The Federal Refund Regulations and Student Financial Assistance: A Plea for Change

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INTRODUCTION

Three students attend Expensive Private University ("EPU"), studying undergraduate Pre-Law (i.e., anything from Engineering to Art). Students One and Two are freshmen and Student Three is a sophomore. Students One and Three receive need-based aid (both institutional and federal), while Student Two receives only a merit scholarship from the institution.\(^1\) Since EPU is a private institution, it charges the same rate of tuition for all three students. Furthermore, all three students’ aid packages\(^2\) are equal in amount (albeit from different sources) and all three live in the same dorm room. On the twentieth day of the semester, all three decide to withdraw from EPU.

Query: Given the facts above, how much will each student receive as a "refund" from EPU? Answer: To the rational observer, the logical answer would be that all three should receive the same amount. However, the pervasive maze of federal regulations, promulgated under the authority of Title IV of the Higher Education

1. Financial aid is generally grouped into two categories: need-based aid and non-need based aid. Need-based aid is awarded on the basis of financial need. Federal aid programs, such as the Federal Family Education Loans (the subsidized and unsubsidized Federal Stafford, Federal PLUS [Parent Loan for Undergraduate Students], the Federal Perkins Loan, and the Federal Work-Study program), are all awarded on the basis of financial need. In federal programs, financial need is determined by subtracting the Expected Family Contribution ("EFC") from a student’s cost of attendance. The cost of attendance is the cost of required tuition and fees, living expenses (generally room and board), and may include books, supplies, miscellaneous expenses, and transportation. The EFC is determined by using a Congressionally mandated formula called the Federal Methodology. Post-secondary institutions may also award their own need-based grant and loan funds, using either the Federal Methodology, or an institutional methodology of their own.

Non-need-based aid is generally awarded on the basis of academic, artistic, or athletic achievement. Non-need-based aid is generally funded by post-secondary institutions, except for a small number of federal quasi non-need-based programs such as the Byrd Scholarship. See Anna Leider, Financial Aid Today, 8 J. FIN. PLAN. 63, 63-71 (Apr. 1995); U.S. DEPT OF EDUC., 1997-98 THE STUDENT AID GUIDE (1997).

2. A “financial aid package” is defined as the sum of all a student’s financial aid including both need-based and non-need-based aid, consisting of grants, scholarships, and self-help funds such as work and loan programs. U.S. DEPT OF EDUC., 1997-98 THE STUDENT AID GUIDE 33 (1997).
Act of 1965 ("HEA")\(^3\) and the Higher Education Amendments of 1992,\(^4\) combined with the reluctance of Congress to impose consistent regulations to protect students not receiving aid, lead to three similarly-situated students receiving three different refunds. This comment surveys the present federal regulations, recent circuit court cases clarifying and obfuscating the issue, and current proposals to forge a unified refund policy.

In assessing the up-front costs of higher education, consumers of higher education have become increasingly willing to accept differential pricing strategies and to work actively to negotiate favorable financial aid packages.\(^5\) Given that students cannot, and do not, always continue their education at their first, or even second, college, the refund policy of a school should be another factor considered in college planning and selection. With the upcoming reauthorization of the Higher Education Act,\(^6\) now is a particularly appropriate time for Congress to address this problem by giving clear direction to the Department of Education ("DOE").\(^7\) Furthermore, combining Congressional legislative authority with DOE regulatory restraint may result in a clear, understandable, and more importantly, consistent refund policy.

THE STATUTORY AND REGULATORY FRAMEWORK OF THE CURRENT REFUND POLICY

The current patchwork of federal refund policies resulted from the reauthorization of the HEA through the Higher Education Amendments of 1992.\(^8\) Congress enacted the Higher Education Amendments, in part, to develop a "fair and equitable" policy which

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6. "Reauthorization" is a process of Congressional review and reapproval of the Act's programs upon the expiration of a statutorily defined time period. Thomas R. Wolanin, A Primer on the Reauthorization of the Higher Education Act, 29 CHANGE 50 (1997). Congress also uses the reauthorization process to change provisions of the Act with input from the financial aid community and the DOE. Id.
7. The Department of Education's mission is "to ensure equal access to education and to promote educational excellence throughout the nation." U.S. Department of Education Strategic Plan: 1998-2002, Sept. 30, 1997, at 9. In fiscal year 1997, the DOE was responsible for programs which provided 67.6 billion dollars in educational aid. Id. at 4. As an administrative agency, the DOE has the power, once authorized by statute, to promulgate federal regulations, ensure compliance, and work with state agencies. Id. at 9-10.
would be applied to students receiving Title IV federal student assistance. In the Higher Education Amendments of 1992, Congress adopted a comprehensive scheme to determine the appropriate refund for any student receiving Title IV aid. Detailed regulations promulgated by the DOE implemented the statutory scheme, but many students and institutions found the regulations to be incomprehensible.

The specific statutory authority for the new refund policy is HEA section 1091b. The statute requires the refund policy to be “fair and equitable.” A “fair and equitable” refund is defined as, at least


11. 20 U.S.C. section 1091b (1997) provides, in its entirety:

1091b. Institutional refunds
(a) Refund policy required. Each institution of higher education participating in a program under this title shall have in effect a fair and equitable refund policy under which the institution refunds unearned tuition, fees, room and board, and other charges to a student who received grant or loan assistance under this title, or whose parent received a loan made under section 428B on behalf of the student, if the student —

(1) does not register for the period of attendance for which the assistance was intended; or

(2) withdraws or otherwise fails to complete the period of enrollment for which the assistance was provided.

(b) Determinations. The institution's refund policy shall be considered to be fair and equitable for purposes of this section if that policy provides for a refund in an amount of at least the largest of the amounts provided under —

(1) the requirements of applicable State law;

(2) the specific refund requirements established by the institution's nationally recognized accrediting agency and approved by the Secretary; or

(3) the pro rata refund calculation described in subsection (c), except that this paragraph will not apply to the institution's refund policy for any student whose date of withdrawal from the institution is after the 60 percent point (in time) in the period of enrollment for which the student has been charged.

(c) Definitions.

(1) As used in this section, the term "pro rata refund" means a refund by the institution to a student attending such institution for the first-time of not less than that portion of the tuition, fees, room and board, and other charges assessed the student by the institution equal to the portion of the period of enrollment for which the student has been charged that remains on the last day of attendance by the student, rounded downward to the nearest 10 percent of that period, less any unpaid charges owed by the student for the period of
the largest of the refunds under either State Law, an approved accrediting agency refund scheme, or the federally mandated refund policy. In defining the federal scheme the regulations provide for a "pro rata refund" policy for first-time students and a "federal refund" policy for non-first-time students. A safe harbor provision states, however, that after the expiration of sixty percent of the period of enrollment, the federal "pro rata" policy is inapplicable. Furthermore, the statute specifies the order in which financial aid must be returned.

The DOE promulgated regulations implementing section 1091b at 34 C.F.R. section 668.22. The regulations are comprehensive, and

(2) For purposes of paragraph (1), "the portion of the period of enrollment for which the student has been charged that remains," shall be determined —

(A) in the case of a program that is measured in credit hours, by dividing the total number of weeks comprising the period of enrollment for which the student has been charged into the number of weeks remaining in that period as of the last recorded day of attendance by the student;

(B) in the case of a program that is measured in clock hours, by dividing the total number of clock hours comprising the period of enrollment for which the student has been charged into the number of clock hours remaining to be completed by the student in that period as of the last recorded day of attendance by the student; and

(C) in the case of a correspondence program, by dividing the total number of lessons comprising the period of enrollment for which the student has been charged into the total number of such lessons not submitted by the student.

Id.

12. The "pro rata refund" is specifically defined in 20 U.S.C. section 1091b(c)(1) (1997), but it is explicitly limited to first-time students. The federal refund policy for non-first-time students is defined in 34 C.F.R. section 668.22(d) and arises by negative implication of section 1091b(c), which by its terms applies only to first-time students.

13. 20 U.S.C. § 1091b(b)(3) (1997). The negative implication of the safe harbor provision is that it is equitable for the institution to charge fees of 100% if the student has attended for less than the first 60% of the semester. Institutions are free to give pure pro rata refunds beyond the 60% point, but due to economic realities few do. Institutions have criticized the 60% point in time as being too generous. See Reauthorization of Student Assistance Programs, 1997: Hearings on Reauthorization of Title IV of the Higher Education Act, 105th Cong. (1997) (statement of Dr. Phillip H. Day, President, Daytona Beach Community College).

14. 20 U.S.C. section 1092(a)(1)(F) (1997) states that "refunds shall be credited in the following order: first to reimburse federal government programs, then other sources of aid (e.g., state government programs), and last the student." Id.

15. The Code of Federal Regulations ("C.F.R.") is a compilation of all federal regulations published in the federal register each year. It contains fifty broad subject matter titles, which are updated annually. The C.F.R. also includes existing regulations which have not been changed during the year. BLACK'S LAW DICTIONARY 257 (6th ed. 1990).
for many student aid administrators, extremely confusing. The regulations require that each institution provide a "clear and conspicuous" explanation of its refund policy.\(^\text{16}\) The regulations continue the comparison mandated by the statute, but in addition to the "pro rata refund" policy required for first-time students, the regulations create the "federal refund" calculation required for other than first-time students. Hence, two possible comparison schemes exist: the greatest refund among a permissible institutional policy under State law, an approved accrediting agency policy, and the "pro rata" refund for first-time students; and the greatest refund among a permissible institutional policy under State law, an approved accrediting agency policy, and the "federal refund" for non-first-time students. Because no accrediting agency's refund structure has been approved by the DOE to date,\(^\text{17}\) the comparison is essentially between the refund policy of the institution (as long as it is permissible under State law), and that of either the "pro rata" or "federal refund" policy under the applicable regulation.\(^\text{18}\)

The initial difficulty inherent in the refund regulations is the presence of several precisely defined terms that cause considerable confusion. First and foremost, the "refund" referred to in the regulations is more than just the amount the student ultimately receives back directly from the school — it also includes the amount of aid returned to federal, state, and institutional programs.\(^\text{19}\) A student who still owes a balance to an institution after receiving a "refund" could reasonably be expected to be perplexed. In addition, the DOE provides little in the way of direct information to students regarding refund policies, apparently assuming that an institution's "clear and conspicuous" explanation will suffice.\(^\text{20}\) Moreover, it may not be possible for such a "clear

\(^{16}\) 34 C.F.R. 668.22(a)(2) (1997).


\(^{18}\) See 34 C.F.R. 668.22(b)(1)(iii) (the pro rata refund policy) and 34 C.F.R. 668.22(b)(1)(iv) (the federal refund policy) (1997).

\(^{19}\) The "refund" referred to is quite different from the common definition, "to repay or restore; to return money in restitution or repayment; e.g., to refund overpaid taxes; to refund purchase price of returned goods." BLACK’S LAW DICTIONARY 1281 (6th ed. 1990).

\(^{20}\) See, e.g., U.S. DEP’T OF EDUC., 1997-98 THE STUDENT AID GUIDE 30 (1997): "If you enroll but never begin classes, you should get most of your money back. If you begin attending classes but leave before completing your course work, you may be able to get part of your money back. Keep in mind that if you receive federal student aid from any of the programs mentioned in the Guide — except for Federal Work-Study — and a refund is made, some or all of that money will be returned directly to those aid programs or to the lender for your loans." Id.
and conspicuous” statement to be drafted by institutions, much less understood, given the current regulatory framework.

Because of the complexity of the federal student assistance programs, and the volume of regulations under Title IV, the DOE provides schools with an annual publication, The Federal Student Aid Handbook (“FSA Handbook”). Chapter Three, section five, of the 1996-97 FSA Handbook provides fifty-seven pages of definitions, explanations, and case studies to elucidate the refund and repayment procedures. As noted, one of the most important definitions is that of “refund,” defined as “the amount paid toward the student’s educational expenses, from all sources, less the amount which the school may retain.”

The FSA Handbook continues to define essential terms used in refund administration. Students who withdraw after receiving aid in excess of the school’s direct charges to cover living expenses have received “overpayments,” and may be required to make a “repayment” of a portion of those funds. These “repayments” differ from “refunds” in that the school refunds aid to federal, state, and institutional aid programs; whereas the student who has received an “overpayment” must pay back the funds received directly to the federal programs. Another key definition, which

21. FSA HANDBOOK 1-1. The FSA Handbook further explains that while it does not carry the same force of law as a statute, regulation, or direction from the Department of Education itself, compliance with the rules as expressed in the FSA Handbook can be used to assess the good faith of an institution undergoing a program review. Id.

22. Id. 3-75 - 3-132. Financial aid professionals have commented to Congress on the amount of information required to explain the refund regulations. See House Education and the Workforce Postsecondary Education, Training, and Lifelong Learning: 1997: Higher Education Act Reauthorization Field Hearing, 105th Cong. (1997) (statement of Keith A. Green, Vice President Student Finance, Berkeley College).

23. FSA Handbook 3-76. Furthermore, the regulations under section 688.22 state that a “fair and equitable” refund policy is one under which a school returns “unearned” charges to a student receiving federal student assistance. 34 C.F.R. § 688.22(a)(1) (1997).

24. FSA Handbook 3-76. The section 688.22 regulations provide that an “overpayment” occurs when a student receives non-loan (except for Federal Perkins Loan) and non-federal work study aid in excess of allowable noninstitutional charges. 34 C.F.R. § 688.22(f)(3)(i) (1996). Allowable noninstitutional charges are those calculated for living and other educational expenses not payable directly to the institution. FSA HANDBOOK 3-85. An “overpayment” would occur to the extent that the funds advanced to the student exceeded the living expenses incurred as of the student’s withdrawal. The date of withdrawal is further discussed at infra note 28 and accompanying text.

25. FSA Handbook 3-76. The Federal Work-Study program through which students work while on campus and are paid wages for their work is excluded from the refund requirements (because the students have earned the funds paid to them). Furthermore, the Federal Family Educational Loan programs, including the Federal Stafford (subsidized and unsubsidized), Federal PLUS, and Federal Direct Loan (subsidized and unsubsidized) programs are excluded from the repayment calculation because the student is obligated to
determines whether the student is eligible for the "pro rata" refund comparison, is a "first-time" student.\textsuperscript{26} Only if a student does not meet any of the definitions of first-time student, may the school use the "federal refund" comparison.\textsuperscript{27}

Several other definitions emerge from the refund calculations themselves. The first step in calculating a refund, under any policy, is to determine the student's date of "withdrawal." Withdrawal is determined from the date on which the student last attended class, as recorded by the school or the student.\textsuperscript{28} The school must also characterize charges as either "institutional" or "non-institutional." Institutional charges are those paid directly to the school for educational reasons.\textsuperscript{29} Non-institutional charges are those paid for educational items to parties other than the school.\textsuperscript{30} "Unpaid charges" are measured by subtracting the total aid paid toward institutional charges from the total institutional charges.\textsuperscript{31} This subtotal is known as the "scheduled cash payment" ("SCP").\textsuperscript{32} From the SCP, any cash the student has paid is subtracted. If any of the scheduled cash payment remains unpaid, this amount reflects the "unpaid charges."\textsuperscript{33} In calculating non-pro rata refunds, the DOE repay those funds directly to the lender. \textit{Id.} 3-77.

\textsuperscript{26} A "first-time student" is defined by each institution. Therefore, a student can be a first-time student at several institutions successively. The regulations define a first-time student as one who has either never attended an institution or who has attended, but received a full refund. 34 C.F.R. § 688.22(c)(7)(i).

\textsuperscript{27} \textit{Id.} at 3-79.

\textsuperscript{28} \textbf{FSA HANDBOOK} 3-83. The regulations further provide a leave of absence provision. The student will not be deemed to have withdrawn if the school approves, the leave is not more than 60 days, the student receives only one such leave per year, and the school does not charge the student during the leave. 34 C.F.R. § 668.22(c)(7)(i) (1997). \textit{See also} \textbf{FSA HANDBOOK} 3-84. For comments on the difficulty of determining the date of withdrawal, \textit{see Reauthorization of Student Assistance Programs, 1997: Hearings on Reauthorization of Title IV of the Higher Education Act, 105th Cong. (1997) (statement of Dr. Phillip H. Day, President, Daytona Beach Community College).}

\textsuperscript{29} \textbf{FSA HANDBOOK} 3-85. "Institutional charges" are tuition, fees, as well as room and board, if charged by the institution. \textit{Id.}

\textsuperscript{30} \textit{Id.} "Non-institutional" charges are most frequently transportation, book charges, or off-campus rent paid to a landlord unaffiliated with the college. \textit{Id.}

\textsuperscript{31} \textit{Id.} 3-87.

\textsuperscript{32} 34 C.F.R. § 688.22(c)(2) (1997).

\textsuperscript{33} \textbf{FSA HANDBOOK} 3-87. The example from the \textbf{FSA Handbook}:

\begin{quote}
[A] student has institutional costs of $3,000. She has an aid package of $2,500. This leaves an SCP of $500 ($3,000 - $2,500 = $500). Assuming she makes no payments, her "unpaid charges" would be the amount of the SCP less what she paid [(in this case, $0), equaling] unpaid charges of $500. Assuming a state refund policy permitting the school to charge her for 50% of her charges, the school would seek to retain $1,500 (50% of $3,000). The unpaid charges calculation, however, would require that the $500 in unpaid charges be deducted from the amount the school is permitted to retain
\end{quote}
Duquesne Law Review contends that the unpaid charges must be subtracted from the amount the school can otherwise retain.  

After determining the unpaid charges, the school must calculate a refund under all of the applicable refund policies. For first-time students, the pro rata refund is compared to the state and accrediting agency policies. The pro rata refund only applies if the student withdraws (as measured by the withdrawal date) within the first sixty percent of the period of enrollment. In the pro rata calculation, the school calculates the percentage of the enrollment period remaining after withdrawal, rounded to the next lowest 10%, to determine the percentage of charges to return. From this amount, unpaid charges are subtracted, assuring that the unpaid charges are paid out of the financial aid funds.

The federal refund calculation starts with the determination of what portion of the institutional charges are to be returned. After returning those charges, the school must also subtract any "unpaid charges." This allocates the risk of non-payment of those charges to the school itself. Similarly, if the institution's own refund policy is different from the federal refund, the unpaid charges must be subtracted.

"Repayments" occur when a student withdraws after receiving financial aid to cover living expenses, and the amount of aid received exceeds the student's living expenses up to the point of withdrawal. After calculating the repayment amount, the school must notify the student and attempt to collect. Unlike unpaid

($1,500 less $500). Thus, the school would be required to "refund" $1,500 of the $2,500 of financial aid the student received. The school would have to collect the unpaid $500 from the student directly.

Id. 3-87. The rationale for the unpaid charges calculation is further described by the FSA Handbook 3-88.

34. The federal circuit court cases involving the federal refund regulations have centered around the concept of "unpaid charges." The unpaid charges issue is further discussed at infra notes 53-54 and the accompanying text.
36. 34 C.F.R. § 668.22(c)(1) (1997).
37. FSA HANDBOOK 3-97. The regulations provide that withdrawal up to the first day of class warrants a 100% refund; up to the first 10% of the enrollment period, a 90% refund; from the 10% to the 25% period of enrollment, a 50% refund; and from the 25% to the 50% period of enrollment, a refund of 25%. After the 50% point in time, no refund need be given. 34 C.F.R. § 668.22(d)(1)(ii-v) (1997).
38. FSA HANDBOOK 3-96.
39. The allocation of the risk is discussed at infra notes 78, 79, 86 and the accompanying text.
40. FSA HANDBOOK 3-98; 34 C.F.R. § 668.22(h)(1)-(2) (1997).
41. FSA HANDBOOK 3-98; 34 C.F.R. § 668.22(g)(3)(i) (1997).
charges, however, the school is not liable for the uncollected repayment and the student loses future Student Financial Assistance eligibility until the repayment amount is satisfied.\(^{42}\)

After calculating the refund or repayment, the school must allocate the refund or repayment in the specific order mandated by the regulations. For repayments, the allocation begins with Federal Perkins Loans, followed by Federal Pell and FSEOG, other SFA programs, and state or institutional funds.\(^{43}\) For refunds, the allocation begins with all of the federal loans and then mirrors the repayment ordering.\(^{44}\) Finally, in the refund allocation, any unallocated funds can be returned directly to the student.\(^{45}\) In returning funds during the allocation process, a school must not return more to any program than the amount received from that program.\(^{46}\)

Given the complexity of the refund structure, it is not surprising that the DOE has offered a number of approved worksheets and case studies for schools to learn the intricacies of the refund

\(^{42}\) FSA HANDBOOK 3-98. Failure to repay an overpayment is reported to the National Student Loan Data System ("NSLDS"). Id. The student will be ineligible for further Federal financial assistance until the repayment is completed. Id. For more information on the NSLDS, see FSA HANDBOOK 2-7.

\(^{43}\) The ordering is found at 34 C.F.R. section 668.22(h)(2) (1997). The FSA Handbook lists the repayment order as:

1. Federal Perkins Loans
2. Federal Pell Grants
3. Federal SEOGs
4. Other SFA Programs
5. Other federal, state, private, or institutional sources of aid.

FSA HANDBOOK 3-100.

\(^{44}\) The ordering for refund allocation is found at 34 C.F.R. section 668.22(h)(1) (1997). The statutory authority for the order is from 20 U.S.C. section 1092(a)(1)(F) (1997). The FSA Handbook lists the refund order as:

1. Federal Supplemental Loans for Students
2. Unsubsidized Federal Stafford Loan
3. Subsidized Federal Stafford Loan
4. Federal Parent Loan for Undergraduate Students
5. Unsubsidized Federal Direct Stafford Loans
6. Subsidized Federal Direct Stafford Loans
7. Federal Direct Parent Loan for Undergraduate Students
8. Federal Perkins Loans
10. Federal SEOGs
11. Other Student Financial Assistance programs
12. Other federal, state, private or institutional sources of aid
13. The student.

FSA HANDBOOK 3-100. See also id. 3-109.

\(^{45}\) 34 C.F.R. § 668.22(h)(1)(xii).

\(^{46}\) FSA HANDBOOK 3-100.
Nevertheless, the DOE's insistence on subtracting "unpaid charges" from the amount schools are permitted to retain has spawned litigation in three circuits to date.

THE "UNPAID CHARGES" CASES

In Career College Ass'n v. Riley, the United States Court of Appeals for the District of Columbia Circuit held that the "unpaid charges" determination from the FSA Handbook and the regulations did not violate the statutory mandate of section 1091b of the HEA. The court considered the statutory language of two sections: 1091b and 1092(a)(1)(F), determining that the fair and equitable provisions and the ordering provisions were to work in conjunction

47. See, e.g., FSA HANDBOOK 3-103-132. It is interesting to note that the worksheets provided by the DOE are emblazoned with the following admonition: "WARNING: DO NOT USE WITHOUT THE ACCOMPANYING INSTRUCTIONS." There are also a number of third-party service providers with software packages enabling schools to maintain records and calculate refunds correctly. The sheer volume of information has met with less than an enthusiastic response from the financial aid community. See House Education and the Workforce Postsecondary Education, Training, and Lifelong Learning: 1997: Higher Education Act Reauthorization Field Hearing, 105th Cong. (1997) (statement of Keith A. Green, Vice President Student Finance, Berkeley College).

48. 74 F.3d 1265 (D.C. Cir. 1996).

49. Career College, 74 F.3d at 1265, 1272. The association also challenged the validity of all the 1994-95, section 668, regulations since they were not promulgated by May 1, 1994. Id. at 1267. The court held that the "interim final rules" satisfied the May 1st deadline. Id. at 1268. The association also challenged a new regulation requiring a minimum cohort default rate for an institution to retain eligibility to participate in Title IV programs. Id. at 1272. The court found that the Secretary's determination that a certain default rate must be avoided to retain administrative capability was both reasonable and not barred by the applicable statutory language. Id. at 1274. Finally, the court dismissed challenges to a reporting requirement pertaining to employment after graduation and to the definition of "a week of instructional time" based on a five-day requirement. Id. at 1275-76.

50. 20 U.S.C. section 1092(a)(1)(F) provides:

[A] statement of the refund policy of the institution, as determined under section 484B [1091b], for the return of unearned tuition and fees or other refundable portion of cost, as described in subparagraph (E) of this paragraph, which refunds shall be credited in the following order:

(i) to outstanding balances on loans under part B of this title for the period of enrollment for which a refund is required,
(ii) to outstanding balances on loans under part D of this title for the period of enrollment for which a refund is required,
(iii) to outstanding balances on loans under part E of this title for the period of enrollment for which a refund is required,
(iv) to awards under subpart 1 of part A of this title,
(v) to awards under subpart 3 of part A of this title,
(vi) to other student assistance, and
(vii) to the student[.]"
with each other. The court then examined the rationale for requiring the unpaid charges to be deducted from the amount retained by the institution. The court concluded that the new provision effectively placed the student in the same position she would have been in had she paid the entire amount due for the period. The school, however, was forced to collect any unpaid amount directly from the student, rather than from the Title IV aid programs. The association contended that the treatment of "unpaid charges" deviated impermissibly from section 1091b; therefore transforming the regulation into an unfair and inequitable policy. The court rejected this argument, reasoning that if the

51. Career College, 74 F.3d at 1270.
52. Id.
53. Id. at 1270-71. The court used the following table to show the various outcomes under both the current and former regulations:

Prior Regulation:

<table>
<thead>
<tr>
<th>Amount</th>
<th>Amount</th>
<th>Total</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paid by Title IV</td>
<td>Amount Paid/Unpaid</td>
<td>By Student</td>
<td>Paid</td>
</tr>
<tr>
<td>$ 4,000</td>
<td>$ 0/$ 1,000</td>
<td>$ 4,000</td>
<td>$ 1,000</td>
</tr>
<tr>
<td>$ 4,000</td>
<td>$ 200/$ 800</td>
<td>$ 4,200</td>
<td>$ 1,000</td>
</tr>
<tr>
<td>$ 4,000</td>
<td>$ 1,000/$ 0</td>
<td>$ 5,000</td>
<td>$ 1,000</td>
</tr>
</tbody>
</table>

Current Regulation:

<table>
<thead>
<tr>
<th>Amount</th>
<th>Amount</th>
<th>Amount</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paid by Title IV</td>
<td>Amount Refunded</td>
<td>Amount Institution</td>
<td>Amount Refunded</td>
</tr>
<tr>
<td>Programs</td>
<td>(to Title IV)</td>
<td>Retains (to Title IV)</td>
<td>(to Title IV)</td>
</tr>
<tr>
<td>$ 4,000</td>
<td>$ 3,000</td>
<td>$ 0</td>
<td>$ 4,000</td>
</tr>
<tr>
<td>$ 4,000</td>
<td>$ 3,200</td>
<td>$ 200</td>
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<tr>
<td>$ 4,000</td>
<td>$ 4,000</td>
<td>$ 1,000</td>
<td>$ 4,000</td>
</tr>
</tbody>
</table>

Id. at 1271. The court explained its table as follows:
Assuming five equally spaced payments (the second row of the table), the student would only have paid $200 of his full $1,000 obligation. Under the prior regulations, the school would refund $3,200 — the amount it actually received, $4,200, minus the pro rata amount earned, $1,000. The government would thus receive $3,200 back; and the student effectively would "receive" $800 — the amount not yet paid and for which he is then not charged. Under the new Refund Regulation, the school must subtract the amount of the student's unpaid charges — $800 — from the amount the institution is otherwise entitled to retain — $1,000 — and is left with only $200. The total refund to Title IV programs would then be $4,000 — $4,200 actually received minus $200 retained by the institution.

54. Career College, 74 F.3d at 1271.
student's "unpaid charges" were subtracted from the federal aid programs, the funds would be allocated to the student before the federal aid programs in direct contravention of section 1091(a)(1)(F).\textsuperscript{56}

The court noted that although there was an apparent tension between the two statutory provisions, it was possible to read them as inconclusive on this particular point.\textsuperscript{57} Following a Supreme Court precedent concerning administrative discretion to resolve statutory conflicts, the court concluded that the Secretary's resolution of the conflict was both reasonable and efficient.\textsuperscript{58} Finally, the court recognized the association's contention that such an allocation places the risk of student non-payment on the schools themselves.\textsuperscript{59} Nevertheless, the court construed the statutory mandate of a fair and equitable refund policy to be measured from the student's, rather than the government's, perspective.\textsuperscript{60} Thus, the court found that such an allocation of risk was, in fact, reasonable under section 1091b.\textsuperscript{61}

The Ninth Circuit approached the refund regulation problem differently, and thus, obtained a different result in California Cosmetology Coalition v. Riley.\textsuperscript{62} In this case, the DOE appealed a district court decision enjoining the use of the refund regulations provided under 34 C.F.R. section 668.22.\textsuperscript{63} After reviewing the history of the HEA and its refund regulations, the court reasoned that the unpaid charges provision was promulgated to shift the risk

\begin{itemize}
\item \textsuperscript{56} Career College, 74 F.3d at 1271. See also section 1091(a)(1)(F) requiring allocation to federal aid programs, then to state programs, and finally to the student. See supra notes 42-43 and accompanying text.
\item \textsuperscript{57} Id. at 1271-72.
\item \textsuperscript{58} Id. at 1272 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (holding that federal agencies retain broad powers to construe statutory language and that agency constructions will be reviewed under a "reasonable interpretation" standard)).
\item \textsuperscript{59} Id. at 1272.
\item \textsuperscript{60} Id.
\item \textsuperscript{62} 110 F.3d 1454 (1997).
\item \textsuperscript{63} California Cosmetology, 110 F.3d at 1455. The district court in California Cosmetology Coalition v. Riley, 871 F. Supp. 1263 (C.D. Cal. 1994) determined that the refund regulations, specifically the unpaid charges section, violated section 1091b of the HEA.
\end{itemize}
of nonpayment from the government to the institution. The Secretary appealed the lower court's injunction, and the Ninth Circuit reviewed de novo.

The court initially considered the specific language of section 1091b. The coalition argued that the statute was unambiguous, and that the Secretary was powerless to alter the "fair and equitable" mandate through regulation. The Secretary countered that "unearned" tuition includes unpaid charges; therefore, such charges must be excluded prior to refunding aid to the federal programs. The court also reviewed the logic and analysis of the D.C. Circuit in Career College Ass'n, including its reliance on the language of section 1091(a)(1)(F).

The Ninth Circuit first determined that there was no ambiguity in section 1091b. Therefore, the court stated that the Secretary was powerless to modify section 1091b through the refund regulations. The court held that the ordering scheme in 1091(a)(1)(F) merely allocates the funds after the refund is determined; it does not affect the calculation itself. The court further disagreed with the D.C.

64. Id. at 1455-1457. The court used the following example to illustrate the regulations: Assume student A and B attend the same institution and withdraw the same day; student A paid $500 towards tuition and student B zero, and the determined refund amount was $1,500. The previous refund policy would have allowed the school to refund only $1,000 to the financial aid programs for student A and a full $1,500 for student B. The new regulations require the school to refund $1,500 for both students, leaving the school to collect the $500 in unpaid charges directly from student B.

65. Richard W. Riley, United States Secretary of Education. A former governor of South Carolina, Secretary Riley has also defended the DOE against charges of institutional obsolescence. See Richard W. Riley, Should Congress Close Down the Department of Education? No, the Agency is on the Right Track, THE WASH. TIMES, Aug. 7, 1995, at 19.

66. Id. at 1457-58. The court reviews summary judgment under Alliance Against IFQs v. Brown, 84 F.3d 343 (9th Cir. 1996) (holding that the standard for review of summary judgment is de novo).

67. See supra note 58.

68. Id. at 1458.

69. Id. This argument relates back to the court's hypothetical that under the previous regulations, the student who had not paid was entitled to have federal aid pay the balance due prior to the refund. Id. The Secretary argued that both section 1091b and the regulations were enacted to preclude this result. Id.

70. Id. at 1459 (citing Career College Ass'n v. Riley, 74 F.3d 1265 (D.C. Cir. 1996)), discussed at supra notes 48-61 and accompanying text.

71. Id. The court expressly approved of the district court's determination that section 1019(a)(1)(F) is only an ordering section, and therefore, not in conflict with section 1019b. Id. (citing California Cosmetology Coalition v. Riley, 871 F. Supp. 1263, 1270 (C.D. Cal. 1994)).

72. California Cosmetology, 110 F.3d at 1460. By failing to find an ambiguity, the court found no duty to accord the Secretary's interpretation weight under the Chevron case. Id.

73. Id.
Circuit's assessment that the statute was enacted with knowledge of the previous defects in the regulations, citing the fact that unpaid charges for a pro rata refund are expressly dealt with in section 1091b(c).\textsuperscript{74} Having disposed of the ambiguity question, the court upheld the injunction.\textsuperscript{75}

Shortly after the Ninth Circuit's ruling in \textit{California Cosmetology}, the Second Circuit dismissed an injunction of the section 668.22 regulations granted by the Northern District of New York in \textit{Coalition of N.Y. State Schs.: v. Riley}.\textsuperscript{76} In a now familiar pattern, the court began by reviewing the history of the HEA, in general, and the refund provisions, in particular.\textsuperscript{77}

The Second Circuit, like the Ninth Circuit, initially analyzed the old refund calculations and concluded that the government suffered fiscal uncertainty when unpaid charges were excluded from the refund calculation.\textsuperscript{78} The court then determined that the new regulations specifically reallocated the risk to the school under the state or accrediting agency refund calculations.\textsuperscript{79} In granting the injunction, the district court, using an analysis similar to the Ninth Circuit's, focused in particular on the lack of any express language concerning unpaid charges in sections 1091b(b)(1) and 1091b(b)(2).\textsuperscript{80} The Second Circuit undertook a de novo review.\textsuperscript{81}

Looking to both the language of section 1091b and the legislative history, the court found no controlling precedent stating that either the government or the school should bear the risk.\textsuperscript{82} By failing to find express direction, the court gave weight to the Secretary's contention that his interpretation and subsequent regulation were permissible. The Coalition argued that by grafting unpaid charges

\textsuperscript{74} \textit{Id.} The court was convinced by the inclusion of unpaid charges in section 1091b(c) that Congress also would have included an express provision for section 1091b(b) as well, had it so intended.\textit{Id.}

\textsuperscript{75} \textit{Id.} at 1461.

\textsuperscript{76} 129 F.3d 276 (9th Cir. 1997).

\textsuperscript{77} \textit{Coalition of N.Y.}, 129 F.3d at 277.

\textsuperscript{78} \textit{Id.} at 278. The court reasoned that because reimbursement from the federal programs occurs before the school receives its unpaid charges, the risk that the student will not pay has been shifted. \textit{Id.}

\textsuperscript{79} \textit{Id.} at 278. The court supported this analysis by looking to 34 C.F.R. section 668.22(g)(2)(ii) and the scheduled cash payment calculation discussed at \textit{supra} note 43 and accompanying text. \textit{Id.}

\textsuperscript{80} \textit{Id.} at 278-79. The district court reasoned that if unpaid charges were to be included, Congress would have done so explicitly, inasmuch as they were explicitly excluded from the pro rata calculation. \textit{Id.}

\textsuperscript{81} \textit{Id.} at 279 (citing Fund for Animals v. Babbitt, 89 F.3d 128, 132 (2d Cir. 1996)).

\textsuperscript{82} \textit{Coalition of N.Y.}, 129 F.3d at 280. The court stated that it did not see evidence of a Congressional intent to assign the risk to either party. \textit{Id.}
into section 1091b(b), the Secretary violated the spirit of section 1091b in both the determination of the refund and in the determination that such a refund was "fair and equitable."\(^8\)

The Second Circuit disagreed with the Coalition's contentions.\(^8\) As to the determination of the refund amount, the court found that the government is not prohibited from receiving a larger refund by excluding the unpaid charges because the statute merely set a floor, not a ceiling, on the amount of the refund.\(^5\) The Second Circuit also dismissed the Coalition's assertion that the "fair and equitable" policy was intended to benefit the school, rather than the student.\(^6\)

Lastly, the Coalition argued that because section 1091b(b) did not mention unpaid charges (as does section 1091b(c)), Congress intended to preclude the Secretary from addressing the issue.\(^7\) The court, however, gave considerable weight to the fact that the Secretary was authorized to approve accrediting agency refund policies because the Secretary could withhold approval if the unpaid charges were not allocated appropriately.\(^8\) After a comprehensive review of the legislative history, the court found no evidence that Congress intended to prevent the Secretary from promulgating the section 668.22 regulations in their current form.\(^9\) The court therefore concluded that the regulations were reasonable and lifted the district court's injunction.\(^10\)

**Suggestions for Change**

Since three circuits have addressed the limited issue of "unpaid charges," and have produced two distinctly different results, it is only a matter of time before other circuits may be confronted with the issue. The DOE has recognized this dilemma in the FSA

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83. Id.
84. Id.
85. Id. The court reasoned that the specific language of "at least" in section 1091b suggested only a lower limit as to the amount of the refund. Id.
86. Id. at 280. The court noted that both the statute and the legislative history were silent pertaining to the allocation of risk. Id. Therefore, the court concluded that the regulation's allocation was not impermissible. Id.
87. *Coalition of N.Y.*, 129 F.3d at 280. The court gave considerable weight to the fact that the 1992 HEA Amendments were passed after the Secretary's original refund regulations had been promulgated. Id.
88. Id. at 281.
89. Id.
90. Id.
The financial aid profession, most notably through the National Association of Student Financial Aid Administrators ("NASFAA"), commented on both the specific dilemma of unpaid charges and the larger issue of the general refund regulations. Speaking through its membership, the NASFAA proposed a broad solution to the problem — a completely new refund strategy that is easier to administer and more rational in its approach. Accordingly, the NASFAA Reauthorization Task Force developed a comprehensive and simple refund procedure. The proposal seeks to establish one unified refund policy which could be applied to both first-time and non-first-time students. In addition, the proposed policy "refunds" to each source of aid the same proportion of tuition and fees charged; thus abandoning the complex ordering scheme of section 1092(a)(1)(F).

Although the NASFAA proposal is a good starting point, to successfully effectuate refund regulation reform, other issues also must be addressed in the 1998 reauthorization concerning proposed changes to the HEA. First and foremost, since administration of financial aid can result in criminal liability of schools and their aid administrators, a clear policy is needed to ensure good faith

91. See FSA HANDBOOK 3-80. The DOE attempted to clear up some confusion with the April 1995 "Dear Colleague" letter, GEN-25-22 ("DCL") by holding harmless any institution that relied on the previous DOE guidance. Id. Until the circuit split is resolved, however, the dilemma will persist.

92. The NASFAA represents almost 3,300 schools and has a membership of almost 9,000 financial aid professionals. See Reauthorization of Student Assistance Programs, 1997: Hearings on Reauthorization of Title IV of the Higher Education Act, 105th Cong. (1997) (statement of Joel V. Harrell, Director of Financial Aid, University of Tennessee at Chattanooga, speaking for NASFAA).

93. The NASFAA Reauthorization Task Force has developed a comprehensive and simple refund procedure. The full text of the current proposal is available on file with the author and via the World Wide Web at <http://www.nasfaa.org/docib/html/gov/reauth/docnum05.html>.

94. See Bates v. United States, 118 S. Ct. 285 (1997). In Bates, a for-profit educational institution willfully failed to make federal loan refunds to students. Bates, 118 S. Ct. at 288-89. One of the school's administrators was indicted on twelve counts of "knowingly and willfully" failing to make the refunds. Id. at 289. The district court dismissed the indictment on the grounds that 20 U.S.C. section 1097(a) (1996) specifically required a showing of intent to defraud the federal government. Id. The United States Court of Appeals for the Seventh Circuit reversed and the Supreme Court affirmed. Id. The Court reasoned that the "knowing and willful" requirement, not found in 20 U.S.C. section 1097(a), should not be judicially engrafted onto the statute. Id. at 290. The Court noted that Congress had included "knowing and willful" in 20 U.S.C. section 1097(d), and hence, would have added similar language to section 1097(a), if required. Id. The Court also noted that the specific addition of "fails to refund" in the 1992 Amendments was a clarification, rather than an addition to the statute. See 20 U.S.C. section 1097(a). Id. at 291. The issue of potential criminal liability was also raised at the district court level in several circuit court cases as a justification for injunctive
administration of refunds calculated in accordance with the law. Uncertainty in the regulations also poses dangers for the ultimate consumers in the higher education market, the students. Financial aid is terribly confusing and heavily regulated, yet little, if any, attention is normally paid to the refund procedure. Nevertheless, for an increasing number of students, withdrawal from an institution during at least one semester of attendance is a real possibility. It, therefore, behooves Congress and the courts (not to mention the DOE), to provide a coherent and consistent framework for schools to present to their students.

The DOE has proposed a significant change to section 1091b of the HEA, but the proposal retains much of the current complexity.\textsuperscript{95} The new refund structure would focus only on Title IV aid, with first-time students receiving additional protection at the beginning of a term.\textsuperscript{96} The ordering provision of the current law has been reworked, but the return of funds in a specified order still exists in the new proposal.\textsuperscript{97} The unpaid charges problem is addressed by a new section requiring excess aid payments to be split between the institution and the student, based on the allowable institutional charges.\textsuperscript{98} Overall, however, the new proposal appears to be statutorily complex, guaranteeing the spawning of complex refund regulations, if enacted as proposed.\textsuperscript{99}

Returning to the three students at EPU, it should be clear that their refunds would differ significantly under current law and regulations. As noted earlier, even though all three attend the same college, three different policies may attach when they decide to withdraw. The physical location of EPU (that is, whether it is located in California or New York) will also influence the outcome. But, regardless of the jurisdiction, the core problem remains — too many variables affect the determination of the student's refunds.

There are several ways in which the refund regulations could be structured to reach a more "fair and equitable" result. The first factor (whether the student receives Title IV aid) should be

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\item relief petitions. See, e.g., Coalition of N.Y. State Career Schs. v. Riley, 129 F.3d 276, 278 (2d Cir. 1997).
\item Id.
\item Id.
\item Id.
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eliminated.\footnote{FSA HANDBOOK 3-75.} There is adequate congressional and constitutional authority to impose a similar refund comparison upon all students, regardless of whether they receive Title IV aid or not. This uniform requirement would eliminate the anomalous situation of a student who has a mere $500 PLUS (Parent Loan for Undergraduate Students) loan from receiving an entirely different refund than a student without one. Also, the distinction between "first-time" and "non-first-time" students should also be eliminated. It is difficult enough for institutions to determine the proper date of withdrawal, without adding the additional burden of determining whether a student meets the precise "first-time" definition. Balancing the interests of students who withdraw early in the semester, against the interests of institutions that have financial commitments for housing, dining, and teaching that continue late in the semester, could lead to a mutually agreeable percentage structure.\footnote{For example, the "pro rata" percentage could apply for the first 20% of the semester and the "federal refund" percentage could apply thereafter.} Institutions increasingly have a vested interest in retaining students. That interest should outweigh any perceived monetary gain from excessive penalties for withdrawal.\footnote{See, e.g., J.J. Thompson & Robert J. Morse, An Explanation of the U.S. News Rankings, USN&WR, Sept. 1, 1997, at 98. The annual U.S. News survey ranks undergraduate institutions using a wide variety of criteria including "retention." Id. at 98. The article indicates that retention is often linked to student opinion regarding the institution of higher education's quality. Id.} The NASFAA has advanced similar proposals to remove the class distinctions in the Federal Stafford and Federal Direct Stafford Loan programs.\footnote{For example, the NASFAA Reauthorization Task Force has proposed eliminating the current Federal Stafford loan limits of $2,625 for Freshman, $3,500 for Sophomores, $5,500 for Juniors and Seniors, with a yearly limit of $5,500 for all four classes. The full text of the current proposal is available on file with the author and via the World Wide Web at <http://www.nasfaa.org/doclib/html/gov/reauth/docnum05.html>.} The refund policy should be brought into line as well.

Finally, a simplified refund policy would benefit both students and schools by allowing easy and consistent calculation of refunds. The elimination of: (1) the Title IV and the first year distinctions, (2) the comparison structure, and (3) the complex "unpaid charges" debate, would make it easier for any student to weigh his or her options in advance, while also allowing institutions to more accurately predict their revenue streams. Simplification of the refund regulations also would remove some of the unnecessary
burden from students experiencing the inevitably difficult process of withdrawing from an institution of higher learning.

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