minority-serving private institutions.²⁵ Moreover, even public institutions have noted that the initially proposed \$35 million in relief is insufficient to meet their needs in addressing the revenue shortfalls resulting from COVID-19.²⁶ Even the Biden proposal provided no funding to address the systemic weaknesses impacting colleges and universities. Subsequent proposals have included aid to more private, nonprofit institutions, but is insufficient to address the underlying financial challenges they face.

Colleges and universities must have the tools necessary to address the systemic weaknesses affecting them if they are to maintain or regain financial viability.

The Bankruptcy Code Must Be Revised

Colleges and universities must have the tools necessary to address the systemic weaknesses affecting them if they are to maintain or regain financial viability. However, many commentators characterize the business model of most colleges and universities as outdated and in need of revision. Unfortunately, reorganization under chapter 11 is currently unavailable to colleges and universities. To be sure, the CARES Act expanded the universe of small businesses eligible to reorganize under subchapter V of chapter 11, but it provided no analogous relief for colleges and universities, and therefore continued the existing bar to reorganization by colleges and universities under chapter 11.

Before 1998, colleges and universities were eligible to reorganize in bankruptcy. For example, Bloomfield College successfully reorganized in bankruptcy. In part to address the misuse of bankruptcy by owners of for-profit institutions,²⁷ the Higher Education Act of 1965 was amended, effective Oct. 1, 1998, to bar colleges or universities that have filed for bankruptcy from participating in the federal student financial aid programs under title IV of the Higher Education Act.²⁸ As a result, students may no longer use their federal financial aid at colleges and universities that have sought relief under the Bankruptcy Code.

Student financial aid is critical to many colleges and universities, particularly those serving large numbers of less-affluent students. Hence, a bankruptcy filing by a college or university effectively leaves no options but liquidation.²⁹ The

12 See Jill Lyman & Evan Gorman, “UE Announces Academic Realignment Plan, Multiple Majors Could Be Cut,” *WFIE* (Dec. 10, 2020), available at [14news.com/2020/12/10/ue-announces-academic-realignment-eliminating-some-majors](https://www.wfie.com/2020/12/10/ue-announces-academic-realignment-eliminating-some-majors).

13 See John Newsom, “‘Heartbreaking’: Guilford College to Make Deep Cuts to Its Academic Majors and Faculty,” *News & Record* (Nov. 6, 2020), available at [greensboro.com/news/local/education/heartbreaking-guilford-college-to-make-deep-cuts-to-its-academic-majors-and-faculty/article-7755e64e-1f88-11eb-8cf0-4743eb7847ae.html](https://www.greensboro.com/news/local/education/heartbreaking-guilford-college-to-make-deep-cuts-to-its-academic-majors-and-faculty/article-7755e64e-1f88-11eb-8cf0-4743eb7847ae.html).

14 See John Newsom, “Guilford College Hits Pause on Sweeping Proposed Campus Changes,” *News & Record* (Dec. 16, 2020), available at [greensboro.com/news/local/education/guilford-college-hits-pause-on-sweeping-proposed-campus-changes/article_e2202e1c-3572-11eb-9344-c72473fc746a.html](https://www.greensboro.com/news/local/education/guilford-college-hits-pause-on-sweeping-proposed-campus-changes/article_e2202e1c-3572-11eb-9344-c72473fc746a.html).

15 See Jennifer Smola, “Ohio Wesleyan Cuts 18 Majors, Consolidates Departments to Save \$4 Million,” *Columbus Dispatch* (Oct. 12, 2020), available at [dispatch.com/story/news/education/2020/10/12/ohio-wesleyan-cuts-18-majors-including-journalism-after-review/3635864001](https://www.dispatch.com/story/news/education/2020/10/12/ohio-wesleyan-cuts-18-majors-including-journalism-after-review/3635864001).

16 See “Saint Rose to Discontinue Academic Programs as Part of Proactive Plan to Address Financial Challenges,” Press Release (Dec. 8, 2020), available at [strose.edu/2020/12/08/saint-rose-to-discontinue-academic-programs-as-part-of-proactive-plan-to-address-financial-challenges](https://www.strose.edu/2020/12/08/saint-rose-to-discontinue-academic-programs-as-part-of-proactive-plan-to-address-financial-challenges).

17 See Rich Kremer, “Marquette University to Cut 225 Faculty and Staff Positions by July 2022,” *Wisconsin Public Radio* (Dec. 10, 2020), available at [wpr.org/marquette-university-cut-225-faculty-and-staff-positions-july-2022](https://www.wpr.org/marquette-university-cut-225-faculty-and-staff-positions-july-2022).

18 Concern for the future of humanities and social science programs at Marquette has been expressed by the Committee on Research (see “Letter,” available at [marquette.edu/innovation/documents/cor-resolution.pdf](https://www.marquette.edu/innovation/documents/cor-resolution.pdf)), Faculty Council (see “Letter,” available at [ourmarquette.net/files/FacultyCouncilopenletteronbehalfoffacultyDec32020.pdf](https://www.marquette.edu/files/FacultyCouncilopenletteronbehalfoffacultyDec32020.pdf)), the Jesuit Community (see “Letter,” available at [ourmarquette.net/files/MUJesuitHigherEducationStatement.pdf](https://www.marquette.edu/files/MUJesuitHigherEducationStatement.pdf)) and faculty members in the STEM disciplines (see “Letter,” available at [ourmarquette.net/files/STEMletterSigned.pdf](https://www.marquette.edu/files/STEMletterSigned.pdf)).

19 See documents, *supra* n.11-17.

20 See Press Release, *supra* n.16; Newsom, *supra* n.13.

21 Pub. L. No 116-136.

22 See “Federal Stimulus Won’t Offset Higher Ed Budget Pressures,” *Fitch Ratings* (Jan. 7, 2021), available at [fitchratings.com/research/us-public-finance/federal-stimulus-won-t-offset-higher-ed-budget-pressures-07-01-2021](https://www.fitchratings.com/research/us-public-finance/federal-stimulus-won-t-offset-higher-ed-budget-pressures-07-01-2021).

23 *Id.*

24 See “Biden Plan for Education Beyond High School,” Press Release, available at [joebiden.com/beyondhs](https://www.joebiden.com/beyondhs).

25 *Id.*

26 See Kery Murakami, “Private College Worries,” *Inside Higher Ed* (Jan. 18, 2021), available at [insidehighered.com/news/2021/01/18/private-colleges-wonder-if-they-are-biden-relief-plan](https://www.insidehighered.com/news/2021/01/18/private-colleges-wonder-if-they-are-biden-relief-plan).

27 See Emma Whitford, “Back from Two Decades on the Brink,” *Inside Higher Ed* (Jan. 12, 2021), available at [insidehighered.com/news/2021/01/12/morris-brown-s-accreditation-would-mean-resurrection-hbcu-long-brink-closure](https://www.insidehighered.com/news/2021/01/12/morris-brown-s-accreditation-would-mean-resurrection-hbcu-long-brink-closure).

28 See 20 U.S.C. § 1002(a)(4)(A).

29 Morris Brown College, which filed for chapter 11 relief in 2012, is the only college or university since 1998 that has not liquidated in bankruptcy. The college, which had previously lost its accreditation and access to title IV financial aid programs, is currently seeking reaccreditation. See Whitford, *supra* n.27. Indeed, on April 13, 2021, the Transnational Association of Christian Colleges announced that Morris Brown College had achieved full candidacy for accreditation. However, reaccreditation may not restore its eligibility to participate in title IV federal financial aid programs. *Id.* In addition, the college, which once enrolled more than 2,000 students, enrolled only 35 students during the 2019-20 academic year. See Morris Brown College Data, available at [morrisbrown.edu/quick-facts](https://www.morrisbrown.edu/quick-facts).

recent bankruptcy filings by the College of New Rochelle, Dowling College and St. Gregory's University underscore this point. In each case, the institution ceased operations and its assets were liquidated.

The ongoing COVID-19 pandemic will only increase the financial pressures on colleges and universities. Enrollments and tuition revenues at many colleges and universities have continued to decline. Similar to the 2008 Great Recession, the pandemic has prompted prospective students to reconsider the value of a college degree,³⁰ and many students who recognize the value of a college degree question whether they should pay full tuition for online degrees that exclude such aspects of the "college experience" as in-person mentoring, face-to-face instruction and networking opportunities.³¹

Moreover, universities and colleges can tolerate only so much cost-cutting and still remain viable. COVID-related relief has not included funding for addressing higher education's systemic weaknesses. Finally, many of the means of operational restructuring necessary to many colleges and universities (e.g., merger/consolidation/partnership or changes in benefit plans, governance or tenure) might be possible only if those institutions are equipped with the powers of a chapter 11 debtor.

How should university and college access to chapter 11 be effectuated? The answer is to repeal 20 U.S.C. § 1002(a)(4)(A), the provision that prohibits institutions that have filed for bankruptcy relief from participating in federal financial aid programs. However, complete repeal is unlikely in the wake of, *inter alia*, (1) the spectacular and widely publicized failures of several for-profit higher-education systems such as Corinthian College and ITT Technical Institutes; (2) the abrupt closures of nonprofit institutions such as Mount Ida College; (3) the \$13 million in financial aid stipends due students that went missing at certain Dream Center Educational Holdings system campuses;³² (4) the misconduct by the controller of the College of New Rochelle (including the failure to pay \$20 million in employment taxes and withholdings) that went unnoticed for three years and led to the college's closure; and (5) deep dives into endowments or investments funds, such as the \$10.2 million that was drained from the College of New Rochelle's already modest \$14.2 endowment to pay operating expenses.³³ These factors, particularly when publicized by the media, have generated suspicion about the operations of colleges and universities. Therefore, repeal of or amendment to 20 U.S.C. § 1002(a)(4)(A) must alleviate those suspicions.

To do so, the repeal of 20 U.S.C. § 1002(a)(4)(A) must be accompanied by one or more amendments to the Bankruptcy

Code crafted to address factors particular to the higher education industry, just as the 2005 amendments to the Code included provisions addressing factors particular to health care bankruptcies. At the very least, the amendments should provide for the appointment of a fiduciary, analogous to a patient care ombudsman appointed pursuant to 11 U.S.C. § 333, to monitor certain aspects of the operation of a college or university.

The security of student aid funds, particularly those advanced or guaranteed by governmental entities, and the institution's endowment should be of paramount concern to the fiduciary, which should have oversight over the security, distribution and use of financial aid funds to ensure that their use complies with applicable law. Similarly, the fiduciary should have oversight over the security, use and disbursement of endowment funds, in particular to ensure that their use complies with any documents governing the endowment. The fiduciary should also be tasked with monitoring the debtor's compliance with applicable law, policies and procedures concerning (1) shared governance, (2) the award of or denial of tenure, (3) the use or sale of the debtor's property, (4) the debtor's continued eligibility for any tax exemptions, and (5) the relationship between the debtor and its founding religious tradition, if any. Another area that could require fiduciary oversight is compliance with diversity and inclusion initiatives.

Two models are available for the necessary amendments to the Bankruptcy Code. The first is exemplified by the health care-related bankruptcy amendments in 2005 and would include adding a new provision to the Code analogous to § 333, which provides for the appointment of a patient care ombudsman and amends other Code provisions as necessary to accommodate the peculiarities of health care reorganizations. This model would be preferable if few additions to the Code or Code amendments are required. The second model would resemble the recently enacted subchapter V of chapter 11 for small business bankruptcies and accommodate the peculiarities of higher-education bankruptcies. This model would be preferable if the required additions to the Code and Code amendments are extensive.

Potential Remedies in the Meantime

Unless and until they can reorganize under chapter 11, troubled colleges and universities must look to other means of maintaining or achieving financial viability. They should begin to work proactively and first take advantage of any financial relief (federal or state) that becomes available to colleges and universities. They should also contact their institutions' lenders and bond trustees and work with them to avoid defaults and, if necessary, to modify the transactional documents to allow the institutions to better weather the COVID-19 pandemic and its aftermath. All contracts, including employment and collective-bargaining agreements, should be reviewed and, to the extent necessary and feasible, renegotiated. In the face of the increased concern (and criticism) about sudden college and university closings, administrators should reach out to and maintain open communications with accreditors and state regulators. If a sale of any of the institution's assets or a significant draw-down on restricted endowment funds is

30 See, e.g., Romesh Ratnesar, "As COVID Casts Doubts over Higher Education, Is a College Degree Worth It?," *Bus. Standard* (Nov. 9, 2020), available at business-standard.com/article/education/as-covid-casts-doubts-over-higher-education-is-a-college-degree-worth-it-120110900081_1.html; Lilah Burke, "10 Months In," *Inside Higher Ed* (Jan. 22, 2021), available at insidehighered.com/news/2021/01/22/survey-outlines-student-concerns-10-months-pandemic.

31 See Jessica Dickler, "College Students Argue Distance Learning Should Cost Less as Some Schools Are Charging More," *CNBC* (Sept. 18, 2020), available at cnbc.com/2020/09/18/as-colleges-move-to-distance-learning-students-take-their-cases-to-court.html.

32 See Daniel Moore, "\$13 Million in Financial Aid Missing? Federal Receiver Tries to Track Down Money from Art Institute Owners," *Pittsburgh Post-Gazette* (Feb. 13, 2019), available at post-gazette.com/business/career-workplace/2019/02/13/Financial-aid-Art-Institute-Dream-Center-Education-Holdings-EDMC-Mark-Dottore/stories/201902130104.

33 See Bill Heltzel, "College of New Rochelle Officials Sued over Financial Mismanagement," *Westchester & Fairfield County Bus. Journals* (Jan. 20, 2021), available at westfaironline.com/132146/college-of-new-rochelle-officials-sued-over-financial-mismanagement.

being considered, prudence dictates communication with the state attorney general.

Similarly, mergers and affiliations will likely trigger the requirement of accreditor approval, and proactive communications with the accreditor would be prudent. Given the tradition of shared governance at institutions of higher education, there should be appropriate communications with faculty and their representatives. Because the aforementioned steps likely will give rise to legal questions, the college or university will need competent legal advice and counsel. Although the actions discussed herein do not come with the authority and powers accorded a debtor in possession, they can be — and have been — very useful to financially struggling debtors and are not without value as long as reorganization under chapter 11 remains unavailable to institutions of higher education. **abi**

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