August 30, 2018

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400 Maryland Ave., SW
Mail Stop 294-20
Washington, D.C. 20202

RE: ED-2018-OPE-0027-0001

To Whom It May Concern:

Thank you for the opportunity to comment on this proposed rule, ED-2018-OPE-0027-0001. I write to express my concern that the rulemaking process for this regulation has been hasty and ill-informed and that the proposed rule appears to be more concerned with protecting predatory institutions than providing much-need relief to the students they have harmed.

Over the past year and a half, the Education Department has taken a number of steps to show it has little interest in helping financially distressed borrowers who have been taken advantage of by unscrupulous schools to get the federal student debt relief they are entitled to under the Higher Education Act. First, the Department delayed indefinitely the 2016 borrower defense rule before it even took effect. Next, the Department has done little to address the nearly 100,000 claims[1] that remain in the backlog. And now, the Department has proposed a rule that would serve only to deny relief to borrowers who have been harmed by the lies of their institutions and limit the extent to which institutions are held accountable for misrepresenting their educational outcomes to prospective and enrolled students.

The Department has revealed throughout the rulemaking process where its sympathies lie. During the first session, Department officials wasted nearly an entire day attempting to block the livestreaming of a public session so that students who have been harmed by predatory schools wouldn't be able to view the negotiations; and as of this writing, it has yet to post any of the audio recordings from session 3, despite prompting from negotiators. The Department also stacked the deck during negotiations, adding numerous slots for institutional representatives to ensure their voices outweighed the voices of borrowers and consumer advocates. And it has given stakeholders only a month to read the extensive proposed rule, analyze its implications and numerous untrue claims, and submit written comments on the matter. The proposed rule betrays the Department's true goal: to protect the interests of institutions, at students' expense.

Prior to the presidential election, New America in 2016 commissioned a nationally representative telephone/cellphone survey of more than 1,000 randomly selected adults and asked how they felt about

[1] https://www.durbin.senate.gov/imo/media/doc/BD%20data%20QFR%20response%207.18.pdf

the borrower defense rule. Americans, Democrats and Republicans alike, agreed overwhelmingly that students who have been deceived by their colleges about the institutions' programs or outcomes should have their federal student loan debt cancelled.[2] The Department's decision to eliminate a rule that would do just that, and replace it with one that would make it virtually impossible for borrowers who have been harmed to get student loan debt relief, flies in the face of the wishes of most Americans.

Below, I outline a number of flaws in the proposed rule, and offer a series of suggested changes. It is my earnest hope that you will give these careful consideration, and make the requisite changes prior to publishing a final rule.

I am available to discuss these comments in greater detail if you have questions or concerns at mccann@newamerica.org, and I look forward to continuing to engage the Department on ways to make this proposed rule conform with the law by providing much-needed relief to borrowers who have been deceived into enrolling or otherwise harmed by the colleges they attended.

Sincerely,

Clare McCann
Deputy Director for Federal Policy
Higher Education Initiative, New America

[2] https://www.newamerica.org/education-policy/edcentral/new-world-for-profits/

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The author would like to thank Libby Masiuk for her generous assistance with these comments.

The Standard for Borrower Defense Claims

34 CFR 685.206

While a federal standard is appropriate, the Department's definition is unworkable for borrowers.
The Department proposes to establish a federal standard for borrower defense claims, noting that a federal standard will be both simpler to administer and more equitable for students across the country than a state standard. The Department found the same thing in developing the 2016 borrower defense rule; the challenges of interpreting the individual state laws of 50 different states, and the concern that students in some states would receive greater benefits than similarly-harmed students in other states, led it to develop a federal standard.

However, the standard that the Department has proposed in this notice would be arbitrarily difficult for borrowers to meet, and seems designed to keep borrowers from accessing relief available to them under the law, rather than to simplify the process or to ensure borrowers have equitable access to relief.

The requirement for intent, knowledge, or reckless disregard is too difficult for borrowers to meet.
In particular, the requirement that institutions have had "an intent to deceive, knowledge of the falsity of a misrepresentation, or a reckless disregard for the truth in making a misrepresentation" (34 CFR 685.206(d)(2)(i)(A)) leaves borrowers at a distinct disadvantage. In most cases, borrowers will not have access to evidence that would indicate how institutions arrived at a misrepresented fact or figure. They lack subpoena power to compel institutions to turn over documents that might reveal the institution's intent. Even state attorneys general, accrediting agencies, and the Education Department rarely follow an investigation of an institution through long enough to surface evidence of intent by the school. In particular, with the Department's ongoing elimination of the gainful employment rule[3] and dismantling of the Enforcement Unit,[4] there's little to suggest that the Department will be able to support borrowers who file claims because they believe their institutions lied to them.

Moreover, misrepresentations need not be intentional to harm students. As the Department itself noted in 2016, "[w]e believe that an institution is responsible for the harm to borrowers caused by its misrepresentations, even if such misrepresentations cannot be attributed to institutional intent or knowledge and are the result of inadvertent or innocent mistakes…. we believe this is the case even for statements that are true, but misleading."[5] The Department has given little justification for why its view has now changed. The proposed rule released this year notes that the Department "agrees with negotiators that it is unlikely that a borrower would have evidence to demonstrate that an institution had acted with intent to deceive,"[6] lending credence to the argument in the 2016 rule that borrowers can be harmed as easily and completely by an unintentional misrepresentation as by an intentional one. The agency goes on to say that it believes the intent standard "strikes a balance between protecting borrowers… and protecting the Federal taxpayer by requiring a level of evidence that ensures

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[3] https://www.nytimes.com/2018/07/26/us/politics/betsy-devos-for-profit-colleges.html
[4] https://www.nytimes.com/2018/05/13/business/education-department-for-profit-colleges.html
[5] 81 FR 75947
[6] 83 FR 37257

misrepresentation actually took place."[7] However, the existing regulatory definition of misrepresentation (34 CFR 668.71(c), as well as the Department's own language from the 2016 borrower defense rule, show it's not the norm to require demonstrating intent to demonstrate the presence of a misrepresentation.

It's not clear from the preamble or regulatory language in the proposed rule whether Corinthian Colleges or ITT Tech, two of the most egregious examples of large-scale misrepresentation and two of the only institutions for which the Education Department has approved borrower defense claims since 2015, would qualify. Given the limited basis of borrower defense examples available to the Department and the public, the answer to that question offers important context for the usability of this rule. In finalizing this rule, the Department should clarify with its best estimate as to whether Corinthian students and ITT Tech students would be covered under this regulation, had this standard been in place during the periods of misrepresentations and given the evidence available to the Department now. It should also incorporate clearer definitions for each of these terms in the final rule and ensure borrowers have a clear understanding of whether their circumstances will qualify. Should the Department find, in its analysis, that its new definitions would not have captured most of these borrowers, it should go back to the drawing board with its proposal.

It is also unclear what kinds of evidence would be acceptable to demonstrate intent, knowledge, or reckless disregard -- and what kinds of evidence colleges and universities could offer to contradict borrowers' and others' claims of misrepresentation. For instance, if schools claimed a simple calculation error, would that be sufficient evidence for the Department to deny the borrowers' application for relief and to let the school off the hook? A lack of clarity on how the Department intends to interpret and apply the regulatory requirement around intent, knowledge, or reckless disregard makes it difficult to understand why this higher degree of proof should be required, and whether it will merely harm borrowers to institute the higher standard. This problem should be familiar to the Department; consider the "safe harbors" created in 2002 for incentive compensation rules, which created loopholes for institutions to violate the law and made it virtually impossible for the Department to enforce congressionally mandated restrictions on the use of incentive compensation.[8] It's unclear how the Department would avoid setting up the same problem, creating grey areas in which it will not be able to properly oversee institutions' misrepresentations to students or enforce those rules through the borrower defense regulation. The Department should describe how its proposed borrower defense standard will differ from the incentive-compensation problems it created--and later fixed--over a decade ago.

This proposed standard is not justified by the heavy burden it will place on borrowers.

By the Department's own estimates, the requirement that borrower defense claims meet a standard of intent, knowledge, or reckless disregard adds a substantial amount of burden without distinguishing among the types of misrepresentations borrowers may have experienced. According to the Department's own estimates, "the proposed Federal standard is not expected to significantly change the

[7] Ibid

[8] https://www.newamerica.org/education-policy/edcentral/incentive-comp/

percent of loan volume subject to conduct that might give rise to a borrower defense claim. The conduct percent," defined as the share of loan volume subject to an eligible misrepresentation, "is assumed to be 95 percent" of the level from the 2016 borrower defense rule. In other words, the Department itself assumes that only 5 percent of misrepresentations are not committed with intent, knowledge, or reckless disregard; or do not fall under the breach of contract or final judgment components of the 2016 standard.[9]

Given that the Department also assumes that over one in 10 dollars at for-profit institutions are subject to this conduct,[10] 5 percent is a very small-scale distinction -- the difference between 11 and 12 percent of loan volume at for-profits, for instance. In other words, the only functional benefit the Department can hope to receive from establishing this higher standard is to serve as a gatekeeping mechanism, preventing borrowers who have been harmed by their institutions from accessing relief simply because of informational asymmetry between borrowers and the school about the nature of that misrepresentation. The Department should eliminate the intent, knowledge, or reckless disregard requirements from the final rule, recognizing its limited utility and significant burden for borrowers.

An existing definition of misrepresentation forms a better basis for this rule.

The 2016 borrower defense rule built on an existing infrastructure within the federal student aid system. The definition of misrepresentation has been in regulation for nearly a decade. Its definition received tentative consensus during a contentious negotiated rulemaking session.[11] Institutions are familiar with the definition; the Department has cited a handful of colleges for their violation of the rule.[12] Aside from a small modification to the language made in the 2016 rule, the Department elected to build a misrepresentation structure around that existing rule.

Instead, the Department has sought to create an entirely new standard, defining a new sub-category of misrepresentations that requires both a misrepresentation and intent to deceive, knowledge of the falsity, or a reckless disregard for the truth. This added language unnecessarily complicates the regulations for those stakeholders who are already familiar with the existing rule. It also means the Department's own enforcement efforts with respect to misrepresentations are not clearly connected to its interpretation of borrowers' eligibility for relief, so the Department's investigations into misrepresentations may fail to turn up relevant evidence the agency can use to enforce the borrower defense rules. Developing an entirely new definition creates problems for consistency within the agency, expends unnecessary government resources on assessing separate definitions, and adds confusion for the field.

Negligent misrepresentations should be incorporated into the standard.

Whether or not an institution intentionally committed a misrepresentation that left a borrower in financial straits, it should take responsibility for the harm against that borrower--and the borrower should have access to relief. In particular, where an institution's actions were so careless in committing

[9] 83 FR 37299
[10] 83 FR 37298
[11] https://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity.html
[12] See, for instance, School Fine Report: https://studentaid.ed.gov/sa/node/107

the misrepresentation as to constitute a misrepresentation in a negligent manner, those actions should also qualify for the standard. Should the Department opt not to use the 2016 standard, it should at least incorporate misrepresentations in a negligent manner into the standard, including incorporating a definition of how the Department will interpret negligence to apply to borrower defense claims. This is a middle ground between the proposed rule and the 2016 rule, which accounted for erroneous misrepresentations because "an institution is responsible for the harm to borrowers caused by its misrepresentations, even if such misrepresentations cannot be attributed to institutional intent or knowledge and are the result of inadvertent or innocent mistakes."[13] The standard as currently drafted includes too many loopholes, leaving virtually no chance institutions will moderate their behavior in response to the rule to influence future behavior and ensure borrowers who were lied to by their schools are given the relief they deserve, negligent misrepresentations should qualify for relief.

Breaches of contract should be included in the standard.
The 2016 borrower defense rule was constructed around the Education Department's experiences with current and previous claims and the legal history of borrowers' challenges to postsecondary institutions. While that experience was limited, it should--and did--inform the Department's development of a new rule. In that spirit, the Department should revisit the components of the standard in the 2016 rule and reconsider excluding them from this rule.

As the Department noted in its 2016 proposed rule, "a common claim that students had raised in lawsuits against postsecondary schools was breach of contract."[14] That is also clear from the Department's own internal history of borrower defense claims, as released through a FOIA request to the Project on Predatory Student Lending.[15] For instance, in 2003, the Department awarded some students of International Business College, which closed in 1998, partial defenses to repayment due to a breach of contract. In another instance, a borrower raised a breach of contract-based defense to repayment; the Department rejected that claim due to the type of loan, but both instances demonstrate that breach of contract may well be a valid and frequent basis for borrowers' claims. Given that, the Department should reconsider its treatment of breach of contract claims in this proposed rule, and include such claims in the standard in the final rule.

Final court judgments should provide immediate relief under the standard.
In this proposed rule, the Department has indicated that it believes a federal standard is appropriate in large part because of the substantial burden the agency faces in analyzing each state's laws separately.[16] However, the Department can more simply acknowledge and respect the roles of states by permitting nondefault, contested judgments against a school based on state or federal laws (and related to the making of a Direct Loan and/or the provision of educational services, as is already required) to qualify

[13] 81 FR 75947
[14] 81 FR 39339. The NPRM includes a footnote that reads: "See, *e.g., Vurimindi* v. *Fuqua Sch. of Bus.,* 435 F. App'x 129, 133 (3d Cir. 2011); *Chenari* v. *George Washington Univ.,* No. CV 14-0929 (ABJ), 2016 WL 1170922 (D.D.C. Mar. 23, 2016)."
[15] https://predatorystudentlending.org/press-releases/department-educations-borrower-defense-includes-fundamental-lie-documents-show-press-release/
[16] 83 FR 37256

borrowers for immediate relief under this rule. Moreover, judgments obtained by government agencies (like attorneys general or federal agencies), while relatively rare, should also be considered to meet the bar for valid borrower defense claims.

These types of judgments indicate that an issue has been thoroughly investigated in a court of law; that the institution had ample opportunity to counter the evidence available; and that the Department can feel confident in the determination of the court. It's clear that such types of court findings should receive elevated consideration by the Department, and including them in the standard means the Department will not be forced to expend limited resources to re-consider the evidence in those cases. The Department should incorporate these types of judgments as a specific, enumerated element of the new federal standard for borrower defense claims.

"Provision of educational services" is too narrowly defined.

The Department notes that borrower defense claims must relate to the making of a Direct Loan for enrollment at the school, or to the provision of educational services for which the loan was made.[17] However, it has drastically narrowed the scope of what qualifies as the provision of educational services. Specifically, the Department states that the "'provision of educational services' refers to the educational resources provided by the institution that are required by an accreditation agency or a State licensing or authorizing agency for the completion of the student's educational program."[18] But institutions may have made promises about the quality of the education that fall outside of the specific requirements of accreditors or state agencies--but that nonetheless significantly affect a borrower's educational experience. Given the Department's limited experience with processing borrower defense claims, it should not unnecessarily preclude other types of educational services from qualifying as potentially valid misrepresentations.

Additionally, the Department limits the "provision of educational services" to only those related to the program of study--precluding educational services relevant to the institution but outside of the borrower's specific program. As the Department wrote in 2016, "while it may appear to be a relatively straightforward clarifying change to amend the regulatory language to read, 'provision of educational services related to the program of study,' such a change could be interpreted to mean that claims related to more general concerns associated with the institution's provision of educational services would not be considered. That is not our intent…"[19] The Department has not adequately justified why it now believes that it should, in fact, consider only program-specific educational services.

Restore the standard from the 2016 final rule.

For the reasons included elsewhere in this section, the Education Department should reconsider its federal standard as drafted in this proposed rule, and instead adopt the standard published in the 2016 rule. The Department's obligation to borrowers is to craft a borrower defense rule that is usable--one in which, if borrowers are harmed by lies their institutions told them, they have access to a reasonable remedy from the federal government. However, this proposed rule seeks to unnecessarily restrict

[17] 83 FR 37244
[18] 83 FR 37325
[19] 81 FR 75958

borrowers' access by requiring them to demonstrate the institution knowingly committed the misrepresentation--a high bar that most borrowers will likely not have enough evidence to prove, even though the Department itself admits that very few of the misrepresentations in higher education fall outside that standard. The 2016 rule carved out a reasonable middle ground, and the Department has not made a compelling case for reversing course now.

Alternatives A and B: "Defensive" and "Affirmative" Claims

34 CFR 685.206(d)(2)

Accept claims from borrowers regardless of their repayment statuses.

The Department has published a proposed rule and requested public comment on a document that fundamentally misrepresents the history of the regulation in question, as described below. As a policy, it will serve only to incent the most sophisticated borrowers to default on their loans, and ensure the most vulnerable, least-informed borrowers are locked out of an avenue to get relief on their loans after being harmed by their schools' lies. The Department cannot justify such a flawed policy on its merits, and instead attempted to punt to a historical interpretation--that doesn't exist. The Department should elect to continue its long-standing interpretation that both affirmative and defensive claims are welcomed by the Department where the borrowers have been harmed by their institutions.

The Department's interpretations in historic borrower defense claims refer to all repayment statuses, contrary to assertions in the NPRM.

The Department asserts--repeatedly, and without evidence--that the Department altered its assumptions in 2015 to, for the first time, accept claims from borrowers in repayment but not in a collections proceeding. However, as described by the Project on Predatory Student Lending at the Legal Services Center of Harvard Law School in their public comment of August 2, 2018, internal Education Department documents released through a FOIA request indicate that the Department has never had a policy requiring borrowers to default and enter a collections proceeding in order to file a claim, and it has accepted affirmative claims from borrowers in the past.[20] As stated in the 2016 rule, "[a]s explained by the Department in 1995, 60 FR 37769–37770, the Direct Loan borrower defense regulations were intended to continue the same treatment for borrowers and the same potential liability for institutions that existed in the FFEL Program—*which allowed borrowers to assert both claims* and *defenses to repayment, without regard as to whether such claims or defenses could only be brought in the context of debt collection proceedings*" (emphasis added).[21] The final 2016 rule also included references to Dear Colleague Letter GEN-95-8, noting that the letter stated **"**the Department's position that *borrower defense claims would receive the same treatment as they were given in the FFEL program, which allowed borrowers to not only assert defenses but also claims under applicable law*" (emphasis added).[22]

An internal memo from February 11, 2003, released through the FOIA to the Project on Predatory Student Lending, confirms this view. The memo, which describes borrowers who submitted defense to

[20] https://www.regulations.gov/document?D=ED-2018-OPE-0027-0011
[21] 81 FR 75956
[22] Ibid

repayment claims for the unlawful actions of a particular institution, notes that the Department had a three-pronged test for borrower defense claims: (1) That the institution "engaged in wrongful conduct that gives rise to a legal cause of action under State law;" (2) that the institution's actions were "directly related to the receipt or distribution of their Direct Loans or the provision of educational services paid for with those loans;" and (3) that the borrowers "were in fact injured" as a result of the institution's actions. Even in the Department's discussion of the borrowers' injury, attorneys for the Department explored the fact that the program lacked accreditation; did not provide an education of sufficient value or minimal qualifications to allow the borrowers find employment in the field; and that the job placement rate falsely implied near-full employment among graduates of the program--but did not ask or answer what the repayment statuses of the borrowers in question was, suggesting it was not Department policy to do so. Other documents in the FOIA request also confirm this, including a reference to a case in which a borrower asserted a claim, naming a servicer--not a debt collector--in a related lawsuit, indicating that the borrower had likely not defaulted. In other words, the Department's entire basis that the defensive claims approach is rooted in a long-standing Department policy is false, and the Department should not pursue that approach further.

Requiring borrowers to file claims during collections proceedings unnecessarily and unfairly limits borrowers' rights to apply for relief.

The Department's proposal to require borrowers to default on their loans and be placed into collections proceedings prior to filing a borrower defense claim is ill-advised, irresponsible, and overtly designed to make relief harder for deserving borrowers to access. One concern with the proposal is that it will significantly shorten the window of opportunity borrowers have to file borrower defense applications with the Department. For harmed borrowers who default on their loans before identifying defense to repayment as an option, they will have no more than a few weeks to gather the relevant evidence about the misrepresentation, assemble proof of their financial harm, prepare to address contradictory claims that may be raised by the institution, complete an application, and submit it. These substantial paperwork burdens will come during a difficult time immediately following student loan default, the consequences for which include the following:

- The borrower's loans are transferred to a private collection agency, which "ha[s] the authority to pursue defaulters much more aggressively than loan servicers;"[23]
- The entire loan balance comes due immediately;
- The borrower loses eligibility for further student aid, so cannot re-enroll in another institution;
- The default is reported on the borrower's credit report, damaging his credit score and potentially making it difficult or impossible to borrow a loan, get a credit card, or get a mortgage; and
- Collection or other fees are charged on the defaulted student loan(s).[24]

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[23] https://www.americanprogress.org/issues/education-postsecondary/news/2018/01/24/445284/getting-private-collection-agencies-federal-student-loans/

[24] https://studentaid.ed.gov/sa/repay-loans/default#consequences

For borrowers who may strategically default in order to become eligible to file a borrower defense application, they accumulate all of those consequences, but lack the ability to resolve their financial circumstances by filing a borrower defense claim until administrative offset proceedings take effect. Student loans are at least 420 days delinquent before they are referred to private collection agencies;[25] and the specific collections proceedings referred to in the proposed regulatory language only occur after the private collection agency has attempted to collect on the loan, often for months.

In either case, leaving open a window as short as 30 days in which borrowers are eligible to file claims--and after which they are precluded from applying for relief, at least until that window reopens after re-default--is unreasonable, and leaves borrowers with few options. For the federal government to provide an inducement for borrowers to default, accruing all of the financial and other consequences of that action, is inappropriate.

It's not clear that the Department's infrastructure for wage garnishment challenges can hold up to the large number of claims that will be received.

Currently, the Department accepts relatively few challenges through the administrative wage garnishment or Treasury offset programs. According to Education Department data obtained by the National Consumer Law Center through a FOIA request,[26] between January 1, 2012 and September 30, 2015, approximately 8.8 million student loan borrowers had their tax refunds or other federal benefits offset. During the same timeframe, more than 544,000 borrowers posted a wage garnishment payment on their federal student loans. With around 7 million borrowers with federally managed loans and another 4 million FFEL borrowers in default now,[27] this suggests relatively few of them are placed into collections proceedings each year.

Moreover, the Department's proposal would build on a limited infrastructure for challenges to those proceedings, expecting it to handle the potentially large scale of borrower defense claims received. That could turn out to be a tall order, especially since those proceedings aren't set up to adjudicate borrower defense claims at all. The data suggest only about 32,000 borrowers challenged administrative wage garnishment from January 2012 through September 2015, and fewer than 15,000 of those in TOP offsets did. Yet from 2015 through July 2018, the Department received over 165,000 borrower defense claims. Nearly 100,000 of those remained pending, at least as of May 2018, with no indications the backlog is declining at all.[28] Moreover, the pace of borrower defense claims being submitted has not slowed much.[29] In addition to leaving claimants who aren't familiar with the defensive claims requirement struggling to repay their loans and unable to apply for relief, the numbers of borrowers making use of the process for raising objections to administrative offsets could still swell significantly if there is an influx of

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[25] https://www.treasury.gov/connect/blog/Pages/An-Update-on-the-Fiscal-Federal-Student-Aid-Pilot-for-Servicing-Defaulted-Student-Loan-Debt.aspx

[26] NCLC FOIA request. Available from the author or from NCLC upon request

[27] Portfolio by Loan Status. https://studentaid.ed.gov/sa/node/412.

[28] https://www.durbin.senate.gov/imo/media/doc/BD%20data%20QFR%20response%207.18.pdf

[29] https://tcf.org/content/commentary/college-fraud-claims-29-percent-since-august-2017/

claimants. The numbers of borrower defense claimants could overwhelm the system, slowing the hearing process and timeline for resolution of the objections for all borrowers.

Limiting borrower defense claims to collections proceedings doesn't save taxpayers very much -- and may actually increase costs.

The Department writes in its proposed rule that one reason for considering excluding so-called "affirmative" claims from the borrower defense process is its "obligation to the taxpayer to provide reliable stewardship of Federal dollars."[30] However, this justification is not borne out by the Department's own estimates.

First, the Department's budgetary estimates for this proposed rule show only a relatively insignificant difference in costs between accepting only "defensive" claims and accepting both "defensive" and "affirmative" claims. The Department's main estimate shows a reduction in benefits to borrowers of $10.5 billion over 10 years relative to the 2016 rule. Its estimate if affirmative claims are permitted is $9.5 billion.[31] In total, the difference in accepting claims for borrowers regardless of repayment status is $959 million over a decade -- or, on average, about $96 million per year. That's well below one percent (0.65 percent) of the annual loan volume the Department awards to students each year.[32] In fact, that average annual cost is barely one-quarter (26 percent) of the *outstanding interest alone* for borrowers with pending defense to repayment claims.[33] The Department should not force borrowers to make life-altering, credit-ruining choices in order to simply file an application, particularly given that it won't save much money by doing so.

Additionally, the Department itself predicts that the requirement for borrowers to default on their loans in order to file claims could increase costs. As the Department wrote in the proposed rule, "A similar behavioral response [driving borrowers to default on their loans in order to file borrower defense claims] could result in a range of troubling unintended consequences, including...increased default collection costs for taxpayers."[34] Its own budget estimates include a scenario in which defensive applications may increase by 15 percent due to strategic defaults or other conditions. It's unclear whether the budget estimates account not just for the added success of borrower defense claims, but also for the added costs of contracting with a private collection agency and the accumulation of fees and interest that will have to be forgiven if a claim is successful. The federal government spends nearly $40 for every $1 collected by private collection agencies--more than $1,700 per borrower whose defaulted loans are rehabilitated.[35] In essence, if the Department were to accept defensive claims only, it would induce borrowers to default, causing those borrowers' financial ruin and driving up costs for the Department--whether or not the claim is expected to be successful.

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[30] 83 FR 37244
[31] 83 FR 37300
[32] https://ed.gov/about/overview/budget/budget19/justifications/q-sloverview.pdf, Q-24, FY 18.
[33] https://www.durbin.senate.gov/imo/media/doc/BD%20data%20QFR%20response%207.18.pdf
[34] 83 FR 37243-37244
[35]
https://www.americanprogress.org/issues/education-postsecondary/news/2018/01/24/445284/getting-private-collection-agencies-federal-student-loans/

The Department should not create an incentive to default.

The Department's proposed policy in Alternative A, requiring borrowers to default and enter collections proceedings prior to being eligible to apply for borrower defense relief on their federal loans, sets up an incentive to default that is of significant concern. It also contradicts the Department's role as a steward of taxpayer dollars, given the increased costs associated with student loan defaults.

As the Department itself notes, research has identified strategic delinquency or default as a risk to policies that incent such delinquency or default in order to access benefits. The study cited by the Department found a 13 percent increase in mortgage holders moving from current to delinquent status within just a few months of the introduction of a policy that required sixty days delinquency for homeowners to be eligible to restructure their mortgages.[36] A 2010 study by the Federal Reserve Bank of Philadelphia had similar findings: homeowners strategically defaulting on their first mortgage, while retaining access to their home equity lines of credit, implying that "current loan modification programs may have unintended consequences for consumer behavior."[37] Researchers at The George Washington University explored the federal Home Affordable Modification Program (HAMP), available to homeowners delinquent on their loans, and found that it did increase the likelihood of delinquency but--as expected--not default, clear evidence of strategic behavior from homeowners looking to take advantage of the program's terms.[38] Collectively, this research shows that policy decisions have serious and actionable consequences, and that at least some not-insignificant portion of borrowers will react to the incentives and structure created for them.

Creating a similar incentive to default in a federally funded loan program--one that already struggles with high default and delinquency rates--will create more problems. The Department has invested significant resources in recent years into ensuring the availability of affordable repayment options for borrowers; promoting those resources; and improving student loan servicing to avoid default.[39] The requirement that some of the most vulnerable borrowers, those whose institutions have lied to them and left them with financial harm, should be given an incentive to default to access the opportunity to have some or all of their loans received is simply irresponsible and contradictory to the advice it provides to all borrowers. The Department should accept claims from borrowers regardless of their repayment statuses.

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[36] http://www.nber.org/papers/w17065.pdf

[37] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724947##

[38] http://www.fmaconferences.org/Vegas/Papers/DelinquencyOption0115.pdf

[39] See, for instance, https://www.ed.gov/news/press-releases/us-department-education-announces-two-final-regulations-protect-students-and-help-borrowers; https://www.insidehighered.com/news/2013/11/04/education-dept-will-email-35-million-student-loan-borrowers-about-income-based; and https://www.ed.gov/news/press-releases/secretary-devos-announces-intent-enhance-fsas-next-generation-processing-and-servicing-environment

Limiting borrower defense claims to collections proceedings likely won't prevent frivolous claims from being filed.

The Department states in its proposed rule that a so-called "change" in the Department's reading of the 1995 borrower defense rule as permitting borrowers to apply even if they were current in their payments or otherwise not in a collections proceeding "resulted in a significant increase in claim volume compared to the prior years, when claim volume was no more than 10 in any given year."[40] However, that patently false claim (see: "The Department's interpretations in historic borrower defense claims refer to all repayment statuses, contrary to assertions in the NPRM," above) relies on several spurious assumptions: that borrowers prior to 2015 were all in collections proceedings; that Corinthian borrowers only applied because of the ability to file "affirmative" claims; and that the influx of new borrower defense claims above approximately 10 per year was due to the acceptance of "affirmative" claims.

None of these is correct. As discussed elsewhere, the Department did not have a policy prohibiting "affirmative" claims prior to 2015. Additionally, there's little evidence to suggest that Corinthian or other borrowers submitted claims *because of* the affirmative-claims policy the Department allegedly adopted in 2015. According to data shared by the Department during negotiated rulemaking, of more than 143,000 claims received by the Department from 2015-2017, well over one in 10 were still in default, and another 11 percent were delinquent on their loans.[41] Moreover, as of September 2016, more than 34,000 Corinthian borrowers who were enrolled during the time the Department found evidence of widespread misrepresentations (though not all in affected programs) were having their wages garnished or tax refunds and other benefits offset after defaulting on their student loans.[42] Had borrowers been pursuing defenses to repayment primarily because of a policy accepting affirmative claims, it seems unlikely tens of thousands of them would have defaulted on their loans.

The fact that the volume of claims received increased substantially in 2015 and thereafter appears entirely unrelated to any alleged change in the Department's interpretation as permitting affirmative claims. The examples of prior borrower defense cases all came from somewhat smaller institutions and groups of borrowers. For instance, Interstate Business College enrolled about 325 students in 1997, the year prior to its closure.[43] Corinthian Colleges, meanwhile, had 16,000 students enrolled when it shuttered its doors.[44] ITT Technical Institutes had 35,000.[45] Rather than being due to the Department's acceptance of claims from students in all repayment statuses, the increase in claims seems to be due largely in part to the massive universe of students subjected to institutions' widespread misrepresentations.

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[40] 83 FR 37285

[41] https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/datasheetd.docx Table D.1

[42] https://www.warren.senate.gov/newsroom/press-releases/in-light-of-troubling-new-data-sen-warren-demands-education-department-halt-collection-of-former-corinthian-students-and-039-debt-and-discharge-their-loans

[43] https://prezi.com/whtiktggedzm/interstate-business-college/

[44] https://www.nbcnews.com/news/education/corinthian-colleges-shuts-down-ending-classes-16-000-overnight-n348741

[45] http://www.latimes.com/business/la-fi-for-profit-schools-20160912-snap-story.html

The Department can consider alternative solutions for deterring frivolous claims.
The Education Department's sole other justification for accepting only defensive claims is that it is concerned about receipt of frivolous claims. However, this is an inadequate reason to force borrowers who have been harmed by their institutions into default on their loans.

First, there is little evidence that the Department is receiving outright frivolous claims. According to a report from the Century Foundation that uses data obtained through a FOIA request through August 15, 2017, approximately three out of four of the 98,868 reviewed claims were against Corinthian Colleges, where the Department advertised findings of widespread misrepresentation. For-profit colleges, where the Department's own budget estimates assume a much larger volume of misrepresentations, had 99 percent of all the claims reviewed. And every corporate entity for which more than 300 borrowers have filed complaints--eleven, in total--has been subject to investigations by state and federal agencies, including several with rulings or settlements against them for violations of consumer protection and other laws related to borrower defenses.[46] Such claims can hardly be considered frivolous, even if they do not all ultimately receive relief.

Moreover, disincentives to file do exist now. As the Department itself noted in the proposed rule, "borrowers not entitled to relief may find themselves worse off if they receive a forbearance while the claim was being processed, because interest would accrue and increase the amount the borrower would be required to repay when the loan reenters repayment."[47] That logic holds true for borrowers who wait in forbearance for potentially years, see their claims approved, but only receive a partial discharge, which the Department has clearly indicated is more likely than not for many borrowers.[48] Additionally, the Department notes (discussed elsewhere in these comments) that institutions may elect to withhold transcripts for borrowers who receive relief -- a disincentive for borrowers to file claims without seriously considering the implications of either applying or receiving relief. The Department also notes this is generally a possible consequence of default on student loans on its own website.[49]

However, as the Department is well aware, it's impossible to predict what is likely to come in the door. The best way to deter frivolous claims in the future is to offer borrowers a clear indication of what evidence and information is expected of them; and to give borrowers transparent and understandable guideposts for how the Department will review and process claims. A lack of clarity could lead to a situation like the one described in the proposed rule, in which "a borrower may attempt to seek loan forgiveness simply because he or she is dissatisfied with the education received or with his or her ability to get a particular job, rather than as a result of a misrepresentation by the institution."[50] The Department should provide plain-English translations of this regulation; share information about known

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[46] https://tcf.org/content/report/college-complaints-unmasked/
[47] 83 FR 37243
[48]
https://www.ed.gov/news/press-releases/improved-borrower-defense-discharge-process-will-aid-defrauded-borrowers-protect-taxpayers
[49] https://studentaid.ed.gov/sa/repay-loans/default#consequences
[50] 83 FR 37243

misrepresentations--including those for which it does not believe a claim will quality--to enable other borrowers to anticipate their likely outcomes; and create a clear-cut application that details exactly the types of evidence the Department will consider acceptable. A group process for assessing similar borrower defense claims together would also reduce the burden on the Department, making it easier to process claims quickly and faster to weed out claims that don't have sufficient evidence available.

Additionally, the Department has said that it is interested in cracking down on third-party debt relief companies and minimizing their influence in the student loan marketplace. The Department should pursue any and all avenues to do so; those companies often further exploit already-vulnerable students and persuade them to pay additional amounts they shouldn't need to pay, sometimes for benefits the company can't help them access. The Department should consider appropriate outreach about those companies to borrowers; consider opportunities to minimize their influence; and take legal action where appropriate and necessary.

Importantly, the Department should not increase the evidence standard to require clear and convincing evidence. As the Department acknowledges in the proposed rules, borrowers will already struggle to provide sufficient evidence to demonstrate their institution not only committed a representation, but did so with intent, knowledge, or reckless disregard. In many cases, borrowers will have little more than their own testimony to validate their claims. The burden of proof should lie with the Department to conduct a thorough investigation and confirm whether or not the claims appear to be true. With the Department's reductions in investigative power through the investigations team of the Enforcement Unit and its emphasis in this proposed rule of adjudicating claims on an individual case-by-case basis, the public cannot have confidence that even the Department itself could gather sufficient evidence to meet a clear and convincing standard in most cases.

Should the Department determine it wants to employ additional mechanisms to allow it to prevent frivolous claims and ensure those borrowers aren't left waiting for review of their likely-to-be-denied claims, it is essential that it obtain additional public comment on further ideas, providing both evidence and a reasoned basis for how the mechanisms will prevent frivolous claims without prematurely knocking out meritorious ones. Several of the notions recommended by the Department on this matter in the proposed rule would create significant concerns and disadvantages for borrowers, and students, institutions, and other stakeholders should have an opportunity to comment on any future suggestions to prevent unintended consequences and other concerns.

Statute of Limitations

685.206(d)(5) [Alternative A] and 685.206(d)(5)(i)(A) [Alternative B]

Extend the statute of limitations for defaulted borrowers to file claims.

Under the proposed Alternative A and for defaulted borrowers under Alternative B, the Department proposes to require borrowers to submit their claims only during the "applicable timeframes for the proceeding."[51] However, as the Department notes elsewhere in the proposed rule, those timeframes

[51] 83 FR 37326

"vary from 30 days for consumer reporting and wage garnishment to 65 days for Federal salary offset and tax refund offset."[52] That is too narrow a timeframe for borrowers who might only learn they may be eligible to assert a defense to repayment under these regulations after they have defaulted, particularly given that they will have to identify evidence of intent on the part of the institution.

Moreover, without additional clarification from the Department, this proposal suggests that once a borrower has missed those windows, he would be locked out of the opportunity to file a claim until--and unless--he resolved the default by rehabilitating the loan or consolidating; became current again on the loan; and then re-defaulted, re-entering a collections proceeding. Without language that specifies otherwise, this proposal sets up a difficult situation for a borrower who may not have been aware of his options at exactly the right moment. Because of the timing required to default, rehabilitate a loan, and re-default, particularly with the availability of deferments and forbearances that can drag out the process of defaulting, borrowers who do so will--in many cases--file claims years after learning about the misrepresentation, when the evidence is harder to track down and the claims are becoming stale. In the interest of ensuring a smooth, fair fact-finding process, the Department should broaden the window for defaulted borrowers to file claims.

The Department should permit borrowers to submit claims regardless of their repayment status. In Alternative B, the Department should apply the same statute of limitations regardless of the borrower's repayment status; there is little justification for why some borrowers would be permitted to file claims much later than others, simply because they defaulted rather than managed to continue making payments on their loans. However, if it declines to do so, the Department should, at a minimum, notify defaulted borrowers as they enter a collections proceeding that they may state that they intend to file a borrower defense claim, and extend the timeframe after that point by which the Department must receive the claim to align with the statute of limitations for affirmative claims. Doing so would establish a process for notifying borrowers they may be eligible for relief on their loans if they experienced a misrepresentation; establish a reasonable window during which borrowers may collect evidence and produce their applications; and protect borrowers from missing their only opportunity to file a claim.

Tie the statute of limitations to the discovery of the misrepresentation, rather than the borrower's enrollment history.

The Department establishes, for affirmative claims under Alternative B, a three-year statute of limitations from when the borrower leaves school. However, the statute of limitations should be based on the borrower's learning of the misrepresentation--and not based on his enrollment at the institution. Many misrepresentations, particularly those where there is sufficient evidence to demonstrate intent, knowledge, or reckless disregard for the truth, are only discovered after borrowers have left school. As the Department wrote in 2016, "[s]tate law, moreover, already commonly recognizes that the running of limitation periods may be suspended for periods during which the claimant had not yet discovered the facts that would support a claim, and may impose no limit on the length of the suspension, effectively allowing a claim to be asserted long after the otherwise applicable limitation period had run."[53]

[52] 83 FR 37299
[53] 81 FR 75956

The Department's own experience with such situations, in which misrepresentations are discovered after the fact, should indicate the need for such extensions of statutes of limitations. For instance, the Education Department fined Heald College in 2015 for misrepresentations of job placement rates prior to October 2012; borrowers began submitting claims in 2015 -- years after leaving the school, but well within even a three-year timeframe from the discovery of the misrepresentation.[54] Surely the Department does not intend to preclude borrowers in cases like Corinthian--with rampant misrepresentations identified by state and federal agencies and backed up with reliable information and evidence--from accessing relief on their loans, even if the evidence appears after they have left school, when they are still suffering from the financial consequences of their poor-quality education.

In 2016, the Department established a statute of limitations from the point when the borrower discovered, or should have reasonably discovered, the facts around a misrepresentation that meets the standard for defense to repayment claims. The Department noted at the time that "a borrower may learn of a substantial misrepresentation upon discussion with other students or borrowers," or should have reasonably learned of it "if facts concerning the misrepresentation are published in nationwide news articles."[55] The ways in which borrowers learn about misrepresentations--and the relative slowness with which state and federal agencies identify and publicize them--have not changed over the last two years. The Department should ensure this regulation is consistent with the 2016 rule by establishing a statute of limitations that begins with the borrower's knowledge of a misrepresentation, not with the arbitrary date of his exiting the institution.

Eliminate a statute of limitations for outstanding amounts remaining to be repaid.

The Department's proposed statute of limitations for affirmative claims in Alternative A runs only three years--both for the borrower to recover amounts already repaid, and to defend against repayment on debt he still owes. However, the Department should not establish a statute of limitations for remaining amounts to be repaid. As the Department noted in 2016, "common law generally allows a debtor to assert claims from the same transaction as the loan at any time as a defense to repayment of the loan, but requires a debtor to assert any claim for recovery of payments already made within the deadlines that would apply had the debtor brought suit on the claim."[56] Negotiators during that rulemaking process agreed with the Department's approach, citing the "legal principle of recoupment."[57] The Department has not given a justification for departing from such commonly accepted legal practices; and should instead revert to having no statute of limitations for remaining amounts, as established by the 2016 rule.

Extend the statute of limitations for borrower defense claims.

The Department should extend its proposed statute of limitations for affirmative borrower defense claims filed under Alternative B to six years, rather than three. As noted in 2016, the Department opted to use a six-year statute of limitations because it was both a common breach of contract and substantial

[54] http://www2.ed.gov/documents/press-releases/heald-fine-action-placement-rate.pdf

[55] 81 FR 39345

[56] 81 FR 39344

[57] 81 FR 39345

misrepresentation statute of limitations utilized by states; and because six years aligns with the limitations period on non-tort claims against the United States.[58] Moreover, given the higher bar the Department has proposed to set for the standard, borrowers--not to mention state and federal agencies investigating possible misrepresentations--will require more time to gather evidence; and without a group process, borrowers will likely be slower to learn about those misrepresentations and file their claims. To shorten the timeframe by half compared with the 2016 rule, particularly in the context of starting the clock as soon as a borrower leaves school rather than as soon as he learns of the misrepresentation, is unnecessarily harsh and will guarantee the most vulnerable borrowers are the ones least able to access the opportunity for relief that Congress established for them in the form of borrower defenses to repayment.

Evidence Standard for Borrower Defense Claims

685.206(d)(5) [Alternative A] and 685.206(d)(5)(i)(B) [Alternative B]

Retain a "preponderance of the evidence" standard in the final rule.

The Department opted in this proposed rule for a preponderance of the evidence standard, both for Alternatives A and B. That is a reasonable standard that will give borrowers a fighting chance at accessing relief when they have suffered harm because of their institutions' misrepresentations, and the Department should retain it in the final rule. The Department noted the appropriateness of this standard both in the 2016 rule and during the negotiated rulemaking process that preceded this proposed rule. In 2016, the Department said that "we believe [preponderance of the evidence] is appropriate as it is the typical standard in most civil proceedings," because the Department uses that "evidence standard in other proceedings regarding borrower debt issues" such as administrative wage garnishment and federal salary offset, and because it "strikes a balance between ensuring that borrowers who have been harmed are not subject to an overly burdensome evidentiary standard and protecting the Federal government, taxpayers, and institutions from unsubstantiated claims."[59] During the first session of negotiated rulemaking in 2017, the Department confirmed the appropriateness of that standard, noting that, "for causes of action based on consumer protection law, some states have concluded that only a preponderance of the evidence is required."[60]

Do not adopt a clear and convincing evidence standard.

The Department has specifically sought comment as to whether it should increase the evidence standard to "clear and convincing," should it opt to accept affirmative claims in the final rule. However, the Department should retain a preponderance of the evidence standard regardless of its approach to affirmative claims (addressed elsewhere in these comments). Clear and convincing sets a much higher bar, almost certainly requiring evidence that the borrower will not have at his disposal. The Department's justification for contemplating the inclusion of a clear and convincing standard, that it will deter borrowers from submitting frivolous claims, is not compelling. The Department cites no research

[58] 81 FR 75959

[59] 81 FR 75936

[60] Session One, Issue Paper One. "...for causes of action based on consumer protection law, some states have concluded that only a preponderance of the evidence is required. See, e.g., Malooley v. Alice, 621 N.E.2d 265, 268 (Ill. App. 1993)."

to suggest an evidence standard prevents or dissuades consumers from submitting claims. In fact, it seems likely that most borrowers who have submitted borrower defense claims to date don't know what the evidence standard expected of them is, wouldn't have a way to contextualize those evidence requirements without legal assistance, and would not change their behavior even if they did understand the expectations for evidence. For instance, the borrower defense application created by the Department doesn't name any evidence standard, but rather asks for a detailed description of the borrower's experience and any relevant materials to be attached.[61] If the Department were to require clear and convincing evidence, it would likely receive the same number of claims and reject more of them. Given that there is no evidence a higher evidence standard would deter frivolous claims, the Department should not adopt it in the final rule.

Clarify the examples of misrepresentations in the proposed rule.

The Department gives several examples of misrepresentations that would likely qualify under the proposed borrower defense rule. However, the examples are in some cases vague and unclear; and do not clarify how the Department would treat several common circumstances. The Department should reevaluate these examples and clarify for institutions, legal aid experts, and other stakeholders how it would view each circumstance.

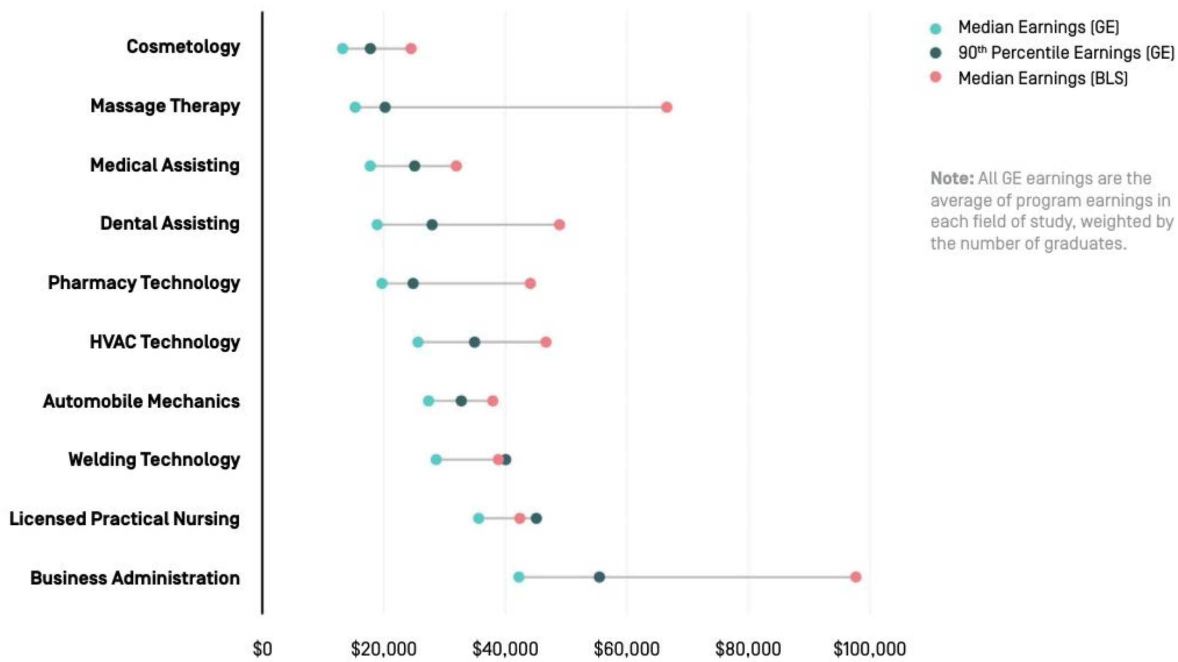
For instance, the Department indicates in the proposed rule that one qualifying misrepresentation would be "[a]ctual institutional selectivity rates or rankings, student admission profiles, or institutional rankings that are materially different from those included in the institution's marketing materials, website, or other communications made to the student."[62] However, it is unclear from this language whether the Department would consider it a misrepresentation if an institution falsified data it gave to an institutional rankings organization in order to inflate its ranking, as has happened several times in recent years.[63]

Additionally, the Department gives an example of another misrepresentation, in which an institution made "[a] representation regarding the employability or specific earnings of graduates without an agreement between the institution and another entity for such employment or sufficient evidence of past employment or earnings to justify such a representation or without citing appropriate national data for earnings in the same field as provided by an appropriate Federal agency that provides such data."[64] However, research by New America has found that earnings from the Bureau of Labor Statistics exceed the actual earnings of program graduates in gainful employment (GE) programs in 96 percent of

[61] OMB Number 1845-0146
[62] 83 FR 37326
[63] See, for example, https://www.washingtonpost.com/blogs/campus-overload/post/george-washington-university-unranked-by-us-news/2012/11/14/d07d2d76-2e83-11e2-9ac2-1c61452669c3_blog.html and https://www.wsj.com/articles/temple-university-says-more-incorrect-data-was-used-in-ranking-its-m-b-a-program-1532560093. Note that in the 2016 borrower defense rule, the Department gave such an example for a school similar to these actual cases and noted that, while a misrepresentation had occurred, the student in the example "received a selective liberal arts education which represents the value that he could reasonably expect, and gets no relief." 81 FR 76087
[64] 83 FR 37326

programs analyzed. In fact, in almost every one of the top 10 most common GE occupations, even for the program graduates with the highest earnings.[65] Figure 1 below, from the report, illustrates this concept.

Figure 1: GE Program Earnings Relative to National BLS Earnings, Most Common Fields of Study



Given that, the Department should clarify whether it believes it is appropriate for institutions to indicate that a borrower can earn the average earnings in a BLS survey, even where that figure far outstrips the actual earnings of program graduates; or whether that may constitute a misrepresentation and a potential borrower defense claim.

Financial Harm

685.206(d)(5)(v)

Consider financial harm in calculating borrowers' eligibility for relief--not their ability to meet the standard.

The Department proposes to consider whether borrowers' circumstances qualify as borrower defense claims based on a two-part initial assessment: whether the borrower experienced a misrepresentation pursuant to the standard (i.e., one made with intent, knowledge of the falsity, or reckless disregard), and whether he experienced financial harm as a result of the misrepresentation. However, the reality is that a misrepresentation relates explicitly to the lie told by the school to the detriment of the borrower. Financial harm may be an appropriate method for determining whether relief is owed to the borrower;

[65] https://www.newamerica.org/education-policy/policy-papers/measuring-up/

but it should not be considered a strategy for weeding out claims that may have merit on the facts, denying the Department valuable evidence about the misrepresentations that have occurred and the potential for an influx of future claims from the institution. Moreover, to consider financial harm in the definition of a misrepresentation is inconsistent with the statute, which instructs the Department to establish regulations around "which acts or omissions of an institution of higher education"[66] will qualify as a defense to repayment--not which financial circumstances a borrower must have for those acts or omissions to be considered valid defenses to repayment.

Expand the definition of financial harm to more thoroughly consider borrowers' circumstances.
The Department offers a narrow definition of "harm" to the borrower, constituting only financial harm. It should broaden that definition to better encompass the circumstances of borrowers. For instance, the Department notes that receipt of a Direct Loan does not, itself, constitute financial harm. However, it does not address the extent to which borrowers have received Pell Grants for their education in the program. Currently, there is no statute that permits harmed borrowers to have their lifetime eligibility for Pell Grants restored, even if their loans are discharged through borrower defense. After a misrepresentation at one school, borrowers may want to pursue additional education at another institution, and they may be forced to take on debt or pay out-of-pocket to do so because they have used their entire lifetime eligibility. All future educational experiences after attending one institution--even if the borrower is successful in receiving a borrower defense discharge on his loans--will be riskier for the borrower, because of dwindling or exhausted Pell Grant eligibility. The Department should include usage of Pell lifetime eligibility in its definition of financial harm.

Additionally, the Department explicitly excludes certain types of financial harm from the definition. For instance, the language excludes any monetary loss predominantly due to local, regional, or national labor market conditions. However, it is difficult to know the extent to which former students' outcomes are predominantly due to those external factors; and could be used by institutions to quibble with borrowers' defense to repayment applications. The Department should eliminate that language from the definition of financial harm, recognizing that if a local economy cannot support graduates, the school shouldn't offer the program. Alternatively, the Department could revise the language to refer only to labor market conditions that arose after the student enrolled, recognizing that labor market conditions may have changed since the borrower enrolled, leaving the institution unable to respond quickly.

The Department also excludes from the financial harm definition any monetary loss that arose "from the borrower's voluntary decision to pursue less than full-time work or not to work," an unclear phrase that should be clarified or removed. For instance, if an institution misrepresented the earnings or job placement rate of a program, and the borrower is only able to earn very low wages, he may need to work part-time because he can't afford child care. Families make difficult trade-offs such as that one often, and shouldn't be punished for those circumstances.[67] At a minimum, the Department should

[66] 20 USC 1087e(h)
[67] https://www.washingtonpost.com/business/economy/the-surprising-number-of-moms-and-dads-scaling-back-at-

revise this language to permit for the possibility that working part-time is an indication of financial harm, not an optional decision. While the Department should not want to incent less-than-full-time participation in the labor market, its inclusion of extended periods of unemployment seems to invite that risk regardless. From a policy perspective, it is certainly preferable for the federal government to incent work in minimum-wage or less-than-full-time positions if the alternative is long-term unemployment.

Ensure borrowers understand what is expected of them with respect to financial harm.
The Department requires that borrowers submit, along with their claims, "the amount of harm that the borrower alleges to have been caused by the school's action."[68] The Department should ensure that--in the regulation and/or in its implementation--it provides clearer information to borrowers who may not know how to quantify the harm they believe they have suffered as a result of the misrepresentation. For instance, the Department could include a checklist of examples of financial harm--including the ones listed in the definition of financial harm in this proposed rule--and ask borrowers to check all that apply, explaining each and leaving an opportunity for borrowers to describe other examples of financial harm they have experienced.

Simplify the process for borrowers by eliminating extraneous requirements for information about financial harm.
The Department asks for a great deal of information from borrowers to demonstrate their financial harm, including information about their ability to pass a drug test and their criminal history. Many of those questions are not strictly necessary; would likely be explained by the borrower's own statement about his financial harm suffered anyway; and seem designed to be invasive as a way to deter applicants, whether or not they have valid claims and have experienced harm or not. The Department should not require borrowers to submit more information than it actually needs, and should be respectful to borrowers in requiring what information it does need.

For instance, the Department asks questions about the borrower's driving record, implying that unemployment due to a poor driving record would not qualify as financial harm. However, a poor driving record for a graduate of a federal aid-eligible truck driving program could be an important indicator of the education provided by the institution.[69] While not all of these questions are inappropriate (for instance, the Department should ask borrowers if they pursued and failed to find employment), the Department must be cautious to frame these and other questions in a way that will not deter legitimate claims (such as by not preemptively implying borrowers have not found employment because of an inadequate attempt to do so). The Department should remain neutral as it considers all the evidence in these cases, and avoid making borrowers uncomfortable intentionally.

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work-to-care-for-their-kids/2015/08/06/c7134c50-3ab7-11e5-b3ac-8a79bc44e5e2_story.html?utm_term=.b20fe47991e1
[68] 34 CFR 685.206(d)(3)(v)
[69] See, for instance: https://hdstruckdrivinginstitute.com/wp-content/uploads/2018/04/49.0205-Gedt.html

Relief Determinations

685.206(d)(5)(vi)

Language about academic transcripts is unnecessary and harmful.

In the proposed rule, the Department notes in the regulation that the borrower must "state" that if he receives a full discharge, "the institution may refuse to verify, or to provide an official transcript that verifies the borrower's completion of credits or a credential associated with the discharged loan."[70] The Department also uses this potential consequence as an argument against permitting a process to group claims for adjudication.[71] However, the Department does not provide any justification for this interpretation. It is unclear why--or whether--institutions would have a particular right to withhold transcripts in the event that they do not owe a debt to the institution or to the federal government, such as in the event that they have had their loans discharged in full to borrower defense. It is particularly hard to imagine what right an institution has to withhold the transcript of a borrower it has lied to and harmed so completely that, even under the restrictions laid out by the Department, that borrower received a full loan discharge. In fact, bankruptcy case law specifically prohibits such withholding of academic transcripts after a borrower has had his student loan debt discharged in bankruptcy.[72] Moreover, FERPA rules require that students be granted access at least to unofficial transcripts. Policies around transcript withholding are also a matter of state law and institutional policy--not federal law or regulation--and may even run afoul of the Department's prohibition on interfering with academic matters.

The inclusion of language around institutions withholding transcripts is, rather transparently, another effort by the Department to deter borrowers with legitimate claims from submitting applications. The Department--or the institution, during the fact-finding process--may elect to provide that warning to borrowers, but it is deeply unnecessary to include it directly in regulation. Moreover, while the wording is phrased as a threat to the borrower, it will not deter frivolous claims; the consequences contained in the threat do not apply to any claimants whose loans are not discharged in full. The Department should not imply borrowers who receive discharges shouldn't have access to their transcripts--something that may preclude their ability to get jobs or further their education later--when it isn't aware of the institution's policy and has no authority to establish such a requirement.

Ensure fair and independent relief determinations through a clear and balanced process.

The Department notes in its proposed rule that it is seeking comment on potential calculations for partial relief.[73] However, the regulations include no proposal on how the Department intends to calculate relief. Given the Department's recent attempts to formulate a partial relief calculation, using a virtually impossible degree of precision[74] and a possibly illegal data-matching mechanism,[75] it seems

[70] 83 FR 37326
[71] 83 FR 37244
[72] https://caselaw.findlaw.com/us-7th-circuit/1002752.html
[73] 83 FR 37263
[74] https://www.ed.gov/news/press-releases/improved-borrower-defense-discharge-process-will-aid-defrauded-borrowers-protect-taxpayers

wise for the Department to solicit public comment on any such formula it intends to use to provide partial relief in the future. With respect to the Department's partial relief formula enacted late last year, for instance, New America raised concerns about the unfair treatment of Corinthian College students and its use of a universe of relatively low-earnings programs and a too-high standard for harm that required Corinthian students to be fully unemployed in order to receive full relief.[76] To prevent further missteps, the Department should be prepared to put any new relief formula in regulation--and only after obtaining public comment on the proposal.

Process

34 CFR 685.206(d)(3)

Consider a group process for reviewing and approving borrower defense claims against widespread misrepresentations.

While the Department's planned process for borrower defense claims does allow it to consider the facts of similar claims together, it should also allow for a process to group claims for determinations of relief where institutional misconduct has been particularly egregious. As of October 2017, the Department had received more than 135,000 borrower defense claims since 2015, and still had a backlog of more than 105,000 during rulemaking.[77] It is simply impractical to have a process that requires the limited staff at the Education Department, where the Federal Student Aid office alone has lost more than 100 employees since the start of the Trump Administration,[78] to individually evaluate each and every claim for each and every instance of widespread misrepresentations. The Department should at least include flexibility for the Secretary to do so in such instances, so that it does not risk maintaining the extensive backlog indefinitely.

Provide clarity and set expectations for processing borrower defense claims.

The Department has proposed very strict time restrictions in which borrowers and institutions must provide and respond to evidence related to borrower defense claims. Both parties have limited windows in which to provide information, and apparently no opportunity to supplement the record later in response to that information. These restrictions, while necessary to keep the process moving and ensure the Department can adjudicate claims in a timely manner, still do not guarantee borrowers a reasonable response time on their claims.

It is true that the Department tries to avoid regulating itself. However, in this case, there may be significant costs to borrowers of the Department's dragging its feet. Once claims are filed, borrowers

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75
http://www.legalservicescenter.org/partial-borrower-defense-denials-violate-due-process-privacy-act-injunction-sought-against-devos-department-of-education/

76 https://www.newamerica.org/education-policy/edcentral/borrower-defense-relief-days-late-and-dollars-short/

77 Session Two, Borrower Defense Claims Data Analysis: https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/borrowerdefense.html

78
https://www.insidehighered.com/news/2018/06/13/education-department-staff-down-13-percent-trump-administration-began

may remain in an interest-accruing forbearance, tacking additional costs onto their loans. If the claims aren't approved, or relief is not granted in full, the borrowers will bear the added costs of the Department's response time. In other words, the longer a borrower's claim languishes at the Department, the more costly that claim is to the borrower, an unfair burden that the Department should correct. It could establish clearer processes for the Department to adjudicate claims quickly and fully in the regulation to set reasonable expectations for its own performance and for borrowers in the event that a backlog persists.

Alternatively or additionally, the Department could opt to add in regulation a provision forgiving interest accrual when it fails to meet its timeline for processing claims, much like the one then-acting-Under Secretary Jim Manning announced during the negotiated rulemaking for this rule.[79] Adding such a provision to the regulation would be a show of good faith to borrowers, assuring them that the Department will process claims in a reasonable timeframe, or that borrowers won't be the ones to pay the price if it doesn't.

Permit appeals if and when new evidence comes to light.

The Department states in this proposed rule that the Department's decision is final and not subject to appeal.[80] However, that final decision applies even if the body of evidence changes--potentially considerably. Such a policy is unwise, and unfair to borrowers. As the Department said in 2016 about its policy to permit appeals if new evidence comes to light, "[w]e believe it is important to allow a borrower to submit new evidence, which he or she may have only recently acquired."[81] Particularly in a rule that requires borrowers to demonstrate intent, knowledge, or reckless disregard to meet the standard, evidence is likely to come from state and federal investigations spurred by borrower complaints, and with the extremely strict statute of limitations proposed by the Department, the taxpayer risk of that reconsideration is minimal. Reopening decisions where the borrower previously didn't provide sufficient evidence but where the facts of the misrepresentation later become proveable (due to evidence provided by the student or obtained by the Department itself) is fair to those borrowers who may have even been the first warning to the Department of a problem with the institution. The Department should change the language accordingly.

Limit schools' roles in the process to avoid overrepresentation of institutional interests to the detriment of harmed borrowers.

The Department has laid out a clear-cut fact-finding process. Information submitted by the borrower is forwarded to the school for a response; the school is given a limited time in which to respond to the claim; and the Department adjudicates the claim according to the evidence on the table. However, it is important to remember that borrowers are at a distinct disadvantage. While the school maintains records on the student's time at the institution, the school's disclosures to that and other prospective or enrolled students, and hundreds or thousands of other data points, the student is largely reliant on his own testimony -- and largely dependent on the Department and other fact-finding agencies to seriously

[79] Transcript, Session One, Tuesday, November 14, 2017.
https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/borrowerdefense.html
[80] 83 FR 37327-37328
[81] 81 FR 75963

investigate any claims. Given that, the Department must be cautious to protect the borrower from undue pressure by the institution.

For instance, in 2016, the Department established a process for adjudicating borrower defense claims that relied on independent hearing officials to "make decisions and determinations independent of the Department employees initiating and presenting evidence and arguments in such proceedings" and "performing investigative and prosecutorial functions for the Department."[82] However, the Department has not laid out any specific process for evaluating claims under this proposed rule; it has not identified who will process the claims, or where, or established any particular guardrails to ensure that students get fair consideration in those discussions. That's particularly problematic in light of the overwhelming deference it lends to institutions.

The Department should therefore modify the process to better balance the interests and relative influence of the institutions and the students. To that end, while the Department should accept evidence from the institution on the facts of an alleged misrepresentation, institutions should not be permitted to submit evidence regarding any borrower's individual financial harm. That responsibility lies with the Department, and maintaining independence from the school on that determination is critical.

Financial Responsibility

34 CFR 668.171

Improve the Department's financial protection by better accounting for external events.
The Department's financial responsibility efforts constitute a significant weakening from the 2016 rule. While the Department maintained a number of important triggers--and should continue to do so in the final rule--the weakening of each of the triggers still means the Department is substantially less likely to identify warning signs of liabilities for closed school discharges or borrower defense early, and less likely to obtain financial protection before it's too late and taxpayers are left shouldering the burden.

Already, the Department of Education pays out more in closed school discharge liabilities than it can cover with available letters of credit.[83] Among the institutions with the largest amounts of closed school discharges paid out to students--62 institutions that closed between 1987 and 2016 and had over $1 million in closed school discharge liabilities--just six institutions had letters of credit on file, and only one had a letter of credit large enough to cover the entirety of the closed school discharge liabilities. Of 96 institutional closures in 2016 alone (through October), the Department had letters of credit on file from just 26 of them. Moreover, these data do not account for other types of financial liabilities that may be foisted on taxpayers--particularly potential borrower defense liabilities.

It is also clear that the Department is not doing enough to consider the types of external events beyond the composite score that might indicate impending financial liability. The Department's own Inspector

[82] 81 FR 75965
[83] Data underlying this analysis were obtained through a FOIA request and are available from the author upon request

General wrote in a recent report that "[i]f the new [2016] borrower defense regulations are enforced, FSA should receive important, timely information from publicly traded, private for-profit, and private nonprofit schools that experience triggering events or conditions. Collecting and analyzing this information will improve FSA's processes for identifying Title IV schools at risk of unexpected or abrupt closure. Enforcement of the new regulations will also improve FSA's processes for mitigating potential harm to students and taxpayers by giving FSA the ability to obtain financial protection from schools based on information that is broader and more current than information schools provide in their annual audited financial statements."[84] The Government Accountability Office concurred, noting that "[u]nless the agency updates the composite score formula to better measure schools' financial conditions and capture financial risks, Education lacks reasonable assurance that the current composite score is a reliable indicator of financial health and is therefore constrained in its ability to protect students and taxpayers against significant financial risks."[85]

Data confirm the concern that the Department is not adequately identifying risks from institutions. A large majority of its financial protection comes solely from the composite score; for instance, in 2015, the Department obtained 426 letters of credit from 396 institutions of higher education, and 65 percent of those were for simple failures of the composite score. Few of the letters of credit on file at the time accounted for more significant issues or events.[86] And many of all the letters of credit on file--44 percent--were for only 10 percent or less of the institution's federal financial aid volume, too small to adequately cover all the potential liabilities at the school.[87]

The National Student Legal Defense Network's (NSLDN) public comments on this regulation include a thorough analysis of each of the financial protection triggers in the proposed rule or included in the 2016 final rule. In particular, those comments identify how the Department has proposed to remove the early-warning nature of the triggers from the 2016 rule, relying instead on an assessment of financial protection requirements only after the fact. That presents significant problems for the agency, given that the original goal of those triggers was to ensure the Department could obtain financial protection to place the burden of future liabilities on institutions, not taxpayers. The Department should assess each trigger on an individual basis, provide a thorough reasoning for its proposal, and adopt the recommendations from NSLDN in its final rule.

Maintain currency on outstanding debts as a financial responsibility requirement, rather than a discretionary trigger.

The Department should reverse its proposal to remove a financial responsibility measure of whether an institution is current in its debt payments and to instead make it a discretionary proposal. Since 1993, Congress has required that institutions demonstrate that [they are] "current in [their] payment[s] of all current liabilities, including student refunds, repayments to the Secretary, payroll, and payment of trade

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[84] https://www2.ed.gov/about/offices/list/oig/auditreports/fy2017/a09q0001.pdf
[85] https://www.gao.gov/assets/690/686709.pdf
[86] FSA Data Center, Financial Responsibility Standards Requiring a Letter of Credit, AY 2015: https://studentaid.ed.gov/sa/node/830
[87] Ibid

creditors and withholding taxes."[88] Pursuant to that requirement, the Department has required since 1994--nearly a quarter of a century--that institutions be current in their debts,[89] noting that "[t]he Secretary believes that an institution's non-payment of obligations is a serious concern because the possibility exists that legal actions brought by creditors may result in forfeiture of some or all of an institution's assets…" and that "the Secretary notes that such actions are also often precede [sic] an action by creditors to force a company into bankruptcy."[90]

The Department has not sufficiently justified the change in this long-standing requirement to a discretionary trigger, rather than a baseline requirement of institutions. The Department indicates that it intends for this trigger to be more timely, "in keeping with [the Department's] goal of assessing potential financial issues contemporaneously."[91] However, given that the requirement that institutions be current in their debt payments currently serves as a baseline financial requirement before institutions may be considered financially responsible, it is unclear why this would be a discretionary, rather than a mandatory, trigger; or indeed, why it would be made a trigger at all. Moreover, there is no evidence that the Department has conducted any analysis of the existing violations of loan agreements, or studied examples of cases in which such violations would not constitute a threat to the overall financial health of the institution, either in 2016 or in this proposed rule. The Department should maintain its long-standing policy by requiring all private institutions to remain current in their debt payments in order to be considered financially responsible.

Ensure taxpayers are protected during the transition to new FASB accounting standards.

The Department has proposed to give institutions of higher education additional years to come into compliance with new Financial Accounting Standards Board (FASB) standards regarding leases. Specifically, the Department proposes to calculate two sets of composite scores--one relying on the old accounting standards, and one on the new--with institutions receiving the better of the two scores. (It is unclear whether the Department intends for this transition period to last in perpetuity, as indicated in the regulatory language, or for six years following the implementation of this rule, as the preamble language suggests.) Moreover, the Department proposes to offer no consequences, even if an institution is failing one of the two calculated composite scores.

The Department's proposal would permit institutions to request a secondary composite score analysis excluding all operating leases. This differs from the financial responsibility subcommittee's proposal during negotiations, however, which specified that only operating leases entered into prior to July 1, 2019, could be excluded in the supplemental composite score calculation.[92] The Department offers no justification for permitting all operating leases to be excluded, even those entered into after this rule takes effect; and to do so is illogical and irresponsible, given that institutions have had plenty of notice about the changes to operating leases and can--and should--ensure compliance with FASB and Department rules for all future leases.

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[88] P.L. 103-208
[89] 59 FR 22353
[90] Ibid
[91] 83 FR 37273
[92] https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/subcomitteedraft.pdf

For similar reasons, the Department should eliminate the transition period to align with FASB's timeline for the effective date of these new lease definitions. The updated accounting standards were first raised in 2005, and after years of stakeholder engagement and a public comment process, were published in 2016, giving institutions of higher education plenty of forewarning that their composite scores could change. To permit institutions to calculate two sets of scores in perpetuity would be irresponsible; and even a six-year transition period is an excessively long period of time. If the Department declines to eliminate the transition period, it should at least shorten any transition period to no more than two years.

Finally, rather than taking the better of the two scores during any transition period, the Department should instead require that institutions failing either of the composite scores--that calculated under the old accounting standards or one calculated under the new standards--be held accountable for the potential financial risk associated with that institution. As the Department itself indicates, "the new FASB lease standard could have a profound impact on an institution's composite score and the Department has no mechanism to make a timely adjustment to the composite score calculation to accommodate this change."[93] The Department should consider placing institutions that fail the composite score under the new FASB standards on heightened cash monitoring; require that they provide timely financial reporting to the Department; and/or require financial protection from those institutions during the transition period.

Procedural concerns with the financial responsibility subcommittee raise questions about the appropriateness of recommended changes.

When the Department published a request for negotiators in this rulemaking, it announced it would form "a Financial Responsibility Subcommittee for Committee 1 [borrower defense]," and that the subcommittee would include "some Committee 1 members (negotiators) as well as individuals who are not committee members."[94] That announcement of a subcommittee was a departure from the typical practice, when negotiators initiate the formation of a subcommittee comprised of negotiators, during negotiations.

Moreover, the Department elected to hold subcommittee meetings entirely behind closed doors, with nothing more than a brief, curated report-out from subcommittee members during the session and third negotiated rulemaking sessions. While negotiating committees have opted to use subcommittees in the past, they have historically been formed *during* negotiations, *by* negotiators -- rather than being established before the negotiations even opened by the Department, and incorporating negotiators who weren't included on the full committee. The difference was apparent in the committee's treatment of the language. Because the Department didn't seat subcommittee members on the full committee and didn't open the subcommittee sessions to the public, there was no fulsome discussion of the issues by the full committee. Moreover, the Department itself seems to have acknowledged the inappropriateness of these covert, behind-closed-doors sessions, given that its most recent

[93] 83 FR 37295
[94] 82 FR 41194

announcement of an intent to form a negotiated rulemaking committee announced that the meetings of the two subcommittees it intends to form in that rulemaking "will be made available through a Department-provided livestream."[95]

Finally, the Department seated a representative with parochial interests in financial responsibility as both a negotiator and a subcommittee member.[96] The Department did not, however, acknowledge that the member had an active issue before the Department on the subject of the subcommittee. Given the favorable treatment that that institution will receive under the language proposed in this rule, those conflicts of interest should have been avoided, or at least clearly identified prior to the start of the rulemaking.

In short, the Department did not follow the appropriate procedures under the Administrative Procedures Act and other federal laws and regulations in promulgating the changes to composite scores under this proposed rule. It should withdraw the proposed changes to composite scores until the accounting standards changes can be properly negotiated in a future rulemaking.

Closed School Discharge

34 CFR 682.402

Automatic closed school discharges will correct for informational and other imbalances among borrowers.

The Department proposes to eliminate the provision from the 2016 rule that would have granted automatic closed school discharges to borrowers who neither completed their degree nor re-enrolled in a Title IV-eligible institution within three years of closure, noting that because the Department has separate authority to automatically apply closed school discharges in some cases, it does not believe the expansion of that authority to all non-enrolled students is necessary.[97] However, the Department has only rarely--if ever--exercised that authority. Moreover, as the Department noted in 2016, "[m]any borrowers eligible for a closed school discharge do not apply."[98] According to Department data, nearly half (47 percent) of borrowers in recent years did not receive a discharge on their loans--nor did they receive federal aid to continue their education at any point during the three years following the school's closure.[99] And "[i]n previous cases of colleges shutting down," *Inside Higher Ed* reported one Department official saying, "only 6 percent of students even reached out to the [D]epartment about having their loans discharged."[100]

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[95] 83 FR 36814

[96] For instance, a representative from Rensselaer Polytechnic Institute served as a member of both the full committee and the financial responsibility subcommittee. However, that institution has sent numerous letters and meeting requests to the Department to raise concerns with how the Office of Federal Student Aid has responded to the institution's composite scores over the last several years. Copies of this correspondence were received through a FOIA request and are available from the author upon request

[97] 83 FR 37267

[98] 81 FR 39369

[99] 81 FR 39396-39397

[100] https://www.insidehighered.com/news/2014/12/09/feds-respond-criticism-bid-ecmc-buy-most-corinthian

Without explanation, the Department is evidently no longer concerned about the low take-up rate among those potentially eligible for closed school discharges. Yet it should be; even--and especially--if the Department adopts its proposal to drastically limit closed school discharge policy to exclude those who are offered a teach-out (regardless of whether or not they choose to participate), students who neither complete their degrees nor access the loan discharge for which they are eligible under the law are likely to be much worse off. As the Department itself has noted, non-completers are more than three times as likely to default on their loans as those who graduate from college.[101] Ensuring those borrowers are able to access the benefits guaranteed to them by Congress when they are unable to complete their degrees because of the institution's closure is a smarter policy approach than attempting to collect on those loans for years, and potentially decades, after they leave the institution.

Additionally, alongside the publication of the 2016 final rule, the Department announced it would restore Pell Grant eligibility to students' lifetime usage tracking for students who were unable to complete their programs because the institution closed.[102] In November 2017, a year later, the Department confirmed that it had completed the first such calculation, restoring some or all Pell Grant eligibility--451,800 semesters' worth, in all--to 288,969 students who were enrolled at closed institutions from 2001 to 2016.[103] The Department seemingly intends to continue this policy moving forward. The practice shows that the Department has the necessary expertise to implement a similar regular data run to identify students who may be eligible for closed school discharges, and provide those discharges automatically. Particularly given the apparent scale of the change and the number of borrowers it could help, it is unclear why the Department doesn't believe it should take advantage of existing data to help more borrowers access the benefits promised to them under the law.

Finally, the Department notes that it should not automatically provide closed school discharges because schools or their records-holders may opt to withhold those borrowers' transcripts, limiting their ability to transfer credits later. However, the Department already has a process for reinstating loans under the regulations for total and permanent disability discharges; the Department could institute a similar look-back period or loan reinstatement provision if it believes that scenario is especially likely. Moreover, the Department evaluated in the 2016 rule the percentage of borrowers who had neither used transferred to another institutions (regardless of whether the credits were transferred) nor applied for a discharge; but the Department has not provided compelling--or even any--evidence that there are any borrowers who do use, or who want to use, their credits but haven't re-enrolled more than three years later. Moreover, credits may become "stale" over time, making it less likely students would even have the option of transferring their credits more than three years after their school's closure.

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[101] https://www.ed.gov/news/press-releases/fact-sheet-focusing-higher-education-student-success

[102] https://www.ed.gov/news/press-releases/us-department-education-announces-final-regulations-protect-students-and-taxpayers-predatory-institutions

[103] https://www.chronicle.com/article/Education-Dept-Restores-Pell/241822

Do not excessively narrow the list of exceptional circumstances under which it can expand the eligibility window.

Currently, the regulations include a provision allowing the Secretary to extend the look-back period for which students are eligible for a closed school discharge under particular ("exceptional") circumstances. The Department now proposes to revise the list of exceptional circumstances to eliminate several important categories, including instances in which the institution discontinued the majority of its programs and cases in which a state or federal agency finds that a school has violated state or federal law.

The exceptional circumstances language was developed in a collaborative process between the Department and a prior negotiated rulemaking committee, which, "[a]fter much deliberation and discussion… reached consensus on the proposed changes to the closed school loan discharge regulations."[104] The language clarified an otherwise vague authority that is inconsistently used by the Department.

The Department has good reason to want to keep the clarity that the 2013 revisions provides. Without clear goal posts or indicators, it is uncertain what would rise to the level of an exceptional circumstance. Such language serves well both the Department and the public. While the regulation is already structured as a non-exhaustive list, there is no justification given in the rule for removing these items. Removing them now would make it harder in the future for the Department to assess and determine whether an extension of the window is appropriate. And changes to the wording of other components of the section--such as moving from an action to revoke state authorization to the actual revocation--could make it harder for some borrowers to receive closed school discharges. For instance, states may have lengthy appeals processes in place that institutions choose to exercise. The Department also proposes to remove the current circumstance of an institution discontinuing the majority of its programs--fundamentally changing the nature of the school, limiting options for its students, and offering institutions a way to string out the closure of the institution so that the majority of students drop out outside the closed school discharge window, limiting the potential liability of the school. The Department should restore the original list of exceptional circumstances.

Broaden the definition of exceptional circumstances for extending the window on closed school discharges.

In addition to restoring the list of exceptional circumstances from the current regulation, the Department should add the loss of Title IV eligibility. Much like the loss of accreditation, loss of federal financial aid eligibility indicates a severe circumstance outside of closure that can severely affect students' ability to attend the institution. For instance, consider Charlotte School of Law, for which federal financial aid eligibility was revoked in December 2016, restored for the spring semester in May 2017, and for which state authorization was revoked and its doors shuttered in August 2017.[105] Students who withdrew in the weeks after the loss of Title IV fall well outside of the 180-day window the Department proposes for closed school discharge eligibility--yet those students accurately read the

[104] 78 FR 45628

[105] https://www.newamerica.org/education-policy/edcentral/csl-part-one/

writing on the wall nearly nine months before the school finally closed. In fact, it is possible the institution elected to remain open so that borrowers would fall outside the window, knowing it would ultimately close but in an attempt to reduce its potential closed school discharge liability in the interim. In the meantime, borrowers took on tens of thousands in institutional loans to continue their attendance without Title IV. Earlier this year Secretary DeVos extended the window for Charlotte School of Law to when the Department originally withdrew the school's eligibility for federal financial aid. The Department stated that this would mean "nearly 300 total student borrowers could now be eligible to have their federal loans forgiven."[106] Adding the loss of Title IV eligibility to the list of exceptional circumstances is logically consistent with what the Department has both proposed and implemented in the past, and a show of good faith to borrowers who may be affected by sanctions of loss of federal aid eligibility the Department places on institutions.

Require closing institutions to maintain heightened notification requirements set out in the 2016 rule.

The 2016 borrower defense rule laid out new requirements that closing institutions provide information about closed school discharge opportunities to their borrowers. For unclear reasons, the Department has proposed here to remove those requirements; it should not do so. As the Department wrote in 2016, [we are] "concerned that borrowers are unaware of their possible eligibility for a closed school discharge because of insufficient outreach and information about available relief… The proposed amendments to the program participation agreement regulations would provide such information to borrowers earlier in the process, and would help to ensure that the borrowers receive accurate and complete information with regard to their eligibility for a closed school discharge, as well as the consequences of receiving such a discharge."[107] The Department also described that "[n]on-Federal negotiators cited cases in which schools that were closing or had closed failed to provide complete or accurate information to their students about their options."[108]

Surely the Department believes that students deserve to hear all the facts when their institution is closing; and there is little evidence that current disclosures are sufficient. Moreover, should the Department opt to limit discharges to only those who were not offered a teach-out, the only case in which students will be eligible for a closed school discharge is when the school has failed to provide even that option. Given the complexity of the closed school discharge process, asking an institution to provide information about it to students in these situations is the bare minimum that should be expected.

Maintain the long-standing interpretation of closed school discharge eligibility as giving students a choice.

The Department should withdraw its proposal to reinterpret and rewrite the closed school discharge regulations to preclude the possibility of loan discharges for those who were offered a teach-out--even if they did not complete it. The statutory language surrounding closed school discharges clearly indicates

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https://www.ed.gov/news/press-releases/secretary-devos-extends-closed-school-discharge-more-charlotte-school-law-students

107 81 FR 39369

108 Ibid

that Congress intended to make the discharges available to all students in a program. Specifically, 20 USC 1087(c) reads that "if a borrower… is unable to complete *the program in which such student is enrolled* due to the closure of the institution...then the Secretary shall discharge the borrower's liability on the loan" (emphasis added).[109] It does not, as the Department suggests, refer to another, substantially similar program; nor does it refer to a program offered by another institution, in another modality, or in another location. The Department's interpretation of the language as precluding discharges for anyone who had the opportunity to complete *a* program is a clear subversion of congressional intent and a plain reading of the legislative text.

Moreover, the Department's proposed changes run counter to its own longstanding interpretation that the statute permitting closed school loan discharges applies to all borrowers from the institution. While teach-out plans are required from closing institutions, the Department has long recognized that a teach-out may not be what a student signed up for, and may differ in key ways from the original program. To respect students' choices and ensure they are able to make the choice that's right for them, the regulations have allowed students to either transfer their credits (or accept a teach-out) or to receive a loan discharge.

The Department is proposing to eliminate that choice in an apparent attempt to reduce liabilities for closing institutions. Importantly, the Department expects this provision, along with the elimination of automatic discharges, to reduce closed school discharges by 65 percent--a highly significant number, especially considering the large share of students who are already eligible for, but don't apply for, discharges.[110] The Department says that it intends to provide an incentive for schools to engage in orderly closures--a laudable goal, but one that is already included in the regulations. The reality of this proposal is that it will leave students stuck with educational programs they didn't sign up for and may not want, with no other options. Particularly given the Department's purported interest in protecting the integrity of students' choices,[111] it's unclear why it would restrict borrowers' options like this -- other than to limit the potential liability schools may face, placing the interests of institutions ahead of the interests of students.

Credit transfer can cause problems, even in teach-out arrangements.

The Department proposes to prevent students from obtaining a discharge on student loans if they are offered a teach-out plan. However, even in teach-out arrangements--and in the current system--students are not always able to transfer 100 percent of their credits or pick up their programs exactly where they left off at a closing institution. The Government Accountability Office recently studied the implications of closures at institutions, and noted that "Education [Department] officials said some students who have requested discharges of their student loans after their private for-profit school closed said they were unable to transfer their credits."[112] The report also explored student transfer and

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[109] 20 USC 1087(c)
[110] 83 FR 37301
[111] https://www.ed.gov/news/press-releases/prepared-remarks-us-secretary-education-betsy-devos-national-alliance-public-charter-schools
[112] https://www.gao.gov/assets/690/686530.pdf. "Table 1" below is Table 3 in the report.

found that students transferring from one institution to another were unable to transfer, on average, more than 40 percent of their credits. Students transferring from for-profit colleges lost as much as 94 percent of their credits when transferring to public institutions.

Table 1: Estimated Percentage of Credits Lost in Transfer, on Avg, by School Type, AY 03-04 to 08-09

School Type	Percentage of Credits Lost	Lower Bound of 95 Percent Confidence Interval	Upper Bound of 95 Percent Confidence Interval	Percentage of Students Transferring between These School Types
Overall Average	43%	40%	45%	Not Applicable
Private for-profit to public	94%	86%	100%	4%
Private for-profit to private for-profit	83%	70%	95%	2%
Public to private for-profit	73%	63%	83%	6%
Private nonprofit to private for-profit	71%	50%	92%	1%
Private nonprofit to public	54%	46%	62%	9%
Private nonprofit to private nonprofit	50%	39%	60%	3%
Public to public	37%	34%	40%	62%

Source: GAO analysis of 2004-2009 Beginning Postsecondary Students Longitudinal Study. | GAO-17-574

The data indicate that this proposal from the Department will have uneven and inequitable implications for students in the for-profit sector, where borrowers are least likely to be able to transfer all of their credits and therefore have the most to lose from being excluded from closed school discharge eligibility. The Department should withdraw its proposal, recognizing it is incompatible with the higher education landscape and will deeply harm more borrowers.

Do not rely on accreditors' approval of teach-outs.

Importantly, not all teach-outs are created equal. Some offer only impractical or sub-par options for students. They do not always guarantee transfer of all credits, or the continuation of all programs. Yet the Department has proposed to deny students options on the basis of accreditor decisions that may not reflect a reasonable teach-out option.

The Center for American Progress and New America recently explored the standards for all regional and national accrediting agencies related to closures and teach-out plans and agreements.[113] In doing so, it is clear that policies are not consistent across agencies, particularly where teach-out agreements are concerned. For instance, one agency provides teach-out agreements are only for those within a year of graduating; other students are considered transfer students, without the protections promised to teach-out students. Many agencies permit the institutions teaching out students to tack on extra costs and fees, provided they notify the students of those fees, meaning the program may be out of reach for many students. None of the policies expressly require in their standards that institutions arrange teach-outs in the same modality as the original program--for instance, offering brick-and-mortar teach-out options for students in a closing brick-and-mortar institution, or online teach-out agreements for a closing distance-education institution--putting students who don't want to pursue a different modality in a difficult position. And in practice, it can be difficult to find teach-out arrangements for

[113] Available from these organizations upon request

some more niche programs, so some students may fall through the cracks in establishing teach-out agreements. Few accreditors list standards beyond geography, costs, and program type that they consider in approving or rejecting proposed teach-out arrangements, although some regional accreditors require that teach-outs be offered by institutions with regional accreditation only.

The reality of a proposal that eliminates all closed school liability for institutions that set up teach-out agreements is that it creates a strong incentive for institutions to establish those agreements--without much consideration for the quality of the teach-out, or how well it will serve the students affected by the institution's closure. Students should come first for the Department; and this proposal will not ensure borrowers are helped when their schools close.

State policies vary widely on school closures.

The Department's proposed language on closed school discharge policies says that teach-out plans must be approved by accreditors and, "if applicable, the school's State authorizing agency." However, the Department lends no discussion to the question of when state authorizers require institutions to get their sign-off on teach-out plans. Many accreditors note that they will work with states and the Education Department on teach-out options only if there is no teach-out agreement in place at the time of closure.[114] One state's efforts to require teach-out plans from institutions and ensure other protections are in place before colleges close have received push-back from institutions of higher education; and organizations representing states have said they are not aware of other states requiring these provisions.[115] However, it seems certainly possible that--once borrowers' closed school discharges are on the line--more states will seek to require approval of teach-outs. And in some cases, they may have a disincentive to approve those teach-outs if it means denying borrowers access to relief on their loans, counteracting any positive incentive for orderly closures.

Teach-out plans are not always an appropriate measure post-closure.

Teach-out plans, pursuant to federal regulations, are required from all institutions upon indications of closure and/or revocation of federal financial aid eligibility, including events like loss of state authorization or emergency actions from the Department of Education. However, some accreditors also require teach-out plans earlier -- like when an institution is in financial straits.[116] When teach-out plans are required prior to deciding (or being forced) to close, they may include only an initial suggestion of which institutions the closing college *might* reach an agreement with--not a signed contract with those institutions. Such a plan does not constitute a formal agreement with another institution to take over in the event that the institution cannot or will not teach out its own students. And it does not mean the teach-out will be executed precisely according to the plan in the event of actual closure.

The Department should revisit its language in the proposed rule. If it opts to keep this ill-advised policy precluding students who are offered a teach-out from receiving closed school discharges, teach-out

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[114] Center for American Progress and New America analysis. Available from the organizations upon request

[115] https://www.insidehighered.com/news/2018/07/16/massachusetts-debates-new-regulatory-requirements-private-colleges-wake-mount-idas

[116] Center for American Progress and New America analysis. Available from the organizations upon request

agreements would be a more appropriate measure than teach-out plans for institutions not remaining open long enough to teach out their own students, since the plans may be outdated or uncertain. Moreover, it should require that the teach-out be the same in its implementation as it was in the accreditor's approval of the plan, ensuring that the letter of the plan is followed through, since the documents on file with the accreditor may not always comport with on-the-ground realities.

If the Department keeps its teach-out proposal, clarify that it applies only to schools closing after July 1, 2019.

The Department's language is unclear about whether it applies to all institutions, indicating it would take effect for any borrower applying for a closed school discharge on or after July 1, 2019 (or the effective date of the rule, if this regulation is not published by November 1, 2018), or whether it applies retroactively to borrowers who have not yet applied for a closed school discharge but whose institutions closed and offered a qualifying teach-out at the time. However, given that the goal of the proposal is to change institutional behavior by placing more emphasis on teach-out plans, any such proposal should only apply to the closure of institutions after this regulation takes effect. The Department should clarify in the language that the choking-off of access to closed school discharge for borrowers whose institutions offer an approved teach-out plan applies only for new borrowers and new institutional closures after the implementation date of this regulation.

Extending the window does not begin to make up for the closing off of opportunities for loan discharges.

The Department proposes to extend the window for closed school discharge eligibility to 180 days. While extending the window is a good way to recognize that academic quality may slip well before the ultimate closure of the institution, and allows that more students will be captured by the longer window, the Department's other proposals so severely limit access as to make this change largely irrelevant. The Department itself acknowledges that it will only increase the loan volume eligible for a discharge by 9 percent, capturing relatively few students, while the other changes greatly swamp the impact of extending the window.[117] The Department should maintain the extended window, but more importantly, it should make the other changes recommended in this section of the comments.

False Certification

685.215

Hold institutions accountable, and assist borrowers, when colleges fail to adequately verify students' high school graduation statuses.

In 2016, the Department wrote that it was concerned about institutions that mislead borrowers by "encouraging non-high school graduates to obtain false high school diplomas to qualify for Direct Loans," highlighting situations raised by negotiators during the rulemaking in which "some schools tell borrowers that a high school diploma is not a requirement for title IV student aid, or that the borrower will be able to earn a high school diploma through the program for which the borrower is taking out the student loan, so the borrower should answer 'Yes' to the high school graduation question on the

[117] 83 FR 37301

FAFSA," or "encourage borrowers to obtain the services of a third party that will provide them with what appears to be a legitimate high school diploma."[118] The Department's reasoning for removing this provision--to rely on an attestation from a borrower about his high school graduation status--does not square with the agency's stated concern that institutions may be directing borrowers (illegally) to submit those false attestations. And its statement that "postsecondary institutions should be able to rely on an attestation...since the Department relies on a similar attestation in processing a student's [FAFSA]"[119] is contradicted by its own reasoning from 2016, in which it says that false certification changes would not apply if "a borrower falsified the FAFSA on their own initiative, did not inform the school that they were not a high school graduate, and the school did not receive any discrepant information indicating that the borrower was not a high school graduate."[120]

Moreover, relying simply on an attestation is hardly common practice among legitimate institutions; as one public commenter wrote to the Department on an accreditation matter, "[f]ailing to verify this condition [a requirement for a high school diploma or its recognized equivalent] is an open invitation to fraud by giving taxpayer money to ineligible students."[121] One accrediting agency--the Accrediting Commission of Career Schools and Colleges (ACCSC) specifically prohibits the acceptance of an attestation as the sole documentation of high school graduation status, noting that "the Commission does not consider a self-certification by a student that he or she has a high school diploma or equivalent to be 'documentation' that the student has met this admissions requirement. The standard contemplates that a school will support its admissions decisions with independent documentation such as transcripts and copies of diplomas or other documentation of equivalency."[122] Meanwhile, an agency with far weaker standards gave rise to Florida Technical College, which reached a six-figure settlement with the Justice Department after employees falsified documentation of students' high school graduation status.[123] It is clear that this illegal behavior undermines the program integrity requirements established by Congress and the Education Department, invites illegal and fraudulent behavior, and fails to help the students who may be misled by their institutions.

Restore language on false certification for SAP from the 2016 rule.

The Department states that it intends to remove a provision permitting the Secretary to grant automatic false certification discharges when she has information that the institution falsified students' satisfactory academic progress (SAP) because "[e]valuation of an institution's implementation of their SAP policy is already part of an FSA program review, so there is already a mechanism in place to identify inappropriate activities in implementing an institution's SAP policy."[124] However, program reviews do

[118] 81 FR 39377-39378
[119] 83 FR 37245
[120] 81 FR 76042
[121] https://cdn.americanprogress.org/content/uploads/2018/03/08101157/Center-for-American-Progress-ACICS-Comment5b15d.pdf
[122] Ibid
[123] https://www.justice.gov/usao-sdfl/pr/florida-based-school-chain-pay-united-states-government-600000-submitting-false-claims
[124] 83 FR 37270

not and cannot address the purpose of the 2016 rule on this matter: to permit loan discharges for the affected borrowers when the Department does find evidence of falsification of SAP. While investigations, audits, and reviews of institutional policies and practices are necessary to uncover evidence of such falsification, and to ensure the institution is held accountable for its irresponsible and unlawful actions, that leaves borrowers holding the bag for the institution's behavior.

Improve communications with borrowers about their applications.

The Department has proposed several changes to false certification that will result in borrowers being left in the dark about their applications. For instance, the Department has revised language noting that borrowers who fail to submit an application while collection on their loans is suspended will re-enter repayment after 60 days, to instead require borrowers to submit a "completed" application. This will have the consequence (perhaps unintended) of forcing borrowers into repayment when they've attempted to submit the application but failed to complete as little as one line of it, even where they may have an otherwise entirely valid false certification discharge application. The Department's stance will have significant implications for borrowers; and the agency should revert to instead requiring borrowers submit an application.

The Department also proposes to remove language included in its 2016 rule that would require the Secretary "to [issue] a decision that explains the reasons for any adverse determination on the application, [describe] the evidence on which the decision was made, and [provide] the borrower, upon request, copies of the evidence. The Secretary considers any response from the borrower and any additional information from the borrower, and notifies the borrower whether the determination is changed."[125] This language ensured that borrowers receive the same kind of due process, careful consideration, and access to relevant evidence that institutions get under the proposed borrower defense provision; and offers borrowers an opportunity to respond and submit additional evidence that could prove critical both to the approval of a borrower's application and to the Department's oversight of institutional misconduct. The Department should restore this language in the final rule, ensuring both that it explains its decisions and offers a reasonable opportunity for borrowers to view and respond to the evidence available.

Arbitration

685.300

Ban the use of federal funds for institutions mandating use of arbitration or class-action waiver agreements.

Contrary to the purported benefits of arbitration that the Department cites, the Department's final rule should not presume to know what is right for students; nor should it cede its own oversight obligations of institutions by permitting colleges to force students into secretive, unbalanced proceedings where borrowers rarely benefit. In 2016, the Department noted that the final rule banned neither the use of arbitration, nor did it "bar the school from seeking to persuade students to agree to arbitrate, so long as

[125] 81 FR 76082

the attempt is made after the dispute arises."[126] That means students are welcome to benefit from the supposed "efficient" and "less adversarial" benefits the Department espouses in this proposed rule with respect to arbitration.[127] To the extent institutions truly believe they can offer a fair, quick, and reasonable proceeding that may "allow borrowers to obtain greater relief than they would in a consumer class action case where attorneys often benefit most" through arbitration, they may attempt to persuade students after a dispute arises. In fact, the Department's proposed rule gives institutions plenty of opportunity to do so, by directing institutions to make additional disclosures and include information about arbitration in entrance counseling materials.

However, the types of binding, pre-dispute arbitration clauses and class-action waivers for which the 2016 rule banned the use of federal funds could have significant negative consequences for borrowers, contrary to the suggestions in this proposed rule. The Department has not addressed those implications. For instance, in 2016, the Department noted that "[c]ommenters who oppose the regulations on the ground that class actions benefit lawyers more than consumers, and may result in modest returns for an individual member of the class, disregard the need for regulation in this field."[128] In that same section of the final rule, the Department specifically cited a report from the Consumer Financial Protection Bureau that found 419 consumer finance class actions suits over a five-year period yielded $2.2 billion in cash or in-kind relief to consumers.[129] The Department does not provide evidence to support its opinion that "arbitration may… allow borrowers to obtain greater relief than they would in a consumer class action case," or that "[a]rbitration also eases burdens on the overtaxed U.S. court system."[130] In fact, just two years ago, the Department acknowledged that it could not support that view, noting that "we have no expertise or experience from which to estimate the effect of the regulation on judicial filings,"[131] and argued instead that it saw "that risk as outweighed by the benefits to students and the taxpayer in allowing those students who wish to seek relief in court the option to do so."[132]

The Department's proposal to permit institutions to receive federal funds to force students into arbitration proceedings and out of class action lawsuits is, fairly nakedly, an attempt to protect schools engaging in unlawful activities from having to pay the piper in court. But the implications of doing so are significant for the Department's own oversight work. As the Department explained in both the proposed and final rules in 2016, "recent experience with class action waivers demonstrates that some institutions, notably Corinthian, aggressively used class action waivers to thwart actions by students for the very same abusive conduct that government agencies, including this Department, eventually pursued…. Corinthian's widespread use of these waivers and mandatory arbitration agreements resulted in grievances against Corinthian being asserted not against the now-defunct Corinthian, but as defenses to repayment of taxpayer-financed Direct Loans, with no other party from which the Federal government may recover any losses. As noted, Corinthian was not alone in this practice. The absence of

[126] 81 FR 76023
[127] 83 FR 37245
[128] 81 FR 76026
[129] Ibid
[130] 83 FR 37245
[131] 81 FR 76030
[132] 81 FR 76026

class action risk coincided with the use of deceptive practices in the industry during the same period…"[133] The Department has an obligation to taxpayers--and broad authority under the Higher Education Act--to prevent cases of widespread misrepresentations from growing to such a scale again by shining a spotlight on proceedings that have typically been shrouded in secrecy.

The encouragement of arbitration clauses may run counter to cohort default rate restrictions.
The Department states in its proposed rule that "[a]rbitration may… allow borrowers to obtain greater relief than they would in a consumer class action case where attorneys often benefit most."[134] It makes clear in numerous statements throughout the rule that the Department believes borrowers can benefit from arbitration, including a note that it "may also allow borrowers to obtain greater relief" than litigation would.[135] In fact, the Department goes so far as to say that it "believes that it is preferable for a school (or its insurer, if such coverage exists) to satisfy a student borrower's meritorious claims of misrepresentation against it and to provide appropriate relief directly to the student borrower for the school's own actions where it is merited."[136]

However, if the Department believes this is the case, it may run counter to other regulations on the books that prevent institutions from "[making] a payment to prevent a borrower's default on a loan" evaluated for the cohort default rate measure.[137] Payments received through arbitration--especially in the context of a proposed rule that would otherwise require borrowers to default in order to file a defense to repayment claim--could be perceived and may in fact be a payment to prevent borrowers' default. In other words, the Department's proposal to encourage arbitration that results in payments to borrowers could likely run counter to the singular outcomes-based accountability requirement included in the statute. The Department must retain the ban on arbitration clauses from the 2016 final rule in order to faithfully execute the laws Congress has passed.

Improve proposed disclosures and counseling about arbitration.
The Department proposes to require institutions that require borrowers to sign pre-dispute arbitration agreements or class-action waivers in their enrollment agreements to make a plain-language disclosure about the requirements; include the disclosure on the institution's website; and include information about internal dispute and arbitration processes in the school's entrance counseling. While disclosures are insufficient, more information to borrowers is certainly the least these institutions should do to pull such arbitration agreements and class-action waivers out of the fine print and ensure students know what they are agreeing to.

As the Department stated in 2016, it did not find the replacement of a ban on such clauses with disclosures compelling, citing research that borrowers are unlikely to make informed decisions when institutions present them with contextless information and noting that "we see no realistic way to

[133] 81 FR 76022
[134] 83 FR 37245
[135] 83 FR 37265
[136] 83 FR 37258
[137] 34 CFR 668.202(c)(1)(iii)

improve this awareness."[138] As the Department stated with respect to a particular comment submitted by an institution official in response to the 2016 proposed rule, "[n]one of [the students] knew what arbitration was or asked any questions about the arbitration provision," despite interviewing hundreds of applicants per year--and in fact, the official herself said she did not understand the provision.[139] The Department also cited survey data from the CFPB, which found that "[credit card] consumers generally lack awareness regarding the effects of arbitration agreements," and research indicating consumers are rarely aware of the consequences of arbitration agreements in "consumer transactions."[140]

Despite the futility of trying to ensure consumers understand they are signing away their right to their day in court, the Department should improve the language around the use of disclosures if it intends not to ban the use of federal funds for such provisions altogether. Several specific recommendations follow:

- **Common disclosures:** The Department, in consultation with the CFPB (which has more experience studying the implications of arbitration agreements and how consumers understand and act upon information about complex financial products and legal terms and conditions), should develop and consumer-test plain-language disclosures about arbitration clauses and class-action waivers, to be supplemented with specific information from the institution about its own processes. The disclosures should, at a minimum, note that predispute arbitration clauses and/or class-action waivers are not required at all institutions of higher education, and clearly state that students will not be able to exercise their right to sue their institution if they have concerns about their academic experience at the school.

- **Prominent disclosures:** The Department should ensure disclosures are prominent and readily available, and that institutions are not burying them in subpages that require multiple clicks to access the information. Specifically, the Department should require that disclosures are listed on all pages of the institution's website that includes information about admissions and/or tuition or financial aid. The Department should also require that the school post the disclosure on the homepage itself, rather than on a sub-page, with the headline portion of the disclosure in an easily readable, prominent format. The Department should enforce those disclosure requirements as part of its regular program review/audit processes.

- **Comprehensive loan counseling:** Borrowers will effectively receive information about the school's arbitration and class-action policies once after enrolling as students--through loan counseling. To ensure they understand the implications of arbitration clauses, the Department should require institutions to verify that students who obtained loan counseling through an interactive tool also received an arbitration/class action waiver through a separate avenue. Specifically, the Department should require that institutions obtain a signature verifying students received and read the loan counseling materials. Moreover, since the Department already has an experiment running on loan counseling, it should consider the lessons learned from participating schools to continually improve these requirements; and assess whether any

[138] 81 FR 76028
[139] 81 FR 76028
[140] Ibid

of the participating institutions have arbitration clauses or class-action waivers to evaluate those institutions' outcomes specifically and separately from the overall treatment group.

Ensure the Department receives the necessary information to anticipate potential problems with institutions.

As stated above, the Department was concerned by Corinthian Colleges' (and other institutions') use of predispute arbitration and class-action waivers to obfuscate the problem of a clearly growing set of borrowers who felt they had been lied to by their institutions. The secrecy continued for so long that, by the time state and federal agencies were aware and able to investigate, tens of thousands of students had been subjected to the institution's misconduct, and the institution was on the verge of closure. Rather than the institution being forced to pay the price--and change its behavior--the college racked up hundreds of millions of dollars in liabilities taxpayers are now being forced to shoulder.

To prevent similar situations from developing in the future, the Department must have access to at least some information about the number and nature of borrower defense-related arbitrations taking place at the institution. While the Department says it is concerned about the burden on the institution and the Department of submitting materials related to arbitrations at the school, and concerned about the possibility that institutions would have to transmit confidential information,[141] its obligations to the taxpayers exceed that concern.

If the Department will not require institutions to submit fulsome information about arbitration proceedings at the school, it should instead require that institutions submit basic details on at least a quarterly basis that would allow the Department to know if further investigation may be necessary. Specifically, the Department should require that institutions report on the following items for each federal financial aid recipient engaged in arbitration on borrower defense-related issues:

- The total number of arbitration proceedings on borrower defense-related topics conducted during the previous quarter;
- A high-level summary of each of the above proceedings, to include the nature of the complaint and its resolution (including whether the student completed the arbitration proceeding; whether the student is still enrolled in the institution, has graduated, or has withdrawn; and the dollar amount or other forms of relief awarded by the institution in each).

Regulatory Impact Analysis

Further clarify the Department's assumptions around the impact of this rule.

A regulatory impact analysis (RIA) offers a critical picture of how a federal agency expects its rule to affect both consumers and taxpayers. However, too often, RIAs lack critical information about the process. As a recent study of education RIAs found, oftentimes the Department neglects to include critical pieces of information. The study notes, in particular, that while some RIAs include a description of possible benefits to students, "none attempt to estimate the number of students receiving these

[141] 83 FR 37266

benefits or the dollar value of these benefits."[142] The study also notes that "[o]nly a few RIAs consider costs to students and education institutions," and "none of them match the costs with the benefits."[143] That's particularly important, since Executive Order 12291 requires both that agencies describe "the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits," and that the "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."[144]

The Department should add several components to the regulatory impact analysis in the final rule, including:

- Quantifying the total share of loan volume and the total share of borrowers affected by institutional misconduct that meets the standard it expects will receive relief on their loans;
- Detailing the average share of relief it expects borrowers in each sector to receive; and
- Conducting a quantitative analysis that directly compares the benefits under this rule against the costs (particularly to borrowers), to create a true cost-benefit analysis in the style recommended under E.O. 12291.

One important non-monetary component of the benefit-cost analysis should be the fairness of the rule to borrowers; the Department indicates that a huge share of borrowers who *should* be eligible for claims based on the misconduct of their institutions will not ever see their loans discharged, because of the way the Department has designed the process. The Department must grapple with that mismatch, considering which borrowers are most likely to obtain relief after being harmed and the inherent unfairness that less sophisticated borrowers (who may be most in need of relief) will be least likely to receive it.

Additionally, the Department should clarify the assumptions in each component of the net budget impact. Specifically, it is difficult to determine the degree to which the Department accounted for data on collections proceedings within the default rates it examined for the defensive applications percent, if at all, to account for the share of defaulted borrowers who experience a given collection proceeding in a year and the narrow timeframe (30-65 days, according to the Department) in which borrowers will have a window to file a defense to repayment claim. It is also unclear how the RIA accounts for the elimination of a group process; how it evaluates the evidence requirements associated with demonstrating a misrepresentation meets the standard of having been made with reckless disregard or intent; or how it accounts for recoveries of discharged funds through a proceeding with the institution as opposed to the financial protection triggers. To better account for uncertainty in this area, the Department could--and should--conduct additional sensitivity analyses to show how each aspect of the proposed rule interacts with the remainder of the rule, and the implications if the Department's estimates turn out to be wrong. While the current sensitivity analyses are helpful, they do not test all of these items; and neither the sensitivity analyses nor the alternative scenarios account for how a group

[142] http://journals.sagepub.com/doi/abs/10.1177/1098214018785463?journalCode=ajec
[143] Ibid
[144] https://www.archives.gov/federal-register/codification/executive-order/12291.html

process would alter the benefits to borrowers under this rule even though the Department indicates that component has the biggest impact on the reduction in benefits as compared with the 2016 final rule.[145]

Moreover, the Department should be clear in its communications with the public that the net budget impact, and not the annualized figures presented in the classification of expenditures, is the primary budget estimate. It should also be clear about the total impact it expects this rule to have on borrowers; for instance, The Institute for College Access and Success calculated that, using the Department's own projections, less than 2 percent of the loan dollars held by borrowers whose colleges committed misrepresentations would be discharged under the proposed borrower defense rule.[146] The Department should be transparent with the public on important, bottom-line numbers like that one in its final rule.

The revised definition of small institutions should be based in data.

For reasons that are unclear, the Department has elected to redefine which institutions are considered small businesses under the Regulatory Flexibility Act. However, its definitions do not make sufficient use of Department data, and define a small institution in an arbitrary manner. Specifically, the Department proposes to call all two-year institutions with enrollment of fewer than 500 FTE students, and all four-year institutions with fewer than 1,000 FTE students, small businesses. Yet the definition used by the Small Business Administration, as described by the Department, establishes different definitions by sector:

- Proprietary institutions are small businesses if independently owned and operated, not dominant in their field, and with total annual revenue below $7,000,000;
- Nonprofit institutions are small businesses if independently owned and operated and not dominant in their field; and
- Public institutions are small businesses if operated by a government overseeing a population below 50,000.

With respect to for-profit institutions, the Department can (and should) rely on the IPEDS finance survey to identify institutions with less than $7 million in annual revenue. Those data yield over 2,000 for-profit institutions.[147] Regarding nonprofit institutions, the Department should consider the typical size of nonprofit institutions in evaluating whether they qualify as dominant in the fields by calculating the median for four-year and less-than-four-year nonprofits. Using the most recently available IPEDS data, the typical nonprofit four-year institution enrolls 1,174 students; and the typical less-than-four-year nonprofit institution enrolls 161. If the Department assumes all institutions below the median size qualify as small businesses, more than 800 four-year nonprofit institutions would qualify and nearly 200 less-than-four-year nonprofits would.[148] This definition would be more responsive going forwarding, by reflecting potential changes in the education marketplace through adjustments to the median in future calculations. For public institutions, the Department should explain why it chose to measure them based

[145] 83 FR 37299
[146] See comments from The Institute for College Access and Success
[147] IPEDS calculations available from the author upon request
[148] Ibid

on student enrollment, when the proposed rule notes that public institutions are usually determined to be small organizations based on the population size overseen by their operating government.

If the Department cannot better justify why it proposes to make the determinations it does, it should revert to the definition it has historically used until it can work with institutions of higher education to find a more accurate threshold.

The Department assumes an unreasonable deterrent effect from this rule.
The conduct percent outlined in Table 5 of the regulatory impact analysis assumes an unsupported and unreasonable deterrent effect year-over-year. In 2016, the Department incorporated a deterrent factor into the final rule, which estimated that the amount of conduct under the standard would fall in the first several years following its implementation, nothing that "[i]n the past, when provisions targeting specific institutional activities or performance have been introduced, there has generally been a period of several years while the worst performers are removed from the system and while other institutions adapt to the new requirements and a lower steady state is established."[149]

However, there is no reason to assume the same--or even a similar--deterrent effect would exist under this new proposed regulation, particularly compared with the 2016 rule. The 2016 rule anticipated significant potential liabilities for institutions that engaged in illegal behavior, accountability for institutions even years after their unlawful behavior, and more misrepresentations coming into the sunlight following the prohibition of certain predispute arbitration agreements and class-action waivers.

Meanwhile, the only justification the Department gives for assuming a deterrent effect is that it believes "institutions will not want to suffer the scrutiny that a significant number of borrower defense to repayment applications would invite."[150] However, the same potential for such scrutiny existed in the 2016 rule--heightened by the fact that more borrowers would ultimately have received relief under that rule; and by the Department's own estimates in the net budget impact, this proposed rule contains nowhere near the potential for significant institutional liabilities, with many fewer financial protection triggers and lower levels of recovery. To assume the same deterrent is impractical and unreasonable.

Additionally, with the Department's elimination through a separate rulemaking of the gainful employment regulations, which restrict federal financial aid eligibility to the lowest-performing programs (where financial harm is likeliest), and its dissolution of the FSA enforcement unit's investigations team, there's a strong likelihood that the percentage of unlawful conduct will actually increase in recent years. The Department estimates that the elimination of the gainful employment rule alone will cost taxpayers over $5 billion over the next decade in additional spending at low-quality programs, and misconduct is more likely to burgeon in that sector, where programs are likeliest to be making claims--some false--about the employment outcomes of graduates.

[149] 81 FR 76056
[150] 83 FR 37299

The Department assumes an unrealistic percentage of borrowers who will qualify under the defensive claims component.

The Department attempts to break out the share of affected students who might qualify under Alternative A by "examining estimated lifetime default rates."[151] However, this approach doesn't adequately predict the share of students who may ultimately be eligible to file a borrower defense claim under that approach.

Specifically, the Department cites default rates by so-called "risk group," including two-year not-for-profit default rates to predict lifetime default in two-year public and nonprofit sectors; two-year for-profit default rates to estimate defaults in that sector; four-year freshman/sophomore risk groups to estimate four-year for-profit defaults; and a weighted average of four-year freshman/sophomore and four-year junior/senior default rates for four-year public and nonprofit colleges. The Department states this is so that it doesn't "underestimate potential future costs of the proposed defense to repayment regulations" and so it "accounts for the possibility of increased defaults by borrowers who may decide that the consequences of default are worth the risk of a potentially successful defense to repayment applications (sic)."[152] However, it seems likely these figures actually significantly overestimate the share of borrowers who could raise a defensive claim under this rule, even if strategic defaults would occur.

Borrowers with defensive claims would, under the Department's proposal, only be able to file a claim during the existing timeframe to challenge a collections action--and only after that action has been initiated. And such actions are not universally applied, nor are those timeframes well understood. For instance, administrative wage garnishment can only be applied after a collection agency identifies the borrower's employer; the debt collector must attempt to reach the borrower numerous times prior to beginning to garnish wages; and certain borrowers are exempt from such orders, like those who have been "involuntarily separated" from employment and not yet continuously employed for at least 12 months.[153] In other cases, borrowers may entirely miss the window for filing a claim; for instance, in the Treasury Offset Program (TOP), the agency notifies borrowers of the opportunity to challenge the offset at their last known addresses, which may not be accurate. In all cases of collections proceedings, these administrative hurdles will likely disproportionately affect borrowers with valid claims--those who wish to file a claim and have been financially harmed are, by definition, less likely to have full employment sufficient to initiate wage garnishment; and more likely to move frequently,[154] potentially making it less likely they will receive the required notices of TOP and wage garnishment initiation.

The Department should examine data on the initiation of collection processes to determine for how many borrowers per year it initiates debt collection proceedings like those described in Alternative A; reduce the share of defensive claims to parallel the share the defaulters per year placed in those proceedings with an opportunity to challenge its initiation; and consider whether a small inflation, like the one suggested in Table 6, is appropriate to account for borrowers who default strictly to file a claim. For instance, the Department could study the data it provided to the National Consumer Law Center

[151] 83 FR 37299
[152] Ibid
[153] http://www.aei.org/wp-content/uploads/2018/08/Federal-Student-Loan-Defaults.pdf
[154] http://journals.sagepub.com/doi/abs/10.3102/0002831211415250?journalCode=aera

(NCLC) through a FOIA request, referred to in the “defensive claims” section of these comments.[155] In the final rule, the Department should detail the revision it makes to these numbers and publish those data to better inform stakeholders of the underlying information informing the budget estimates.

The Department assumes too high a recovery rate from institutions.
The Department’s anticipated recovery percentage for borrower defense claims is vastly overstated given policy changes in the proposed rule; the Department should revisit its assumptions and greatly reduce the percentage for recovery.

In the 2016 final rule, the Department established a baseline recovery percent that indicated the Department expected--absent a policy change--that it could recover 75 percent of loan volume discharged through borrower defense claims from public institutions, and 5 percent from private nonprofit or private for-profit institutions.[156] That baseline policy included the Department’s ability to initiate recovery proceedings within three years of students exiting the institution (unless the Department gave the institution notice within those three years of receipt of a borrower defense claim it received),[157] and financial protection it might hold based on the existing financial responsibility composite scores. The 2016 rule, the Department believed, would increase the share of claims recovered by lengthening the timeframe in which it may recover funds to match the statute of limitations on claims, and by increasing financial protection held by the Department following trigger events demonstrating high-risk behavior. Assuming an “increase in… the effectiveness of the financial responsibility protections over time,” the Department factored in a “ramp-up” in the recovery percent year-over-year.[158] The 2016 final rule assumed that about one-quarter of borrower defense discharges for borrowers from private nonprofit and for-profit institutions would be recovered, increasing to about 37 percent a decade later.

This proposed rule includes very few of the financial protections the Department laid out in the 2016 rule. The 2016 rule included eight mandatory triggers, many of which were early-warning indicators. This proposal includes just four, all of which are much less predictive of problems and will apply to very few colleges. Those four triggers are:

1. Actual borrower defense discharges, which--by the Department’s own estimates--are highly unlikely to be paid out given changes in the process, a higher bar to demonstrate misrepresentations meet the standard, and an adversarial process;
2. Final judgments against the institution, which are relatively uncommon and even less likely than under the 2016 rule since arbitration clauses and class-action waivers are permissible under this proposed rule;
3. Withdrawal of owner’s equity for a proprietary institution with a low composite score, affecting only a narrow subset of private institutions; and

[155] Data were obtained through a FOIA and are available from NCLC upon request
[156] The higher level in the public sector is based on the long-standing presumption that public institutions are backed by the full faith and credit of their states
[157] The statute of limitations under the 1995 regulation is described in more detail at 81 FR 75955
[158] 81 FR 76056

4. SEC actions against publicly traded institutions, of which there are only about a dozen.[159]

There's little chance these triggering events--all of which constitute such significant evidence of concern that it may well be too late to prevent further damage and liabilities for taxpayers--will provide enough financial protection to explain the difference between the recovery percentages estimated in the 2016 rule and those included in this proposed rule. Moreover, the triggers for final judgments, withdrawal of owner's equity, and SEC actions are uncommon and bear no relationship to borrower defense-related misrepresentations, specifically--so they will not, as the Department assumed other triggers would in 2016, increase the effectiveness of financial protection over time. Thus, there is little reason to believe the share of borrower defense discharges recovered from institutions will increase over time at all; it may even decrease, since some of these events will likely lead to the closure of the school and the removal of the riskiest institutions from the marketplace.

General Comments

The Department should not call this rule an "institutional accountability" regulation.
The proposed rules, inexplicably and without any basis in the policy, are titled "Institutional Accountability" regulations. However, there is little in the rule to indicate it would serve any function in holding institutions accountable. In contrast to the 2016 final rule, this regulation would provide relief to fewer borrowers, limit pressure on unscrupulous institutions to moderate their behavior, and prevent liabilities. It would reduce the amount of financial protection required from institutions that engage in risky behavior. It encourages institutions to force borrowers into secretive arbitration proceedings and out of the courtroom, giving schools permission to engage in unlawful conduct knowing students won't be able to act on their concerns. And it would deter borrowers from even applying for relief by forcing them to first default on their loans, asking invasive and inappropriate questions, and nickel-and-diming the amount of harm they experienced. Moreover, labeling these "institutional accountability" regulations will only serve to confuse the record moving forward. Instead, the Department should revert to calling the regulations what they are: rules on borrower defense to repayment.

The Department is inconsistent in its use of prior rules as the baseline.
This proposed rule is confusing, and sometimes arbitrary, in its consideration of the 1995 and 2016 regulations as the baseline. The Department states that "[t]he currently effective regulations, not the delayed provisions of the 2016 final regulations, are the provisions codified in the Code of Federal Regulations. Thus, we are amending the currently effective regulations, not the delayed provisions of the 2016 final regulations, in this NPRM." However, the Department states in the same section that the main budget estimates for this proposed rule incorporate the baseline from the President's Budget Request, which includes the 2016 rule.

This inconsistency creates significant issues with the Administrative Procedures Act -- both in the Department's refusal to consider a properly negotiated and published rule as current policy (even if it has been delayed by the administration), and in its differential treatment of the primary budget

[159] http://investsnips.com/list-of-publicly-traded-post-secondary-education-companies/

estimates and the regulatory changes proposed here. In its final rule, the Department must reconcile these concerns by aligning the baseline policy--currently the 1995 rule--with the baseline budget figures--currently relying on 2016.