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INTRODUCTION

The United States has experienced a frightening trend in college closures. Indeed, in 2016, thirty-three colleges closed.[1] Likewise, in 2018, thirty-five colleges closed, and over 90% of these colleges were private institutions.[2]

This trend continues.[3] A recent Edmit[4] model projected over one third of all private four-year colleges are in financial distress.[5] While some private colleges may adjust their tuition or cut expenditures to endure the crisis, others will undoubtedly close.[6] What is more, the recent shift to online learning sparked by COVID-19 has further decreased revenue for small, private colleges.[7] In fact, COVID-19

1 Jim Fong, *The Clock Is Ticking...Strategic Recommendations for Higher Education in 2019*, UPCEA (Jan. 4, 2019), upcea.edu/the-clock-is-tickingstrategic-recommendations-for-higher-education-in-2019/.

2 *Id.*

3 Hallie Busta, *How Many Colleges and Universities Have Closed since 2016?*, EDUC. DIVE, https://www.educationdive.com/news/how-many-colleges-and-universities-have-closed-since-2016/539379/ (last updated July 9, 2020).

4 Edmit provides information to assist higher education stakeholders in making optimal investment decisions. *See generally About Edmit*, EDMIT, https://www.edmit.me/about (last visited Aug. 5, 2020).

5 Fred Thys, *One Third of Private 4-Year Colleges Are At High Risk Financially, Model Predicts*, WBUR, www.wbur.org/edify/2020/05/08/higher-education-financial-crisis (last updated May 8, 2020). More specifically, the study predicted "that if present financial trends continue [the colleges] would be able to survive six years, at most." *Id.*

6 *Id.*

7 Jessica Dickler, *As College Classes Move Online, don't Expect a Tuition Discount Due to Coronavirus*, CNBC (Apr. 14, 2020, 8:03 AM), https://www.cnbc.com/2020/04/14/colleges-move-online-amid-coronavirus-but-forget-a-tuition-discount.html.

has *accelerated* the rate of private college closures.[8] In the last few months, MacMurray College[9], Holy Family College[10], and Urbana University[11] have permanently closed their doors.[12] In addition, NYU professor Scott Galloway predicts at least ninety more colleges will perish, including Dickinson College, Bard College, and Sarah Lawrence College.[13]

Several variables led to these closures. Private colleges cannot compete with their public counterparts for numerous reasons, such as geographical challenges, lack of economies of scale, and mismanagement.[14] Furthermore, unchecked board mismanagement, at least in part, led to many of these closures.[15] For example, the current regulatory framework––pertinently, insufficient disclosure requirements on Form 990––permits nonprofit college board members to engage in malfeasance behind closed doors.[16] And on the back end, courts' improper application of the business judgement rule as well as capricious standing doctrines shield directors from liability after breaches of fiduciary duties occur.[17]

8 Abigail Hess, *7 Ways the Coronavirus Pandemic Could Change College this Fall and Forever*, CNBC (Jun 19, 2020, 12:26 PM,), https://www.cnbc.com/2020/06/19/7-ways-coronavirus-pandemic-may-change-college-this-fall-and-forever.html.

9 MacMurray College recently announced it would be closing due to declining enrollments, rising competitive costs, insufficient endowment funds, and recurring annual deficits caused by COVID-19 impacts. *MacMurray College to Close at End of Spring Semester*, MACMURRAY C., https://www.mac.edu/closure (last visited Aug. 7, 2020).

10 Holy Family College closed due to increased operating costs, unstable enrollment, and the financial impact of COVID-19. *Holy Family College to Discontinue all Operations at the end of Summer Term*, HOLY FAM. C. (May 4, 2020), https://blog.holyfamilycollege.edu/news/holy-family-college-to-discontinue-all-operations-at-the-end-of-summer-term.

11 The closure of the Urbana University branch of Franklin University affected 1,254 students and 111 full-time employees. *Urbana University to Close Physical Campus and Move Academic Programming Online through Franklin University After Conclusion of Spring 2020 Term*, URBANA U. (Apr. 21, 2020), https://www.urbana.edu/about-us/pressroom/news/2020/urbana-university-close-physical-campus-and-move-academic-programming.

12 Hallie Busta, *How Many Colleges and Universities Have Closed since 2016?,* EDUC. DIVE, https://www.educationdive.com/news/how-many-colleges-and-universities-have-closed-since-2016/539379/ (last updated July 9, 2020).

13Scott Galloway, *No Mercy / No Malice*, USS U. (July 17, 2020), www.profgalloway.com/uss-university.

14 Patrick R. Baker, Paula Hearn Moore & Kaleb Paul Byars, *Nonprofit College Crash: Enforcing Board Fiduciaries Through Increased Accountability and Transparency in the IRS Form 990 Procedure*, 2019 BYU EDUC. & L.J. 167, 168 (2019).

15 *Id.* at 167.

16 *Id.* at 172, 186, 187.

17*Id*. at 172, 181; *see e.g.*, Lundberg ex rel. Orient Found. V. Coleman, 60 P.3d 595, 598 (Wash. Ct. App. 2002) (holding board members lacked standing to bring suits against other

While these conditions alone have resulted in numerous closures, one major event is rapidly accelerating the financial pressure on private higher education institutions: COVID-19. A recent study shows nearly five hundred colleges faced little financial risk before the pandemic; however, over 20% of those colleges now face a high level of financial pressure.[18] Even more, COVID-19 has exacerbated the negative effects of mismanagement on these colleges, as well as the colleges that struggled for survival even *before* COVID-19. One may ask: If those private colleges struggled to survive during the best of times, how can their (malfeasant) directors possibly save them during a global pandemic with no foreseeable end? The answer is simple: They cannot.

This introduction has identified the impact COVID-19 has left on the financial health of already struggling nonprofit private colleges. Part II details more specific hardships these schools face and discusses the difficult decisions they must make. Part III provides areas in which and reasons why these colleges will incur additional losses in the future. Part IV details the responses some colleges took to combat the negative financial effects of COVID-19. Part V provides this Essay's thesis: it calls for amendments to IRS Form 990 that would require colleges to provide better, more complete disclosures. These disclosures would safeguard colleges' stakeholders from malfeasant directors and future unforeseeable crises such as COVID-19. Finally, Part VI briefly concludes.

I. COVID-19'S INITIAL EFFECTS ON PRIVATE NONPROFIT COLLEGES

The initial financial impacts of COVID-19 on colleges have been substantial. Colleges' revenue from tuition, their athletic programs, and their endowments have all plummeted.[19]

board members for breaches of fiduciary duty).

18 Deirdre Fernandes, *Amid Coronavirus Pandemic, a Growing List of Colleges in Financial Peril*, THE BOS. GLOBE, www.bostonglobe.com/2020/05/08/metro/amid-pandemic-growing-list-colleges-financial-peril/ (last updated May 8, 2020, 8:18 PM) ("Nationwide, 110 more colleges and universities are now in peril because of the financial impact of the virus . . . .").

19 Rick Seltzer, *Coronavirus Upends Colleges' Financial State*, INSIDE HIGHER ED (Mar. 20, 2020), https://www.insidehighered.com/news/2020/03/20/coronavirus-outbreak-piles-

Based on a 2019 study, the percentage of undergraduates who received institutional grants from private nonprofit colleges grew from 76% to almost 82%.[20] Even more, the amount of the grants increased from 45% of tuition to almost 55%.[21] What is more, at the onset of the virus, many colleges refunded fees for housing, parking, and dining while also losing a large source of revenue due to shortened athletic seasons.[22] Indeed, many of these colleges have brought suits against their insurance providers seeking indemnification for drastic COVID-19 losses, and these suits reflect the colleges' eerie financial situations.[23]

Moreover, COVID-19 devastated many colleges' athletic programs. Colleges that previously hosted a variety of athletic programs have cut budgets, and these cuts have forced many colleges to cancel athletic seasons or worse, discontinue certain programs altogether.[24] For instance, Stanford University expected a $12 million deficit *before* the outbreak.[25] COVID-19 broadened the deficit, and in response, Stanford eliminated eleven of its athletic programs.[26] Other colleges have cancelled all sports for the Fall 2020 semester.[27] Historically,

short-term-costs-and-long-term-uncertainty-college-and; Victoria Yuen, *Mounting Peril for Public Higher Education During the Coronavirus Pandemic*, CTR. FOR AM. PROGRESS (June 11, 2020, 4:00 AM). https://www.americanprogress.org/issues/education-postsecondary/reports/2020/06/11/485963/mounting-peril-public-higher-education-coronavirus-pandemic/.

20 Kenneth E. Redd, *No End in Sight*, BUS. OFFICER (May/June 2020), www.businessofficermagazine.org/features/no-end-in-sight/.

21 *Id.*

22 Collin Binkley & Jeff Amy, *Financial Hits Pile up for Colleges as Some Fight to Survive*, ASSOCIATED PRESS (Apr. 7, 2020), https://apnews.com/673bffcda00bf5522153c15e6e0373d5.

23 *See generally All-Risks Insurance––Universities Sue their Insurers for Coverage of COVID-19 Losses*, INS. L. REPS.: PERS. & COM. LIAB., 2020, 2020 WL 4391703 (explaining Benedictine College, Rockhurst University, and Maryville University––all private colleges––filed their suits after they were forced to shift to online instruction); Troy Sepion, *Midwest Colleges Say Insurers Owe Them for COVID-19 Coverage*, WESTLAW INS. DAILY BRIEFING, July 31, 2020, 2020 INSDBREF 0379 (same).

24 *List of College Teams Cut Because of Coronavirus Pandemic*, ASSOCIATED PRESS (July 8, 2020), apnews.com/fd7075343269ea7e08bb2965b78bbbc5.

25 Marc Tessier-Lavigne, et al, *An Open Letter to the Stanford Community and the Stanford Athletics Family*, STAN. U. (July 8, 2020), news.stanford.edu/2020/07/08/athletics/.

26 *Id.* Specifically, Stanford has cancelled the following programs: "men's and women's fencing, field hockey, lightweight rowing, men's rowing, co-ed and women's sailing, squash, synchronized swimming, men's volleyball and wrestling." *Id.*

27 Christina Maxouris, *Coronavirus Has Pushed These Schools to Cancel Their Athletic Programs in the Fall*, CNN (July 9, 2020, 6:24 AM) https://www.cnn.com/2020/07/09/us/schools-sports-programs-canceled-coronavirus/index.html.

Notre Dame received on average $120 million in revenue each year from its football program alone;[28] however, volatility caused by COVID-19 has yielded uncertainty regarding what, if any, revenue Notre Dame will derive from the upcoming season.[29] Notre Dame, historically a non-conference team, joined the Atlantic Coast Conference this Fall hoping for a Fall 2020 season.[30] Yet, Notre Dame has paused tickets sales for the 2020 season.[31]

College endowments also endured a massive downturn. In the Summer of 2020, due to shutdowns and unpreparedness, colleges could not obtain revenue from summer courses, other summer programs, or federal programs.[32] Additionally, the stock market recently experienced two of its worst weeks since 1927, further causing endowments to plummet.[33] This downturn is troublesome because colleges have historically funded 9.7% of their operating budgets through their endowments.[34] Without these endowments, colleges will struggle to cover their operating expenses. To provide a concrete example of the issue, Furman University's endowment decreased by

28 Chris Smith, *College Football's Most Valuable Teams: Reigning Champion Clemson Tigers Claw into Top 25*, FORBES MAG. (Sep. 12, 2019 6:00 AM), www.forbes.com/sites/chrissmith/2019/09/12/college-football-most-valuable-clemson-texas-am/?utm_source=TWITTER.

29 Eric Hansen, *Notre Dame AD Jack Swarbrick on Possibility of No Football Amid Pandemic: 'Result Will Be Dictated to Us'*, USA TODAY (July 14, 2020, 6:05 PM), www.usatoday.com/story/sports/ncaaf/2020/07/14/notre-dame-ad-jack-swarbrick-grapples-possibility-no-football/5439073002/; The Big Ten is likely to cancel their football season. *See generally* Paul Myerberg, *Big Ten Presidents Move to Verge of Not Playing College Football this Fall Due to Coronavirus Concerns*, USA TODAY (Aug. 10, 2020, 12:17 PM), https://www.usatoday.com/story/sports/ncaaf/bigten/2020/08/10/big-ten-votes-against-college-football-season-due-coivd-concerns/3332196001/.

30 Eric Hansen, *What Does the Big Ten's Possible Cancellation of Fall Sports Mean for Notre Dame Football?*, ND INSIDER (Aug. 10, 2020), https://www.ndinsider.com/football/what-does-the-big-tens-impending-cancellation-of-fall-sports-mean-for-notre-dame-football/article_f939af77-6f4b-5b6c-8968-c365735fd222.html.

31 *See generally Important 2020 Ticket Information*, NOTRE DAME, https://und.com/covid19/ (last visited Aug. 11, 2020).

32 Jessica Dickler, *College Enrollment Likely to Drop as Schools Consider Staying Closed until 2021*, CNBC (Apr. 27, 2020, 11:01 AM), https://www.cnbc.com/2020/04/27/college-enrollment-may-drop-as-schools-weigh-staying-closed-until-2021.html.

33 Michael Sheetz, et al., *Stock Market Live Friday: Dow Down 900, Worst Week in 11 Years, Oil Craters*, CNBC (Mar. 20, 2020, 7:17 AM), www.cnbc.com/2020/03/20/stock-market-live-today.html.

34 Sandy Baum, et al., *College and University Endowments: In the Public Interest?*, ITHAKA S+R (May 22, 2018), https://doi.org/10.18665/sr.307377.

more than $100 million.[35]

II. IMPACTS CONTINUING IN THE FUTURE

Experts forecast the financial situation of colleges will worsen. Moody's downgraded its outlook of the higher education sector due to the financial instability the virus is causing.[36] Most notably, COVID-19 will likely dampen international and domestic admissions. Further, the abrupt shift towards total online learning will present expensive challenges to colleges.

One major area of concern is the likely decrease in domestic and international admissions colleges will experience. International students, with the support of their governments, generally pay full tuition.[37] However, these students are currently unable to enroll in American colleges, either by choice or due to travel restrictions.[38] Consequently, many universities will lose a significant source of financial support.[39] For example, the University of Arizona projects it will lose $33.1 million in revenue.[40] More specifically, it expects enrollment of new and current international students to decrease by 80%

35 Elizabeth Davis, *Steps to Address Financial Crisis, Reopen in the Fall*, FURMAN U., (May 18, 2020), www.furman.edu/covid-19/updates/05-18-2020/.

36 Jeremy Bauer-Wolf, *Moody's Lowers Higher Ed Outlook to Negative Amid Coronavirus Crisis*, EDUC. DIVE (Mar. 18, 2020), www.educationdive.com/news/moodys-lowers-higher-ed-outlook-to-negative-amid-coronavirus-crisis/574414/.

37 Andrew DePietro, *Here's a Look at the Impact of Coronavirus (COVID-19) on Colleges and Universities in the U.S.*, FORBES (Apr. 30, 2020, 5:20 PM), www.forbes.com/sites/andrewdepietro/2020/04/30/impact-coronavirus-covid-19-colleges-universities/.

38 Elissa Nadworny, *International Students Can Study in the U.S. Fall — If They Can Get Here*, NAT'L PUB. RADIO (July 19, 2020, 7:01 AM), https://www.npr.org/2020/07/19/892613376/international-students-can-study-in-the-us-this-fall-if-they-can-get-here (identifying a major problem for international students of closed consulate offices, where students go for interviews to obtain a student visa). In fact, the U.S. Immigration and Customs Enforcement released a document stating, "If Initial students have not arrived in the United States, they should remain in their home country." *Frequently Asked Questions for SEVP Stakeholders about COVID-19*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/doclib/coronavirus/covid19faq.pdf (last updated Aug. 7, 2020). For example, Julia Ururahy, a Brazilian international student, had to stay in Brazil after the United States implemented a travel ban. Marina Guimaraes, *Shutdown: The Coronavirus: Brazilian International Student Caught in US Travel Ban*, PAVEMENT PIECES (July 3, 2020), https://pavementpieces.com/brazilian-international-student-caught-in-us-travel-ban/.

39 DePietro, *supra* note 37.

40 Elizabeth Reddin, *Colleges Expect Few New International Students Will Make it to Their Campuses this Fall*, INSIDE HIGHER ED (May 26, 2020), www.insidehighered.com/news/2020/05/26/colleges-expect-few-new-international-students-will-make-it-their-campuses-fall.

and 30%, respectively.[41]

But the impact of COVID-19 on college admissions will not be limited to the international realm; domestic student admissions will decline as well. Analysts predict domestic students will enroll in universities closer to home and select more economically feasible options.[42] Some students are even considering deferring their admission until the economy and college programs are more stable.[43] According to a poll, nearly one in six high school seniors will defer their admission for a year in an attempt to allow the pandemic to pass before entering college.[44] Even more, four out of ten parents suggest they might delay their children's admission.[45]

On a separate note, the recent migration to online learning has also affected parents' and students' attitudes towards higher education. After COVID-19 spread widely, colleges were forced to rapidly transition to online learning in the spring, and this transition necessitated that colleges incur extensive expenses for software, training, and equipment.[46] Also, most students are hesitant to pay full tuition for online classes.[47] Indeed, students around the country have brought class actions demanding at least partial refunds of their tuition for last semester, highlighting the weaknesses of online education.[48] Online classes also present a problem for international students due to time zone differences and technological barriers.[49]

41 *Id.*

42 DePietro, *supra* note 37; *see also* Scott Jaschik, *Colleges Lose 20% of Students*, INSIDE HIGHER ED (Apr. 29, 2020), https://www.insidehighered.com/admissions/article/2020/04/29/colleges-could-lose-20-percent-students-analysis-says.

43 Jessica Dickler, *College Enrollment Likely to Drop as Schools Consider Staying Closed until 2021*, CNBC (Apr. 27, 2020, 11:01 AM), www.cnbc.com/2020/04/27/college-enrollment-may-drop-as-schools-weigh-staying-closed-until-2021.html.

44 Craig Goebel, et al., *Insights*, ART & SCI. GROUP (Apr. 2020), https://www.artsci.com/news/2020/04/30/colleges-announce-plans-to-re-open-as-students-face-may-1-decision-day.

45 Dickler, *supra* note 43.

46Elissa Nadworny, *Can Colleges Survive Coronavirus? 'The Math is not Pretty'*, NAT'L PUB. RADIO (Apr. 20, 2020), www.npr.org/2020/04/20/833254570/college-brace-for-financial-trouble-and-a-big-question-will-they-reopen-in-fall.

47 *Id.*

48 Perrie Weiner et al., *Defending Against COVID-19 Tuition Refund Class Actions*, LAW360 (June 8, 2020, 5:05 PM), https://www.law360.com/articles/1277269/defending-against-covid-19-tuition-refund-class-actions.

49 Ibrahim Aksoy, *International Student Struggles with Time Zone Changes Amid Virtual*

The move to entirely online courses has caused particular concerns for students with nonimmigrant F-1 and M-1 visas.[50] Towards the beginning of July, the U.S. Department of Homeland Security stated its intention to release a temporary final rule that would prevent nonimmigrant F-1 and M-1 students from remaining in the United States if their education is entirely online.[51] This policy change will exacerbate the retention and admission rates of international students who will already struggle as discussed above. Multiple entities including at least twenty states, two dozen universities, and the District of Columbia filed lawsuits to prevent the policy change from occurring.[52]

III. COLLEGES RESPOND

Colleges throughout the nation are exerting significant effort to restructure their budgets in response to COVID-19.[53] For some, the results could be detrimental. To illustrate, Furman University recently released its financial response plan.[54] Furman will only permit essential expenditures––it has postponed filling open positions, completing non-essential construction products, and issuing merit raises.[55] Further, like Stanford and Notre Dame as discussed above, Furman will cut certain of its athletic programs and scholarships.[56] Moreover,

Learning, THE PACE CHRONS. (Mar. 31, 2020), https://pacechronicle.com/news/2020/03/31/international-students-struggle-with-time-zone-changes-amid-virtual-learning/.

50 Emma Whitford, *Department of Homeland Security Rule Bans International Students from Online-Only Instruction Models This Fall*, INSIDE HIGHER ED (July 7, 2020), www.insidehighered.com/news/2020/07/07/department-homeland-security-rule-bans-international-students-online-only.

51 *SEVP Modifies Temporary Exemptions for Nonimmigrant Students Taking Online Courses During Fall 2020 Semester*, IMMIGR. & CUSTOMS ENFORCEMENT (July 6, 2020), www.ice.gov/news/releases/sevp-modifies-temporary-exemptions-nonimmigrant-students-taking-online-courses-during.

52 Elizabeth Redden, *Trump Administration Drops Directive on International Students and Online Courses*, INSIDE HIGHER ED (July 15, 2020), www.insidehighered.com/news/2020/07/15/trump-administration-drops-directive-international-students-and-online-courses.

53 *See generally* Jessica Dickler, *Colleges Cut Academic Programs in the Face of Budget Shortfalls Due to COVID-19*, CNBC (Jun. 23, 2020, 10:35 AM), https://www.cnbc.com/2020/06/23/colleges-cut-programs-in-face-of-budget-shortfalls-due-to-covid-19.html

54 Elizabeth Davis, *Steps to Address Financial Crisis, Reopen in the Fall*, FURMAN U. (May 18, 2020), www.furman.edu/covid-19/updates/05-18-2020/.

55 *Id.*

56 *Id.* Specifically, Furman has cancelled baseball and men's lacrosse, and it has

highly compensated employees will have their salaries reduced by 10% for one year.[57] Employees whose workloads were lessened by summer closures were furloughed for up to ten weeks.[58] Similarly, all other staff members will be furloughed in the upcoming fiscal year for two weeks.[59]

Bethel University in Minnesota is following Furman's lead as illustrated in a letter it issued to the Bethel community.[60] Notably, Bethel issued a hiring freeze and reduced its retirement contributions by 3%.[61] The letter also mentioned Bethel's board is considering furloughs, personnel reductions, and pay decreases.[62]

The list of suffering colleges continues to climb despite the roughly $14 billion in federal aid that has been provided to higher education institutions via the CARES Act.[63] Even colleges with colossal endowments such as Harvard are accepting funding provided by the CARES Act.[64]

IV. A PROPOSAL: UPDATE IRS FORM 990 TO REQUIRE BETTER DISCLOSURES

Stakeholders of private nonprofit colleges (such as students, faculty and staff members, donors, and communities) remain uninformed as their boards and administrators scramble to formulate strategies to combat the financial impact of COVID-19. To protect these stakeholders from board malfeasance during these and future

substantially decreased the total number of athletic scholarships to be implemented over the next five years. *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 Jay Barnes, *COVID-19 Update: Fall Plans and Financial Update*, BETHEL U. (May 11, 2020), https://www.bethel.edu/covid-19/images/5-11-20-covid-19-update.pdf.

61 *Id.*

62 *Id.*

63 Thys, *supra* note 5; Higher Education Institutions are eligible for some CARES Act funding to cover coronavirus related expenses, and the institutions must provide much of this funding to its students. *See generally* Eligibility of Students at Institutions of Higher Education for Funds under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 85 Fed. Reg. 36,494 (June 17, 2020).

64 *See* Ellen M. Burstein & Camille G. Caldera. *Facing Backlash, Harvard Will Allocate 100 Percent of CARES Act Funds to Student Financial Assistance*, THE HARV. CRIMSON (Apr. 21, 2020), www.thecrimson.com/article/2020/4/21/harvard-stimulus-funds-financial-aid/.

unprecedented times, Congress and/or the IRS should increase the required disclosures in IRS Form 990. Despite our previous encouragement for these necessary changes,[65] current safeguards remain infective.

It is first necessary to understand the requirement and organization of Form 990. Internal Revenue Code § 6033(a)(1) requires that all tax-exempt organizations––except for small organizations and religiously affiliated organizations––file an annual return stating items of gross income, receipts, disbursements, and other information relevant to internal revenue laws.[66] To comply, tax exempt nonprofits (including private nonprofit colleges) must complete IRS form 990.[67] Donors and board members refer to organizations' Forms 990 for decision-making purposes; yet, the information in the forms is usually outdated and incomplete.[68] Indeed, twelve to eighteen months often pass before Forms 990 become publicly available depending on whether the forms are filed on time or after an extension.[69] With this background in mind, it is possible to understand that addressing the issues with Form 990 will solve (or at least mitigate) many of the difficulties COVID-19 has presented for nonprofit private colleges. As discussed above, COVID-19 is a predicament for private nonprofit colleges that continually escalates into unpredictable territory. Meanwhile, other external factors such as competition, geographical issues, and the changing views of higher education have created financial issues for these colleges.[70] Private colleges must discount tuition to increase admissions.[71] Even more, colleges face pressure to implement online courses and events, such as virtual tours and webinars, that

65 *See generally* Baker, *supra* note 14, at 181–87.

66 I.R.C. § 6033(a)(1) (2018).

67 Guidance under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31,959 (May 28, 2020).

68 Baker, *supra* note 14, at 182, 185.

69 *How Long Does it Take for Forms 990 to Appear on Foundation Center's Website?*, GRANTSPACE, https://grantspace.org/resources/knowledge-base/lag-time/ (last visited June 11, 2020). Furthermore, it is possible organizations could simply choose to complete the form only once every three years. Baker, *supra* note 14, at 182, 184. In fact, organizations will keep their tax-exempt status and will incur only nominal penalties even if they choose to do so. *Id.*

70 DePietro, *supra* note 37.

71 Emma Whitford, *Tuition Discount Rates Trend Upward*, INSIDE HIGHER ED (May 21, 2020), https://www.insidehighered.com/news/2020/05/21/tuition-discount-rates-continue-rise-while-enrollment-stagnates-report-shows.

may host a larger pool of students.[72] Universities are experiencing diminishing returns as they expend their resources without payoff.

External factors are not the only egregious issues private nonprofit colleges face. Internal problems such as unpunished mismanagement create issues for these colleges.[73] Board members have fiduciary duties to act in the best interest of their institutions.[74] However, protections exist that effectively deny stakeholders standing to sue board members for malfeasance, and the business judgment rule often improperly shields board members from liability for breaches of their fiduciary duties.[75] Another internal problem is Form 990 reporting; stakeholders only have access to outdated and incomplete information to use for their decision-making.

All these problems have weighed heavily on private nonprofit colleges for a long time, but COVID-19 has exponentially increased their effects. Colleges must fight harder to compete. College admissions will decrease and thus these colleges will receive less revenue and incur larger deficits. Meanwhile, their Endowments have drastically decreased due to plunges in the stock market, and the essential shift to online courses has increased costs to colleges and students.

Accordingly, timely financial reporting is needed now more than ever to assist stakeholders in decision-making, and the benefits that follow a change to Form 990 will flow even after the crisis. Lag time for Form 990 is approximately two years-- too long a period for

72 Andrew Smalley, *Higher Education Responses to Coronavirus (COVID-19)*, NAT'L CONF. STATE LEGISLATURES (July 27, 2020), https://www.ncsl.org/research/education/higher-education-responses-to-coronavirus-covid-19.aspx.

73 Baker, *supra* note 14, at 173–76 (breach of fiduciary duties by Burlington College led to the closure of the college).

74 *AGB Statement on the Fiduciary Duties of Governing Board Members*, ASS'N OF GOVERNING BOARDS OF U. & C. 2 (2015), https://agb.org/wp-content/uploads/2019/01/statement_2015_fiduciary_duties.pdf.

75 Baker, *supra* note 14, at 172 (citing Brock Built, LLC v. Blake, 686 S.E.2d 425, 431 (Ga. Ct. App. 2009) (holding the business judgment rule shielded from liability a construction company board member who improperly increased his personal incentive compensation)). And Form 990 issues cause problems even when directors comply with their fiduciary duties. Specifically, directors' duty of care requires them to make informed decisions based on available information. However, even directors acting in good faith cannot receive complete information about their organizations because the only Forms 990 available for review are outdated, incomplete, and inaccurate.

stakeholders of private nonprofit colleges.[76] This timeframe is well beyond the time consumers, students, and donors have to make important determinations during the pandemic and its aftermath.

To correct these issues, Congress and/or the IRS should implement the following specific changes:

- Currently, the penalties nonprofit colleges incur for failure to timely file their Forms 990 include a penalty of $20 per day each day the return is late up to a maximum of $10,000 or 5 percent of gross receipts.[77] The Government must implement stricter penalties so late reporting is not an economically feasible option.

- Currently, institutions may receive automatic extensions to filing deadlines.[78] These extensions per se increase the time before stakeholders have access to important information about their colleges.[79] Consequently, Congress should examine extension requests with more scrutiny to promote timely public information.

- Currently, it is commonplace for nonprofits to submit Forms 990 riddled with errors and without answers to required fields.[80] Because the IRS requires the electronic submission of Form 990, it should ensure *all* required fields on Form 990 are completed by denying the submission's electronic attempt, and each field should accurately represent a college's financial situation.[81] Moreover, Form 990 should require additional disclosures such as how the organization will respond to unforeseeable scenarios such as COVID-19.

76 Baker, *supra* note 14, at 182.

77 *Exempt Organizations Annual Reporting Requirements – Filing Procedures: Late Filing of Annual Returns,* INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/exempt-organizations-annual-reporting-requirements-filing-procedures-late-filing-of-annual-returns (last visited Aug. 8, 2020).

78 *About Form 8868, Application for Extension of Time to File an Exempt Organization Return*, INTERNAL REVENUE SERV. FORMS & INSTRUCTIONS, https://www.irs.gov/forms-pubs/about-form-8868 (last updated Apr. 14, 2020).

79 Baker, *supra* note 14, at 184.

80 Baker, *supra* note 14, at 185–86.

81 Baker, *supra* note 14, at 185–87 (e.g., management might exaggerate financial stability to attract donors).

- Currently, Form 990 collects information on an annual basis with the report due more than four months after the end of the entity's reporting year.[82] Congress should impose the same timely reporting requirements on colleges that it places on financial institutions, which must submit quarterly reports (i.e., "call reports") on their financial health within 30 days of the close of the quarter and which become publicly available within 60 days of the close of the quarter.[83]

These changes will increase transparency and will lessen stakeholder risks to future, unforeseeable financial shocks.

CONCLUSION

Private nonprofit colleges consistently experience financial strain due to various internal and external factors, and COVID-19 is exacerbating the effects of these factors. Colleges will experience rapid diminished enrollment and face increasingly volatile endowments. Further, many staple, revenue-producing programs––such as college athletics––will be inoperable and thus these colleges will incur even greater financial strain.

In response, preventative measures should exist to mitigate the risks of future unforeseeable catastrophes. Harsher penalties and additional, more complete Form 990 disclosures will protect stakeholders from general board member malfeasance and future unforeseeable catastrophes. Quicker, more accurate, and more detailed Forms 990 will assist stakeholders in making their important investment decisions.

82 I.R.C. § 6033 (2018).

83 *Bank Financial Reports*, FDIC, https://www.fdic.gov/regulations/resources/call/index.html (last updated May 21, 2020).