

August 30, 2018

Jean-Didier Gaina  
U.S. Department of Education  
400 Maryland Ave., SW  
Washington, D.C. 20202

RE: Docket ID ED-2018-OPE-0027  
(Comments submitted electronically via: <http://regulations.gov>)

Dear Mr. Gaina:

We are pleased to submit these comments in response to the July 31, 2018, Notice of Proposed Rulemaking (Docket ID ED-2018-OPE-0027) regarding the borrower defense to repayment rule.<sup>1</sup>

The Institute for College Access & Success (TICAS) is an independent, nonprofit organization that works to make higher education more available and affordable for people of all backgrounds. Through nonpartisan research, analysis, and advocacy, we aim to improve the processes and public policies that can pave the way to successful educational outcomes for students and society.

There is strong, recent evidence of the urgent need for a strong borrower defense rule. In 2015 and 2016, Corinthian Colleges and ITT Technical Institute collapsed amid federal and state investigations into deceptive, high-pressure recruiting tactics and misrepresentations to students.<sup>2</sup> Tens of thousands of students suffered fraudulent or illegal conduct and were nonetheless left in debt. As the Department developed this proposed rule, which outlines a potential process for post-2019 student borrowers, it still has over 99,000 pending borrower defense applications.<sup>3</sup> Some of these claims are believed to have been pending for three years.<sup>4</sup> In the meantime, a district court has ruled against the Department's attempt to establish partial loan discharges, which have amounted to an average of about 20 cents for every dollar connected to a successful borrower defense claim.<sup>5</sup> Yet despite the clear documentation of the need for a strong, fair, and fast process, the Department has proposed a process that is far lengthier and more burdensome and denies relief to the vast majority of harmed borrowers.

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<sup>1</sup> Unless otherwise noted, page numbers cited in these comments refer to the Notice of Proposed Rulemaking (NPRM) as published in *Federal Register* on pp. 37242-37220 on July 31, 2018. See <https://bit.ly/2wsuQbM>.

<sup>2</sup> Johnson, Alex. April 25, 2015. "Corinthian Colleges Shuts Down, Ending Classes for 16,000 Overnight." *NBC News*. <https://nbcnews.to/2Nxkyh0>. Korn, Melissa. September 6, 2016. "ITT Technical Institute Shuts Down After Government Cut Off New Funding." *The Wall Street Journal*. <https://on.wsj.com/2wwUI5h>.

<sup>3</sup> Sen. Dick Durbin. Press release. July 24, 2018. "Durbin Releases Shocking New Data on Department of Education's Borrower Defense Application Backlog." <http://bit.ly/2MAVr08>.

<sup>4</sup> For a recent discussion of some of these students, see Berman, Jillian. August 24, 2018. "These For-Profit College Students Hope for Debt Relief as a Debate about Their Loans Rages in Washington." *MarketWatch*. <https://on.mktw.net/2wwfVfF>. See also Douglas-Gabriel, Danielle. March 7, 2018. "Education Dept.'s Mishandling of Student Debt Relief Claims Creating Headaches for Applicants." *The Washington Post*. <https://wapo.st/2MYjp4W>.

<sup>5</sup> Martin Calvillo Manriquez, et al. v. Elisabeth DeVos, et al. "Amended Order Regarding Plaintiff's Motion for Preliminary Injunction." Filed June 19, 2018. <https://bit.ly/2wrexul>; Martin Calvillo Manriquez, et al. v. Elisabeth DeVos, et al. Exhibits. Filed April 12, 2018. <https://bit.ly/2LF58FD>. TICAS calculations of the average amount of relief use data from Exhibit D, paragraphs 10 and 11.

We believe that the Department’s proposal will fail to accomplish its own stated goals. For example, while the Department seeks to “ensure that borrower defense to repayment discharges are handled swiftly, carefully, and fairly” and “encourage students to seek remedies” (p. 37242), according to its own estimates the rule would discharge less than two percent of loans connected to an illegal misrepresentation (in dollar terms).<sup>6</sup> While the Department hopes to “discourage institutions from committing fraud or other acts or omissions” (p. 37242), it would hold colleges financially responsible for paying back less than 1.2 percent of the loan volume associated with illegal acts.<sup>7</sup> The Department describes its goal, “most of all, to ensure that millions of American students and borrowers are provided with accurate information” (p. 37243), but it would repeal all of the notice and disclosure requirements in the existing borrower defense rule that has been delayed.

The premise of the Department’s proposal is factually flawed. The Department inaccurately states that it changed its policy in 2015, no longer requiring that borrowers default before applying for borrower defense, and that the result was a flood of frivolous applications. The Department concluded that “minimal consequences for submitting an unjustified claim could potentially create improper incentives for borrowers with unsubstantiated allegations against schools to seek loan discharges” (p. 37243), leading to an increased burden on the Department among other consequences. The Department’s concern over meritless applications apparently motivated the severe eligibility restrictions and procedural requirements imposed by the proposed rule.

In fact, there was no policy change: the Department has never required students to default prior to asserting a borrower defense claim.<sup>8</sup> More than two decades of experience demonstrates no widespread incidence of frivolous claims. Even among the 138,989 claims submitted after the purported policy change in 2015, the Department concedes that it “does not have sufficient information” to determine whether frivolous claims are a problem (p. 37243). It concedes that there are disincentives to apply: applicants “may find themselves worse off” by applying because interest may accrue (p. 37243). Most importantly, the severe eligibility restrictions proposed by the Department generally do not further the goal of identifying or deterring frivolous claims, while preventing nearly all students who suffered illegal conduct by their college from obtaining relief.

The proposal is deeply troubling when considered as one part of the Department’s systematic dismantling of a strong accountability regulatory regime. By eliminating the gainful employment rule and the FSA enforcement unit, the Department is eliminating its efforts to prevent wrongdoing.<sup>9</sup> This proposal barely provides relief to borrowers who have already been harmed by their institutions and does nothing to prevent future misrepresentations or misconduct. The Department is creating a facade of accountability where none will exist.

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<sup>6</sup> Calculations by TICAS using data from the U.S. Department of Education, 83 FR 37298. For more information, see page 29.

<sup>7</sup> Ibid.

<sup>8</sup> See U.S. Department of Education, Federal Register, Vol. 81, No. 116, June 16, 2016, <https://www.gpo.gov/fdsys/pkg/FR-2016-06-16/pdf/2016-14052.pdf>, p. 39353; U.S. Department of Education, Federal Register, Vol. 81, No. 211, November 1, 2016, <https://www.gpo.gov/fdsys/pkg/FR-2016-11-01/pdf/2016-25448.pdf>, p. 75956; and comments submitted by the Project on Predatory Student Lending to the Department of Education on August 2, 2018. [www.goo.gl/NKnf3H](http://www.goo.gl/NKnf3H).

<sup>9</sup> Green, Erica. July 26, 2018. “DeVos to Eliminate Rules Aimed at Abuses by For-Profit Colleges.” *The New York Times*. <https://nyti.ms/2LvJHLQ>. Ivory, Danielle, Erica L. Green and Steve Eder. May 13, 2018. “Education Department Unwinds Unit Investigating Fraud at For-Profits.” *The New York Times*. <https://nyti.ms/2jTFLVd>.

**We urge the Department to withdraw this proposal and immediately implement the 2016 rule. Further, we urge the Department to reissue a proposal that strengthens student protections beyond the 2016 rule and is clear of factual and procedural defects.** Specifically we recommend that it:

- Recognize the full range of illegal conduct related to federal loans.
- Remove the numerous baseless hurdles that will prevent cheated students from obtaining relief, including unreasonable evidentiary requirements, a punitive requirement that students default on their loans before applying for relief, and narrow windows of time in which the Department will hear claims.
- Ensure the independence of decision-makers involved in borrower relief determinations.
- Retain from the 2016 regulation a process for providing debt relief to groups of students where there is sufficient evidence of widespread fraud or other illegal conduct.
- Retain from the 2016 regulation measures to stop schools from shielding themselves from accountability through pre-dispute arbitration clauses and class action waivers.
- Protect students' ability to discharge their student loans when their school closes by rejecting the proposal for mandatory transfers and increasing information, and give the Department clear authority to determine when exceptional circumstances arise, while adopting the proposal to expand eligibility to students who withdrew within 180 days of the school closing.
- Establish strong financial triggers to protect students and taxpayers alike from school misconduct.

We elaborate on these and other issues in the attached comments, including a number of issues on which the Department specifically requested comment. If you have any questions about our comments, please feel free to contact us by phone at (510) 318-7900, or by email at [jkvaal@ticas.org](mailto:jkvaal@ticas.org), [dcochrane@ticas.org](mailto:dcochrane@ticas.org), or [brobertson@ticas.org](mailto:broberson@ticas.org).

Sincerely,



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## I. Procedural concerns

### **A. The Department has premised its proposal on a flawed factual basis.**

As described in our cover letter, the premise of this proposal is factually flawed. The NPRM asserts that the Department changed its policy in 2015 to no longer require that borrowers default before applying for borrower defense. The Department’s concern over the resulting potential for meritless applications apparently motivated the extensive eligibility and procedural restrictions it proposes.

In fact, there was no policy change: the Department has never required students to default prior to asserting a borrower defense claim.<sup>10</sup> More than two decades of experience demonstrates no widespread receipt of frivolous claims. Even though it has received 138,989 claims since the supposed policy change in 2015, the Department concedes that it “does not have sufficient information” to determine whether frivolous claims are a problem (p. 37243). It also notes that “the vast majority of borrower defense claims filed since 2015 have alleged that the school at issue made statements to the borrower that amount to misrepresentations under state law” (p. 37256). Without proper assessment of the types of claims it is getting through the door, or explanation for such a dramatic shift in policy, these changes are arbitrary.

Another contradiction concerns whether there is a need for greater deterrence of frivolous claims. At one point, the Department asserts that, “with nothing to lose by submitting a claim, a borrower could be tempted to submit a claim whether or not he or she has been harmed” (p. 37243). However, in the very next paragraph it acknowledges that unsuccessful applicants “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” (p. 37243).

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<sup>10</sup> See 81 FR 39353; 81 FR 75956; and comments submitted by the Project on Predatory Student Lending to the U.S. Department of Education on August 2, 2018. [www.goo.gl/NKnf3H](http://www.goo.gl/NKnf3H). These comments provide documentation of successful borrower defense claims in which default status was not considered relevant, including one in which the claim was forwarded by a contractor who serviced non-defaulted loans.

## **B. The Department’s proposal would not achieve its stated goals.**

There are many contradictions throughout the NPRM that convey a disconnect between its stated goals and its likely impact. While we highlight these contradictions throughout this comment, here are some of the particularly notable discrepancies:

- There is no rational relationship between the Department’s goal of distinguishing between valid and frivolous claims and its proposals to limit applications to loans in default, impose a “clear and convincing” standard of proof, or limit applications to specific periods as short as 30 days.
- The Department seeks to “ensure that borrower defense to repayment discharges are handled swiftly, carefully, and fairly” and “encourage students to seek remedies” (p. 37242). According to its own estimates, the rule would discharge less than two percent of loans connected to an illegal misrepresentation (in dollar terms).<sup>11</sup>
- While the Department hopes to “discourage institutions from committing fraud or other acts or omissions” (p. 37242), it would force colleges to share in less than 1.2 percent of the cost of illegal acts.<sup>12</sup>
- The Department writes that “most of all” its goal is “to ensure that millions of American students and borrowers are provided with accurate information” (p. 37243), but it would repeal all of the notice and disclosure requirements from the 2016 regulation. Moreover, the goal of “enabl[ing]” students to make informed decisions on the front end of college enrollment, rather than to grant them financial remedies after-the-fact” (p. 37243) is contrary to the very purpose of the borrower defense provision, which is to grant financial remedies after the fact while deterring institutions from committing unlawful acts in the future.
- The proposal purports to “reduce uncertainty about the future of the federal financial aid system itself due to the strain on the government of large numbers of borrower defense to repayment discharges.” However, in the context of the \$1 trillion in student loans that the Department is expected to make over the next decade,<sup>13</sup> the proposal’s expected \$12.7 billion in savings (p. 37297) is very small and has no rational relationship to that goal.
- Though the Department acknowledges that its current “FSA process has proven to be burdensome to borrowers, given the time it takes to adjudicate each claim, and costly to taxpayers” (p. 37251), it plans to compound the burden by pursuing an individualized claims review process. It also imposes new elements, such as the state of mind of the college and circumstances surrounding the student’s application challenges, which will substantially increase the burden of adjudicating each claim for borrowers and the Department.

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<sup>11</sup> Calculations by TICAS using data from the U.S. Department of Education, 83 FR 37298. For more information, see page 29.

<sup>12</sup> Ibid.

<sup>13</sup> Congressional Budget Office. April 2018. “Student Loan Programs—CBO’s April 2018 Baseline.” <https://bit.ly/2NzeKmX>.

### **C. The Department’s vague proposals and rushed process deny the public a fair opportunity to comment.**

Finally, the NPRM demonstrates a distinct lack of clarity about the direction of the regulation that the Department wishes to take, making it far more difficult for the public to provide meaningful comments on its proposal. There are two sets of “Alternative” proposals (§685.206(d)(2) and §685.206(d)(5)(i) and (ii)) wherein the Department provides two options for the types of claims the Department plans to accept: either defensive only or affirmative and defensive. Neither of these alternatives are explained clearly or in enough detail. In addition to the unclear concepts, the Department does not express a clear vision of which of these alternatives they prefer and wish to pursue.

Furthermore, the Department’s use of the 2016 final regulation as the baseline for its Regulatory Impact Analysis is inconsistent with its consideration of the 1995 borrower defense regulation as the “current regulation” throughout the preamble. These inconsistencies make it extremely difficult to comment on the Department’s proposal without an apples-to-apples description of policy changes and accompanying budget estimates for those policy changes.

The errors and internal contradictions within the proposed regulations are compounded by a rushed rulemaking process. Executive Order 12866 directs agencies to “afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.”<sup>14</sup> No justification is provided for the shorter comment period in this case. Even if the process had not been so disordered, providing a mere 30 days for such an impactful regulation greater reduces the potential for detailed examination from the public.

As the Legal Services Center of Harvard Law School noted, the proposed rule’s “inaccuracies undermine the compliance of this NPRM with Executive Orders 12866 and 13563 and inhibit the interested public’s ability to comment meaningfully on these economically significant regulations.”<sup>15</sup> We urge the Department to withdraw this proposal, implement the 2016 rule, and consider stronger protections for students and taxpayers.

## **II. Borrower responsibilities and defenses**

### **A. Eligibility for relief**

In 2016, the Department replaced the state-based standard for defense to repayment claims (hereafter “borrower defense”) from the 1995 regulation with a new federal standard. The Department now proposes to apply the 1995 state law standard to all loans disbursed prior to July 1, 2019. Moving forward, the Department proposes to replace the 2016 federal standard with a new and far weaker federal standard with additional evidentiary burdens and procedural obstacles.

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<sup>14</sup> Section 6(a)(1) of Executive Order 12866 states that “each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.” Executive Order 12866. Federal Register, Vol. 58, No. 190. October 4, 1993.  
[https://www.reginfo.gov/public/jsp/Utilities/EO\\_12866.pdf](https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf).

<sup>15</sup> Martin Calvillo Manriquez, et al. v. Elisabeth DeVos, et al. 2018.

The Department's proposed federal standard in this NPRM ensures that few, if any, borrowers will see relief. By requiring information that no borrower would have access to, let alone easy access, the Department is effectively limiting relief for even the most meritorious of claims. The Department also makes a series of changes throughout the NPRM from the 2016 rule without providing justification for the changes, which we detail below. We urge the Department to rethink completely this federal standard by making it more fair and usable.

**1. The Department should adopt a strong federal standard that adequately protects students across the country, without limiting student eligibility under state laws.**

The Department states in its preamble that the proposed regulations are designed to "provide students with a balanced, meaningful process that relies on a single, federal standard rather than 50 state standards to ensure that borrower defense to repayment discharges are handled swiftly, carefully, and fairly" (p. 37242).

The Department should adopt a robust standard that protects students across the country based on the strongest state laws. The new standard should be a federal floor for all borrowers, not a ceiling that rolls back current eligibility for relief based on violations of any state consumer protection and other laws.

The federal standard proposed by the Department is too narrow. As discussed below, the Department's definition of misrepresentation imposes new, unjustified restrictions and evidentiary burdens. Further, the provisions for breach of contract and judgments of all types as pathways for borrower defense eligibility that were included in the 2016 rule should be reinstated here. The Department's concerns that breach of contract could be too broad (p. 37257) can be easily remedied with language stating that the breach of contract must relate to the provision of educational services and the making of the loan.

We note that other avenues for relief for borrowers are unavailable or insufficient. First, under the NPRM, the Department encourages the use of pre-dispute arbitration agreements and class action waivers. Borrowers who believe their school is violating state law could be forced to advance their claim individually in an arbitration forum chosen by the school. Second, even if a borrower were not prevented from suing their school in court for violating state law, many borrowers do not have the resources required to hire attorneys to litigate their claims. Third, borrowers also do not have access to the breadth of information and evidence available to the Department. Finally, not every state has an attorney general that prioritizes school fraud, and even those that do may not have the resources to pursue every case.

Under the NPRM, borrowers with loans disbursed on or after July 1, 2019 would no longer be eligible for relief based on violations of state laws that protect consumers from unfair, deceptive, or abusive conduct. For example, under the proposed rule, if a college uses high pressure sales tactics, hires unqualified teachers, slashes services, unreasonably limits course enrollments to save costs, withholds reasonable accommodations from students with disabilities, charges exorbitant fees, or arbitrarily withholds degrees, students may effectively no longer be eligible for borrower defense discharges based on violations of state law that prohibit these types of conduct.

## 2. The Department should reject its unduly narrow definition of “provision of educational services.”

The proposed definition of “provision of educational services” is far narrower than the 2016 regulation and the Department has not provided justification or explanation for this narrowing.

### ***a. The Department’s definition should clearly apply to general concerns with the institution’s educational services, without limitation to a specific program of study.***

The Department’s proposed federal standard states that “a ‘misrepresentation’ ... directly and clearly relates to the making of a Direct Loan, or a loan repaid by a Direct Consolidation Loan, *for enrollment at the school or to the provision of educational services for which the loan was made*” (emphasis added, p. 37326, proposed §685.206(d)(5)(iv)). The 2018 NPRM states that the “provision of educational services” is “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*” (emphasis added, p. 37326, proposed §685.206(d)(1)(iii)). The 2018 NPRM further describes that “we thus intend for a misrepresentation relating to the “provision of educational services” to be clearly and directly related to the borrower’s program of study” (p. 37255).

This is a distinct and significant narrowing from the existing rule that the Department has delayed. The Department previously recognized that “the Department’s determination of whether a claim pertains to the provision of educational services or the making of a Direct Loan will depend greatly upon the specific elements of that claim.”<sup>16</sup> The Department further explained, “for example, 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, and we believe the regulatory language as proposed best captures the intended scope of borrower defense claims.”<sup>17</sup>

The Department now proposes to do exactly what it warned against only two years ago, without explanation or adequate justification. Because misrepresentations can occur at any time post-enrollment regarding aspects of educational services that may not be directly tied to a student’s program of study, we urge the Department to return to the 2016 language. For example, a school may promise a student post-enrollment that he generally will have access to job placement services upon graduation that may not necessarily relate to his program of study, persuading the student to remain enrolled.<sup>18</sup> Under the Department’s new, more stringent standard, these students could be barred from relief even though they experienced legitimate misrepresentations.

Further, the Department should consistently clarify that all Direct Loans taken out to attend a school are covered. For example, a student may enroll in a school that makes a misrepresentation at initial enrollment but the student does not take out a loan until her second year. We urge the Department to

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<sup>16</sup> 81 FR 75958.

<sup>17</sup> Ibid.

<sup>18</sup> However, such provisions may not be required by accreditors or states, depending on the individual circumstances. See, for instance, the Accrediting Bureau of Health Education Schools (ABHES), which has no required standards around career placement services for graduates: [https://www.abhes.org/assets/uploads/files/18th\\_Edition\\_Accreditation\\_Manual.pdf](https://www.abhes.org/assets/uploads/files/18th_Edition_Accreditation_Manual.pdf).

ensure that all Direct Loans held by an affected student are eligible for borrower defense claims, regardless of the timing of the borrowing and illegal conduct, by returning to the 2016 language.

***b. The defense to repayment claim should apply to all federal loans, regardless of how the funds were spent.***

The final rule should also make clear that all Direct Loans are covered regardless of whether the loan is used to pay for tuition or for non-tuition costs of attendance. Defining covered claims as those relating to “the making of the loan or the provision of educational services for which the loan was provided” may lead some to argue that a loan used for textbooks, supplies, transportation, or living expenses is ineligible for a borrower defense discharge because it was not provided for “the provision of educational services.” Any Direct Loan taken out for a legitimate cost of attendance should be eligible for borrower defense. Closed school and false certification discharges are not limited to loans that cover tuition, nor should they be. This is equally true for borrower defense discharges.

***c. The defense to repayment claim should apply to the institution's pre- and post-enrollment activities.***

We recommend that the regulatory language in §685.206 (d)(5)(iv) explicitly include pre-enrollment and post-enrollment activities, such as marketing, recruitment, career advising and placement services.

**3. The Department should eliminate its requirement that intent, knowledge, or reckless disregard exist.**

In its proposal, the Department requires 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” (proposed §685.206(d)(2)(i)(A)).

First, borrowers have very little to no ability to uncover such evidence associated with intent, should it even exist. Unlike the federal government, state actors, or parties to civil lawsuits, individual borrowers do not have investigatory powers. They cannot subpoena schools for information. The Department itself acknowledges that “it is unlikely that a borrower would have evidence to demonstrate that an institution had acted with intent to deceive” (p. 37257).

Second, intent has not been a required element of misrepresentation, and -- as the Department noted in 2016 -- is not an element of consumer protection laws in many states. It further wrote:

“We 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.”<sup>19</sup>

Now, the agency asserts that the intent standard “strikes a balance between protecting borrowers... and protecting the federal taxpayer by requiring a level of evidence that ensures misrepresentation actually

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<sup>19</sup> 81 FR 75947.

took place” (p. 37257). However, such a definition will do nothing to protect borrowers and the question of intent is not relevant to whether a misrepresentation “actually took place.” The mental state of the school has no bearing on whether borrowers were harmed. The concept may be better suited to the Department’s determinations of recoveries from schools rather than determinations of borrower harm.

Third, we are concerned that an intent requirement would allow schools to cover their tracks by maintaining internally inconsistent policies or maintaining ignored paper policies while informally promoting and rewarding illegal conduct. We have already seen “boiler room” style recruitment practices that may implicitly encourage misleading or deceptive salesmanship.<sup>20</sup>

Finally, there is no rational relationship between this proposal and the Department’s goal of deterring frivolous claims. The Department provides no analysis on whether the claims it possesses are frivolous or how they would be affected by an intent standard. The Department’s own Regulatory Impact Analysis describes that the new standard will cover 95 percent of the same unlawful conduct as the 2016 standard did.<sup>21</sup> While creating the requirement that borrowers show evidence of intent poses new burdens for borrowers, the Department’s own projections show that very few misrepresentations are actually unintentional. We urge the Department to retain the 2016 approach on this definition.

#### **4. The Department should retain its existing definition of misrepresentation.**

##### ***a. The Department should return to its 2016 definition of misrepresentation, and its alignment with its 2010 misrepresentation regulation, for borrower defense purposes.***

In 2016, the Department aligned its definition of misrepresentation with the current definition of misrepresentation for enforcement proceedings. The Department noted, “We believe that aligning the definition and types of substantial misrepresentations for borrower defense with the Department’s long-held authority to bring enforcement actions under part 668, subpart F, will provide more clarity for schools and reduce their burden in having to interpret and adjust for the new borrower defense standards.”<sup>22</sup> Indeed, in the 2009 NPRM for its revision of the misrepresentation regulation, the Department stated:

“The Department oftentimes receives complaints from students who allege that they were the victims of false promises and other forms of deception when they were considering their postsecondary educational opportunities. We believe that helping students to make sound decisions regarding their educational pursuits is essential to maintaining the integrity of the title IV, HEA programs.”<sup>23</sup>

Though the Department in this preamble spends lengthy time describing the differences between its proposal and the 2016 rule on this issue (pp. 37256-37257), it does not provide an explanation for its move away from alignment with the existing 2010 misrepresentation definition used for enforcement purposes. We agree with its earlier conclusion that the alignment serves well the dual purposes of

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<sup>20</sup> U.S. Department of Justice. Press release. November 16, 2015. “For-Profit College Company to Pay \$95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud and Other Violations.” <http://bit.ly/2LGPCZM>.

<sup>21</sup> “The conduct percent is assumed to be 95 percent of the PB2019 baseline level.” 83 FR 37299.

<sup>22</sup> 81 FR 75947.

<sup>23</sup> 75 FR 34834. <https://www.gpo.gov/fdsys/pkg/FR-2010-06-18/pdf/2010-14107.pdf>.

protecting students and taxpayers while reducing administrative burden and urge the Department to reinstate it.

***b. The Department should not require each borrower to prove individual reliance.***

In these proposed regulations, the Department will require each borrower to show reliance on a misrepresentation to receive relief.<sup>24</sup> The definition of a misrepresentation is sufficient for all borrower defense claims alleging a misrepresentation: that a borrower could reasonably be expected to rely on the misrepresentation, without requiring that a borrower document that they actually relied on it. The current definition of substantial misrepresentation in §668.71(c), which the NPRM does not propose changing, is “any misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person’s detriment.”

We urge the Department to remove the individual reliance component of the new proposal. At a minimum, the final rule should allow borrowers to certify that they chose to enroll or remain enrolled in the school based in part on the issues they describe, as the Department currently allows in its borrower defense application form.<sup>25</sup> We also urge the Department to consider and account for the significant administrative burden such individual reliance will require.

**5. Requiring students to show financial harm as an element of misrepresentation is deeply problematic.**

Under the Department’s proposal, borrowers must demonstrate financial harm as a result of misrepresentation. The Department notes in the preamble that “a misrepresentation may serve as a basis for a borrower defense to repayment only if the misrepresentation resulted in financial harm to the borrower” (p. 37259). The Department notes in the regulatory language that such harm is “such monetary loss that is not predominantly due to intervening local, regional, or national economic or labor market conditions as demonstrated by evidence before the Secretary or provided to the Secretary by the borrower or the school” (p. 37327). In addition, borrowers must show that the financial harm experienced is not a result of a criminal record or decision not to seek employment, amongst other things.

***a. The definition of “misrepresentation” should not incorporate the concept of financial harm.***

First, the Department does not have the legal authority to require financial harm to show a valid claim. The Higher Education Act states that the Secretary shall specify in regulations which “acts or omissions of an institution of higher education a borrower may assert as a defense to repayment.”<sup>26</sup> However, here the Department is requiring a borrower to prove financial harm for his claim to even qualify as a valid borrower defense, a requirement that is wholly separate from any act or omission of the school.

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<sup>24</sup> “The institution at which the student enrolled made a misrepresentation, ***upon which the borrower reasonably relied under the circumstances*** in deciding to obtain a Direct Loan, or a loan repaid by a Direct Consolidation Loan, for the student to enroll or continue enrollment in a program at the institution.” 83 FR 37326, §685.208(d)(5)(i) in Alternative A and §685.208(d)(5)(ii)(A) in Alternative B. (Emphasis added)

<sup>25</sup> U.S. Department of Education. “Application for Borrower Defense to Loan Repayment.”

<https://studentaid.ed.gov/sa/sites/default/files/borrower-defense-application.pdf>. Accessed August 30, 2018.

<sup>26</sup> 20 U.S.C. 1087e.

While some may argue that the concept of financial harm is relevant to whether students' entire loans are discharged, it serves no purpose in assessing whether a misrepresentation took place. In addition to falling outside the scope of the statute, the elimination of valid claims before the Department even has an opportunity to assess the merits of the claim, based on borrowers' financial circumstances rather than the facts of the claim, will have negative implications for the agency's ability to monitor misconduct by schools.

Conversely, in 2016, the Department mentioned that a borrower had to rely on the misrepresentation to his or her detriment. It stated that it "understands that, generally, "detriment" refers to any loss, harm, or injury suffered by a person or property... there is no quantum or minimum amount of detriment required to have a borrower defense claim, and the denial of any identifiable element or quality of a program that is promised but not delivered due to a misrepresentation can constitute such a detriment."<sup>27</sup> We urge the Department to return to this far more fair and reasonable standard.

We note here that the 2016 final regulation did not define financial harm in any way, and that this NPRM's financial harm criteria is a brand new construct on which the Department has conducted no analysis and for which it provides no impact. Instead, the Department sets forth a series of new requirements that borrowers must demonstrate alongside the misrepresentation in order to file a claim. Without further explanation and analysis by the Department, this criteria is an arbitrary measure created to minimize or disqualify meritorious claims.

A school's misrepresentation in and of itself should be the basis for adjudicating claims. As such, we urge the Department to remove this criterion from the final rule, or, alternatively, define the existence of a past or present federal student loan as financial harm.

***b. If it retains this concept, the Department should reject overly complex, incomplete, and burdensome definitions of financial harm.***

The Department's definition of financial harm is especially problematic for the following reasons:

- It does not consider the financial harm of Pell Grant usage. There is currently no process for restoring Pell Grant eligibility to those who receive a borrower defense discharge, which means that even if the Department discharged a portion of the loans, the borrower will still have lost Pell eligibility that would have allowed him to re-enroll without taking on additional debt.
- It excludes from financial harm any monetary loss predominantly due to local, regional, or national labor market conditions (p. 37327). However, economic conditions should not excuse otherwise illegal conduct by colleges.
- It excludes from financial harm any monetary loss that arose because the borrower pursued less-than-full-time work or chose not to work (p. 37327). However, if a program has very low earnings, a borrower may be forced to work only part-time because they can't afford necessary child care or eldercare.

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<sup>27</sup> 81 FR 75951.

- Its example of a job guarantee is overly narrow. The Department gives an example of financial harm that includes inability to secure employment in the field of study for which the institution expressly guaranteed employment (p. 37327, proposed §685.206(d)(5)(v)(C)). However, an institution may have misrepresented the job placement rates, giving the clear impression that the borrower would be able to find employment, without expressly guaranteeing it.

Third, defining financial harm in an incredibly detailed fashion that will require significant scrutiny of a borrower’s individual circumstances. Such a factually intensive analysis would greatly exacerbate the administrative burdens of a process that is already failing to reach timely judgments.

***c. If the Department retains this concept, it should remove unnecessary information requirements from borrowers.***

The Department asks for a great deal of information from borrowers to demonstrate their financial harm, including “whether the borrower failed to meet other requirements of or qualifications for a job in such field for reasons unrelated to the school’s action underlying the borrower defense, such as the borrower’s ability to pass a drug test, satisfy criminal history or driving record requirements, and meet any health qualifications” (pp. 37325-37326, proposed §685.206(d)(3)). This information may be sent to the school for a response.<sup>28</sup>

Many of these requirements are so invasive that they may deter applicants from engaging in the process, regardless of the merits of their claim. This information is not relevant to assessing whether a misrepresentation took place, and there is no justification for schools to have the opportunity to comment on borrower behavior that has nothing to do with the alleged misconduct.

Under current regulation §685.215, the Secretary provides false certification discharges for instances in which a school “certified the eligibility of a student who, because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary, would not meet the requirements for employment (in the student’s state of residence when the loan was originated) in the occupation for which the training program supported by the loan was intended.” If the Department is going to request such invasive information from the borrower, it should be directly related to the school’s certification and solely for the purpose of determining whether a false certification discharge is more appropriate given the borrower’s circumstances.

**6. The Department does not need to add provisions or requirements to reduce frivolous claims**

The Department “seeks comments from the public regarding what types of provisions or requirements could be used to reduce frivolous claims while still ensuring a borrower a fair and meaningful opportunity to seek relief in the event of fraud” (p. 37244). The Department later requests comments “regarding other mechanisms that could be utilized to discourage the submission of frivolous claims which are costly for the Department and institutions to adjudicate. Such mechanisms could include

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<sup>28</sup>“Upon receipt of a borrower’s request for relief based on defense to repayment, the Department will notify the school of the pending request, provide a copy of the borrower’s request and any supporting documents to the school, provide a waiver signed by the student permitting the institution to provide the Department with items from the student’s education record relevant to the defense to repayment claim, *and invite the school to respond and to submit evidence* within the specified timeframe included in the notice.” 83 FR 37327, proposed §685.206(d)(7). Emphasis added.

limiting the period of time after a borrower leaves an institution during which a defense to repayment claim can be submitted (such as imposing a 3-year limit on borrower defense to repayment claims to align with the Department's 3-year record retention rate) (p. 37252)."

However, as described above and noted by the Department, there is no "sufficient information to determine the extent of this potential incentive effect" (p. 37243). This is a solution in search of a problem. Moreover, as noted by the Department, student loan interest can accrue throughout the adjudication process (p. 37243), deterring claims with little or no chance of success. A time limit would equally constraint both meritorious and meritless claims, without distinguishing among them.

We recommend that the Department reject further proposals to deter students from seeking the relief they may be entitled to. We strongly discourage efforts by the Department to place arbitrary restrictions on borrowers to reduce its own administrative burden.

### **7. The Department should include in its final rule the ability for harmed borrowers to submit both defensive and affirmative claims for borrower defense.**

The Department includes within §685.206(d)(2) of the NPRM two proposals for what types of claims borrowers would be able to bring to the Department: only so-called "defensive" claims, which occur in response to collection efforts after a student loan default, or both defensive and "affirmative" claims that are brought at other points in the repayment process. As mentioned earlier in these comments, the Department has always had a policy of adjudicating both defensive and affirmative defenses and in fact has acted in accordance with this authority.<sup>29</sup> We strongly urge the Department to include both defensive and affirmative claims in its final proposal.

#### ***a. The Department should strike Alternative A.***

As proposed by the NPRM, Alternative A would only allow borrowers to assert borrower defense claims in response to a collection proceeding on defaulted loans.

Requiring borrowers to default on their loans before they can apply for borrower defense will increase the number of defaults and force students to significantly jeopardize their livelihoods without any assurance that they will receive relief. As the Department itself states, "relief-seeking borrowers choosing to enter default could result in a range of troubling unintended consequences, including damage to borrower credit scores, increased default collection costs for taxpayers, and increases to institutional cohort default rates" (p. 37244).

The consequences of default for borrowers are severe, long-lasting, and well documented by the Department. In past rules, the Department has consistently detailed the severe consequences of default

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<sup>29</sup> See comments submitted by the Project on Predatory Student Lending to the Department of Education on August 2, 2018. [www.goo.gl/NKnf3H](http://www.goo.gl/NKnf3H). These comments provide documentation of successful borrower defense claims in which default status was not considered relevant, including one in which the claim was forwarded by a contractor who serviced non-defaulted loans. See also: 81 FR 75956; 81 FR 39353.

for borrowers.<sup>30</sup> The Federal Student Aid website on default lists no fewer than 11 serious consequences of going into default:

- “The entire unpaid balance of your loan and any interest you owe becomes immediately due (this is called “acceleration”).
- You can no longer receive deferment or forbearance, and you lose eligibility for other benefits, such as the ability to choose a repayment plan.
- You will lose eligibility for additional federal student aid.
- The default will be reported to credit bureaus, damaging your credit rating and affecting your ability to buy a car or house or to get a credit card.
- Your tax refunds and federal benefit payments may be withheld and applied toward repayment of your defaulted loan (this is called “Treasury offset”).
- Your wages will be garnished. This means your employer may be required to withhold a portion of your pay and send it to your loan holder to repay your defaulted loan.
- Your loan holder can take you to court.
- You may not be able to purchase or sell assets such as real estate.
- You may be charged court costs, collection fees, attorney’s fees, and other costs associated with the collection process.
- It may take years to reestablish a good credit record.
- Your school may withhold your academic transcript until your defaulted student loan is satisfied.”<sup>31</sup>

There are additional dangers to borrowers defaulting. Borrowers who default may have their driver’s licenses revoked or may lose their professional license to work, which is particularly harmful in the high need fields of nursing and teaching.<sup>32</sup> Defaulted borrowers may face ballooning debt amounts, with collection fees of up to 25 percent.<sup>33</sup> Defaulted student loans are now often seen as a threat to the federal budget.<sup>34</sup>

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<sup>30</sup> In 2016, the Department stated in its final borrower defense rule: “When borrowers default on their loans, everyday activities like signing up for utilities, obtaining insurance, or renting an apartment can become a challenge. Borrowers who default might also be denied a job due to poor credit, struggle to pay fees necessary to maintain professional licenses, or be unable open a new checking account.” 81 FR 76051. <https://ifap.ed.gov/fregisters/attachments/FR110116.pdf>. In its 2011 gainful employment regulation, the Department stated that “the common consequences of default include large fees—collection costs that can add 25 percent to the outstanding loan balance—and interest charges; struggles to rent or buy a home, buy a car, or get a job; collection agency actions, including lawsuits and garnishment of wages; and the loss of tax refunds and even Social Security benefits. Moreover, borrowers in default are no longer entitled to any deferments or forbearances and may be ineligible for any additional student aid until they have reestablished a good repayment history. 76 FR 34387. <https://ifap.ed.gov/fregisters/attachments/FR061311GEDebtMeasures.pdf>.

<sup>31</sup> U.S. Department of Education. “Understanding Delinquency and Default.” <https://studentaid.ed.gov/sa/repay-loans/default>. Accessed August 29, 2018.

<sup>32</sup> Silver-Greenberg, Jessica, Stacy Cowley, and Natalie Kitroeff. November 18, 2017. “When Unpaid Student Loan Bills Mean You Can No Longer Work.” *The New York Times*. <https://nyti.ms/2BZTwxn>.

<sup>33</sup> Kantrowitz, Mark. May 28, 2015. “The Horrors of Defaulting on Education Debt. The harsh reality of defaulting on student loans.” <http://bit.ly/2LDf3M0>.

<sup>34</sup> Mitchell, Josh. December 13, 2017. “Nearly 5 Million Americans in Default on Student Loans.” *Wall Street Journal*. <https://on.wsj.com/2oiNOgm>. See also, Michaels, Matthew. December 14, 2017. “More people than ever are defaulting on student loans — and it could put the US economy at risk.” *Business Insider*. <https://read.bi/2wtcfw5>.

Active duty service members and civil servants in the field of national security will be disproportionately harmed by a default requirement. For active duty service members who are using Department of Defense educational benefits or the GI Bill, defaulting could result in the loss of their security clearance and discharge from the military.<sup>35</sup> Similarly, civil servants can lose their clearances because of delinquent or defaulted student loan debt.<sup>36</sup>

Alternative A would force many parents to default as well. The Department's definition of "borrower" in proposed §685.206(d)(1) includes Parent PLUS loans. Therefore, under Alternative A, both parents and their children would be forced to default on their respective loans for the same harm. This impact would fall disproportionately on families of color.<sup>37</sup>

Ironically, the Department's Regulatory Impact Analysis reveals that a default requirement barely changes budget estimates for borrower defense. The Department's main estimate (based on Alternative A) produces savings of \$10.5 billion over 10 years (p. 37300), while including affirmative claims saves \$9.5 billion. Therefore, the estimated cost of accepting affirmative claims, in addition to defensive ones, is only about \$96 million a year. This figure is tiny in comparison to the \$154 billion in total federal student aid that was disbursed in 2016-17 alone.<sup>38</sup>

Requiring borrowers to default on their loans to file claims could increase costs to taxpayers. The Regulatory Impact Analysis includes a scenario in which defensive applications may increase by 15 percent due to strategic defaults or other conditions. It is not clear if these budget figures include the additional costs of contracting with a private collection agency. 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.<sup>39</sup>

Alternative A has particularly pernicious impacts on consolidation loans. We commend the proposal for allowing borrower defense claims for loans that were repaid by a Direct Consolidation Loan disbursed on or after July 1, 2019. Borrowers with FFEL loans will only be able to apply for borrower defense through consolidation. However, FFEL borrowers that have defaulted on their loans already need to rehabilitate those loans in order to consolidate.<sup>40</sup> Therefore, the Department would require a defaulted FFEL borrower to rehabilitate their loans and default a second time before becoming eligible for borrower defense relief.

Alternative A would punish students who were cheated by their schools. This is particularly true in straightforward instances such as misrepresentations dealing with tuition and financial aid as described

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<sup>35</sup> Veterans Education Success. Press release. July 26, 2018. "DeVos's Proposed Borrower Defense Rule Rewrites Epitaph For Predatory Schools Like Corinthian and ITT." <http://bit.ly/2wshrAd>.

<sup>36</sup> For example, see "Student Loans and Your Security Clearance." <http://bit.ly/2NvXT4E>. Accessed August 29, 2018.

<sup>37</sup> Fishman, Rachel. New America. May 15, 2018. "The Wealth Gap PLUS Debt: How Federal Loans Exacerbate Inequality for Black Families." <http://bit.ly/2C6Pm6K>.

<sup>38</sup> College Board. October 25, 2017. "Trends in Student Aid 2017." Table 1. <http://bit.ly/2NBZBBj>.

<sup>39</sup> Campbell, Colleen. Center for American Progress. January 24, 2018. "Getting Private Collection Agencies Out of Federal Student Loans." <https://ampr.gs/2LFOZzX>.

<sup>40</sup> For more information, see U.S. Department of Education. "Getting Out of Default." <https://studentaid.ed.gov/sa/repay-loans/default/get-out>. Accessed August 29, 2018.

in proposed §685.206(d)(5)(iv)(G) and (H).<sup>41</sup> Just as a credit card company cannot force you to miss payments and destroy your credit score in order to dispute a charge, the federal government here should not require so draconian a step for legitimate grievances.

***b. Alternative B should use a preponderance of the evidence standard.***

Alternative B for Paragraph (d)(2) allows for both defensive and affirmative claims. Though we believe the Department does have the authority to allow for both defensive and affirmative claims and should establish both in its final rule, we believe that the requirements the Department is proposing to put on borrowers for both affirmative and defensive claims are far too onerous and unnecessary.

The Department seeks comment on whether claims under Alternative B “should have to be supported by clear and convincing evidence, rather than preponderance of the evidence” (p. 37252). The Department argues that “such a standard might be appropriate, as it is the standard used in most states for adjudicating fraud litigation and could deter some frivolous affirmative claims” (p. 37252). However, the Department neglects to provide justification or explanation for this potential change of position from the 2016 final borrower defense rule, which stated:

“We do not agree that the “preponderance of the evidence” standard will result in greater risk to institutions. We believe this evidentiary standard is appropriate as it is the typical standard in most civil proceedings. Additionally, the Department uses a preponderance of the evidence standard in other proceedings regarding borrower debt issues. See 34 CFR 34.14(b), (c) (administrative wage garnishment); 34 CFR 31.7(e) (federal salary offset). We believe that this evidentiary standard 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.”<sup>42</sup>

The Department’s position may be based on a misunderstanding that borrower defense claims are based in fraud, where the clear and convincing standard is more common.<sup>43</sup> However, this position severely narrows the parameters of the borrower defense standard both in past regulations and law. A school does not need to be found guilty of fraud to have committed an act that gives rise to a borrower defense. Consequently, the standard for fraud generally is not applicable to the regulation as a whole.

A higher evidentiary standard would not deter frivolous claims. While there is no evidence that borrowers with weak claims are applying simply because they have nothing to lose, these borrowers equally have nothing to lose under either standard.

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<sup>41</sup> “A representation regarding the amount of tuition and fees that the student would be charged for the program that is materially different in amount, method, or timing of payment from the actual tuition and fees charged to the student.” §685.206(d)(5)(iv)(H). “A representation regarding the availability, amount, or nature of any financial assistance available to students from the institution or any other entity to pay the costs of attendance at the institution that the school does not fulfill following the enrollment of the borrower.” §685.206(d)(5)(iv)(G).

<sup>42</sup> 81 FR 79536.

<sup>43</sup> See Restatement (Third) of Torts: Liab. for Econ. Harm section 9 TD No 2 (2014) (“The elements of a tort claim ordinarily must be proven by a preponderance of the evidence, but most courts have required clear and convincing evidence to establish some or all of the elements of fraud.”) (p. 37252).

The Department also requests comments on a possible approach in which, should both types of claims be allowed (affirmative and defensive), there would be two different evidentiary standards: preponderance of the evidence for defensive claims and clear and convincing evidence for affirmative claims (p. 37252). Adjudicating claims under two different standards would be confusing for borrowers, administratively burdensome for the Department, and inequitable among borrowers. For example, between two borrowers who experienced the same illegal conduct, one might receive relief and the other not. For these reasons, we recommend that the Department use the preponderance of the evidence standard for all claims.

## **8. Comment request for evidence collection**

The Department notes that it “also welcomes comments regarding the process the Department might use to collect evidence from borrowers and schools, to evaluate the merits of a borrower’s defense to repayment claim, and to render decisions on claims that are submitted affirmatively” (p. 37253). This request does not acknowledge or explain the process that the Department has been using to date to collect evidence in its current adjudication of claims, nor the definitive policies the Department has put in place previously through rulemaking and guidance. Without describing its current process or providing a concrete proposal, it is impossible to provide recommendations on how the Department’s process should be improved.

At a minimum, there must be a formal mechanism for state attorneys general, other law enforcement agencies, regulatory entities, and nonprofit legal aid organizations that provide legal representation to students to petition the Department for relief on behalf of a group of borrowers, and receive written responses from the Department. These entities often discover potential claims early, which would provide more borrowers with timely access to relief.

### **B. The Department should establish an expeditious, independent, and fair process for resolving claims.**

#### **1. The Department should retain the 2016 regulatory language regarding group processes 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 for the Department to group claims for determinations of relief.

The Department justifies the need to deter frivolous claims as a way to reduce administrative burdens. Since 2015, the Department has received more than 135,000 borrower defense claims (p. 37243) and, as of May 2018, still had a backlog of more than 99,000.<sup>44</sup> The Federal Student Aid office has lost more than 100 employees since the start of the Trump Administration.<sup>45</sup>

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<sup>44</sup> Sen. Dick Durbin. Press release. July 24, 2018. “Durbin Releases Shocking New Data on Department of Education's Borrower Defense Application Backlog.” <http://bit.ly/2MAVr08>.

<sup>45</sup> Kreighbaum, Andrew. June 13, 2018. “Under DeVos, a Smaller Department of Education.” *Inside Higher Ed*. <http://bit.ly/2LCqPGg>.

Allowing the Department flexibility to process claims, especially in instances where misrepresentations may be systemic and widespread, is an effective route to reduce its administrative burden without compromising the accuracy and fairness of its decisions. The Department simply does not have the resources to provide the level of individual scrutiny that this proposal would require.<sup>46</sup> We urge the Department to reinstate the 2016 language regarding group discharges.

## **2. The Department should ensure due process for borrowers.**

Under the proposed regulation, after a borrower submits his borrower defense application to the Department, the Department forwards the borrower's information along with any relevant Departmental internal records to the school for a response. Then, the Department adjudicates the claim according to the information and evidence provided by both the borrower and the school. Throughout this process, borrowers are at a significant disadvantage: the proposed rule neither provides borrowers an opportunity to respond to the school's submission nor an opportunity to review and respond to the Department's internal evidence used on their claim.

Borrowers should be entitled to equal opportunity and ability to respond to any information that will be used to adjudicate their claim. The Department should specify in the final rule that borrowers will have just as much access and opportunity to respond as schools.

## **3. The Department should reject arbitrary windows of time in which it will consider claims.**

The Department notes in its preamble:

“[W]hile there is no statute of limitations on borrowers' ability to submit a defense to repayment application in response to collection activities, borrowers will have to inform the Department of their intent to raise a defense to repayment within the timeframe specified for requesting a hearing in their notice of collection activity to guarantee their filing will be reviewed. The timeframes vary from 30 days for consumer reporting and wage garnishment to 65 days for federal salary offset and tax refund offset (p. 37299).”

Under proposed §685.206(d)(5)(ii), a defense to repayment must be submitted within three years from the date the student is no longer enrolled at the institution.

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<sup>46</sup> The Treasury and IRS acknowledged in a similar context that the administrative burden of individual adjudications was not justified by the resulting savings to taxpayers. We urge the Department to heed the analysis and decision making of the Treasury and IRS on this issue. See recent Treasury document re tax treatment of discharged debt for Corinthian students: "The Treasury Department and the IRS believe that most borrowers whose Corinthian student loans are discharged under the Defense to Repayment discharge process would be able to exclude from gross income all or substantially all of the discharged amounts based on fraudulent misrepresentations made by the colleges to the students, the insolvency exclusion, or another tax law authority. However, determining whether one or more of these exceptions is available to each affected borrower would require a fact intensive analysis of the particular borrower's situation to determine the extent to which the discharged amount is eligible for exclusion under each of the potentially available exceptions. The Treasury Department and the IRS are concerned that such an analysis would impose a compliance burden on taxpayers, as well as an administrative burden on the IRS, that is excessive in relation to the amount of taxable income that would result. Accordingly, the IRS will not assert that a taxpayer within the scope of this revenue procedure recognizes gross income as a result of the Defense to Repayment discharge process." <https://www.irs.gov/pub/irs-drop/rp-15-57.pdf>.

The Department should not impose arbitrary windows of time in which it will consider borrower defense claims, as they do not exist for other loan discharges. For example, there are no time limits on borrowers' ability to receive false certification discharges. Whether a school commits fraud in the form of a substantial misrepresentation or falsely certifies that a student has a high school diploma, the Department should ensure that students receive full loan relief. The time limits will exclude both meritorious and frivolous claims alike. Finally, the proposed time limits begin at ambiguous and varying times depending on the type of school misconduct, creating confusion.

#### **4. The Department should ensure the independence of decision makers involved in borrower relief determinations.**

Unlike the 2016 final rule, the Department makes no mention of who within the agency will be adjudicating borrower defense claims.

To avoid real or perceived conflicts of interest, Department staff in offices involved in making policy, budgeting, or assessing school compliance with Title IV program policies and regulations should not be involved in adjudicating borrower defense claims. In addition, the Department should delegate some functions to the Office of Hearings and Appeals, particularly the function of any hearing official (should one be used), because it is charged with providing "an independent forum for the fair, impartial, equitable, and timely resolution of disputes involving the U.S. Department of Education and recipients of Federal Education Funds."<sup>47</sup>

Even honest and hardworking staff may have a potential conflict of interest that could influence their handling of borrower defense claims. For example, Department employees in an office charged with assessing school compliance with Title IV policies may be reluctant to approve borrower defense claims against a school if they or their colleagues did not catch the school's wrongdoing in a program review. Staff involved in policy or budgeting may consciously or unconsciously make decisions to minimize the budgetary impact, produce what they believe to be the optimal number of approved claims, or match their projections.

These safeguards are paramount in cases when the school can oppose borrowers seeking relief by offering evidence and argument during the proposed process. While the process of recouping funds from schools has been decoupled from reviewing individual borrower defense claims, the process by which the school attempts to refute students' claims has not. For the reasons detailed above, it is particularly important that staff involved in these cases are neutral and impartial.

#### **C. The Department should presume that students are entitled to full relief.**

Under the proposed regulations, the Department states that "as noted in the preamble to the 2016 final regulations, the Department has a responsibility to protect the interests of federal taxpayers as well as borrowers. As a result, we continue to believe that establishing a legal presumption of full relief would not be appropriate" (p. 37263).

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<sup>47</sup> U.S. Department of Education, Office of Hearings and Appeals. <http://oha.ed.gov/index.html>. Accessed August 29, 2018.

We remind the Department that closed school discharges provide full relief regardless of whether a student received some benefit from the school before it closed. Full relief should be provided in the vast majority of borrower defense cases as well. Therefore, we strongly urge the Department to presume full relief for all approved borrower defense claims, rather than placing the burden on borrowers to justify full relief.

The Department “invites comments on this proposal and on methods for calculating partial relief in connection with defenses to repayment” (p. 37263). Borrowers should be entitled to a presumption of full relief. In certain rare instances, partial relief could be provided if the Secretary specifies the reasons for doing so. For example, in cases where only the cost but not the quality of the education provided is at issue, partial relief may be justified. Partial relief may also be justified in certain circumstances involving breaches of contract, should the Department restore eligibility for these claims. In such cases, the Department should provide its reasoning and documentation for providing partial relief. However, under no circumstances should relief be reduced based on potential fiscal impact. Taxpayers can and should be protected by holding institutions accountable, not by denying loan relief to harmed students.

#### **D. Restore the 2016 language allowing the Department to recover from schools on current borrower defense claims.**

The 1995 borrower defense regulation (§685.206(c)(3)) tied the Secretary’s ability to recover from schools for borrower defense claims to a three-year record retention period. Under that regulation, the Secretary could only initiate an action within three years after the last award year in which the student attended the school. The Department notes here that it will “maintain this time limit for recovery actions on approved borrower defense to repayment claims for loans first disbursed before July 1, 2019” (p. 37264). However, it declines to carry forward the provisions in the 2016 regulation extending the recovery period in cases where the Department has notified the school of pending claims against it or there is a longer applicable state statute of limitation.

This new proposal runs contrary to the Department's stated goal of protecting taxpayers. Its dangers are illustrated by the more than 99,000 pending claims,<sup>48</sup> pushing more eventual borrower defense claim approvals outside of the applicable recovery window. The Department should, at a minimum, include its prior proposal to extend the recovery period for existing loan volume when it has notified the institutions of pending claims, and it should begin those notifications in earnest to protect taxpayers from its own foot-dragging.

For prospective borrower defense claims, on new loans after July 1, 2019, the Department proposes to establish a five-year recovery period against institutions from when the claim is adjudicated. This is a strong proposal that will protect taxpayers. However, its strong provision for future claims makes it all the more difficult to rationalize the Department’s weak proposal for existing loan volume. In a proposal that puts so many barriers in place for borrowers in the name of protecting taxpayers, the least the Department can do is restore its 2016 provisions on recovery from schools for the same reason.

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<sup>48</sup> Sen. Dick Durbin. Press release. July 24, 2018. “Durbin Releases Shocking New Data on Department of Education's Borrower Defense Application Backlog.” <http://bit.ly/2MAVr08>.

### **III. Pre-dispute arbitration agreements and internal dispute process (§668.41 and §685.304)**

#### **A. The Department's emphasis on students receiving direct payments from schools for borrower defense claims undermines accountability for cohort default rates.**

In §668.202(c)(iii), the Department's existing regulations specify that a borrower will be considered to be in default if a school or any other affiliated entity makes "a payment to prevent a borrower's default on a loan that is used to include the borrower in that cohort." In this NPRM, the Department states:

"The Department 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" (p. 37258, emphasis added).

By creating a borrower defense environment that heavily emphasizes borrowers negotiating borrower defense payments with their schools privately within the three-year cohort default window, the Department is purposely blurring the lines of how §668.202 will be implemented and enforced and creating legal dilemmas for schools. If the Department leaves §668.202 as is, schools have a strong disincentive not to settle with students. If the Department modifies §668.202 to adjust for its newly proposed borrower defense environment, the Department will jeopardize the validity of the sole statutory accountability metric (the cohort default rate) that Congress has enacted through the Higher Education Act.

We urge the Department to remove the emphasis on private dispute resolution from this regulation by restoring the 2016 pre-dispute arbitration provision and developing a strong borrower defense regulation where the rules of the road are clear to borrowers and schools.

#### **B. The Department should restore the 2016 barring of funding to schools that choose to use pre-dispute arbitration agreements.**

In amendments to §685.300 made in the 2016 rulemaking, the Department required that schools participating in the Direct Loan Program agree not to (1) rely on or enter into forced arbitration agreements with students for the resolution of borrower-defense-related claims (§685.300(f)), or (2) rely on or enter into class-action waiver agreements that prohibit students from banding together with others to bring borrower-defense-related claims (§685.300(e)).<sup>49</sup>

The 2016 rule ensured that students could hold colleges accountable for wrongdoing in court rather than being forced to pursue claims in arbitration proceedings. In addition to denying students their right to a trial in a neutral, open court, the secrecy of the arbitration process insulates the Department from wrongdoing by predatory, for-profit colleges. It also deprives prospective students from having important information about a school's wrongdoing as they make one of the most important decisions about their education. Moreover, the secrecy that is inherent in arbitration proceedings would further

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<sup>49</sup> 81 FR 76087-76088.

compound the challenges facing borrowers seeking to demonstrate that the school intended to deceive them, as required by the proposal.

The Department instead 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, including putting the disclosure on the institution's website, and including information about internal dispute and arbitration processes in the school's entrance counseling.

The Department's proposal to require that colleges employing pre-dispute arbitration clauses and class-action waivers disclose these terms to students will address none of the challenges posed by these agreements. For instance, more notice does not address the fact that arbitration does not provide meaningful relief to students. Further, additional notice will not change the fact that many students who are aware of arbitration agreements will not understand their implications and will in any event feel compelled to sign them. There is no reason to believe these notices will inform students' enrollment decisions, since the web site disclosure may not even reach prospective students and entrance counseling generally occurs after a student has already enrolled.

Furthermore, the Department provided a strong fiscal and legal justification for its arbitration provision in 2016 that this Department does not revisit. Section 454(a)(6) of the HEA (20 U.S.C. 1087d(a)(6)) authorizes the Department to include in its program participation agreements with schools "provisions that the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of" the Direct Loan Program. In 2016, the Department determined that its position on pre-dispute arbitration agreements was justified under this provision. The Department noted that:

"A major objective of the program is protecting the taxpayer investment in Direct Loans. That objective includes preventing the institutions empowered to arrange Direct Loans for their students from insulating themselves from direct and effective accountability for their misconduct, from deterring publicity that would prompt government oversight agencies to react, and from shifting the risk of loss for that misconduct to the taxpayer. Predispute arbitration agreements, like class action waivers, do each of these, and thus jeopardize the taxpayer investment in Direct Loans."<sup>50</sup>

It stated further that it "expect[ed] that the potential exposure to class actions will motivate institutions to provide value and treat their student consumers fairly in order to reduce the likelihood of suits in the first place."<sup>51</sup> Here, the Department neither acknowledges nor analyzes the fiscal benefits of such deterrence for the agency, taxpayers, or students. It also does not explain why its earlier conclusions regarding deterrence were incorrect.

This Department also does not address the impact on the Direct Loan program of removing this provision. Instead, this Department cites *Epic Systems Corp. v. Lewis* and *AT&T Mobility LLC v. Concepcion* (p. 37265). However, *Epic Systems Corp.* concerned whether an employer's use of a pre-

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<sup>50</sup> 81 FR 76022.

<sup>51</sup> 81 FR 76026.

dispute arbitration agreement with employees violated a provision of the National Labor Relations Act; it did not address the authority of the Department, or any agency for that matter, to condition federal funding on a recipient's agreement not to use forced arbitration. Similarly, negotiators in the 2016 negotiated rulemaking on borrower defense raised arguments regarding *Concepcion*,<sup>52</sup> to which the Department responded in its final regulation that it:

“[D]oes not have the authority, and does not propose, to displace or diminish the effect of the FAA. These regulations do not invalidate any arbitration agreement, whether already in existence or obtained in the future. Moreover, the Department does not have the authority to invalidate any arbitration agreement, did not propose to do, and does not in this final rule attempt to do so.”<sup>53</sup>

Therefore this Department’s arguments using *Epic Systems Corp.* and *Concepcion* should be disregarded. Neither case addresses an agency’s adoption of a spending restriction pursuant to its broad regulatory authority. Its reliance on a recent congressional resolution regarding a CFPB rule addressing forced arbitration (p. 37265) should be rejected as well on the same basis.

For these reasons, we recommend that the final rule retain the 2016 provision requiring colleges seeking federal aid eligibility to avoid using or enforcing forced arbitration agreements, class-action waivers, and mandatory internal dispute resolution provisions.

### **C. The Department should restore the 2016 rule’s provision on transparency of arbitral and judicial documents.**

We also urge the Department to maintain requirements for schools to submit to it arbitral and judicial documents regarding borrower-defense-related claims. There is no reasonable justification for refusing to receive potential evidence of a school’s fraud or other wrongdoing at a time when the Department could use that information to prevent widespread harm to students.

## **IV. Closed school discharges (§674.33, §682.402, and §685.214)**

### **A. The Department should retain the existing list of exceptional circumstances under which it can expand the eligibility window.**

Current 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 revised the list of exceptional circumstances in 2013 to specify a number of events that could qualify: the school’s loss of accreditation; the school’s discontinuation of the majority of its academic programs; action by the state to revoke the school’s license to operate or award academic credentials in the state; or a finding by a state or federal government agency that the school violated state or federal law. Importantly, the Department noted that the Department and the non-federal

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<sup>52</sup> 81 FR 39385.

<sup>53</sup> 81 FR 76023.

negotiators reached consensus on the closed school discharge provisions, including this exceptional circumstances provision.<sup>54</sup>

The Department now proposes to revise the list of exceptional circumstances to eliminate a number of the important categories that consensus had been reached upon five years ago, 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 Department provides no justification in the NPRM for removing these items. However, removing them now will reduce the likelihood that the Department exercises this provision for borrowers in the future.

The Department should restore the original list of exceptional circumstances that were agreed to by consensus, given that it provides no reasoning that the list should change, and since its proposed changes could have serious implications for borrowers.

### **B. The Department should retain automatic closed school discharges.**

We request that the Department reinstate the 2016 automatic process for closed school discharges. The Department notes that under longstanding regulations, “the Department may grant a closed school discharge without an application if the Secretary determines, based on information in the Secretary’s possession that the borrower qualifies for the discharge” (p. 37267). The Secretary notes, and we agree, that the Secretary “already has the authority to grant a discharge without an application in appropriate cases at her discretion” (p. 37267). The issue here has never been one of authority, it has been one of use.

The Department noted as its reasoning in the 2016 NPRM for automatic closed school discharge was that:

“Many borrowers eligible for a closed school discharge do not apply. The Department is concerned that borrowers are unaware of their possible eligibility for a closed school discharge because of insufficient outreach and information about available relief. In some instances, the closing school might inform borrowers of the option to complete their program through a teachout, but fail to advise them of the option for a closed school discharge.”<sup>55</sup>

The 2016 rule provided a clear policy by which the Secretary could use its authority to grant automatic closed school discharges. The rule was developed based on the Department’s understanding of eligible borrowers’ lack of utilization of closed school discharges. We urge the Department to return to this policy.

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<sup>54</sup> 78 FR 45628. <https://www.gpo.gov/fdsys/pkg/FR-2013-07-29/pdf/2013-15812.pdf>.

<sup>55</sup> 81 FR 39369.

**C. The Department should continue to offer students the choice of starting fresh without student loans, instead of forcing them to complete their programs at a college chosen by their failing school.**

Under current closed school discharge regulations, a student may choose to either accept a “teach-out” plan or have their loans discharged. Under the Department’s new proposal, if a school offers a “teach-out” plan and students do not accept it, they would be ineligible for a closed school discharge.

This proposal runs contrary to the legislative intent of the closed school discharge provision. 20 U.S.C. 1087(c) states that if a student borrower “is unable to complete the program *in which such student is enrolled* due to the closure of the institution” (emphasis added) then the student borrower is eligible for a closed school discharge. The language as written strongly implies that the program needs to be the same exact program that the student was in before the school closed. While providing the option of a teach-out does not conflict with the intent of the statute, requiring a student to accept a teach-out that is not the exact same program would conflict with the statute.

In other contexts, the Department recognizes the care with which students choose their programs of study in the first place. In the context of financial harm, the Department writes, “borrowers consider a variety of factors in choosing a school or program, including not just cost, but also other attributes of the school, such as its facilities, convenience, and the opportunity for the student to enroll in his or her program of choice (which may be unavailable to the student at other institutions)” (p. 37259). The variety of factors that affect student choice are no less compelling in the context of a teach-out than they are at initial enrollment. Indeed, they are even more compelling. Students should not be forced to continue their educations at facilities or in a format that does not suit their needs or interests.

In that same section, the Department notes, “the borrower has the opportunity to leave an institution should it not provide educational opportunities or experiences commensurate with the borrower’s expectations” (p. 37259). Again, the same principle applies to teach-outs. The Department itself noted in its 2016 NPRM for the borrower defense rule that, “Though teach-outs can be beneficial to borrowers in a closed school situation, a closed school discharge may be a better option for some students.”<sup>56</sup> As such, we urge the Department to heed its own current and previous reasoning and remove this provision from the final rule.

**D. The Department should extend the closed school discharge window to 180 days.**

The Department proposes to extend the window for a borrower to qualify for a closed school discharge based on withdrawal from a closed school without completion of a program from 120 days before the school closed to 180 days. As the Department notes, this timeline accommodates students who withdrew one semester before a precipitous closure including the potential for summer breaks. We recommend that the Department retain it. However, this addition is no substitute for all the closed school discharge policies this NPRM is taking away from borrowers.

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<sup>56</sup> 81 FR 39369.

## V. False certification discharges (§685.215)

### **A. The Department should remove the new references to a “complete” application.**

The Department proposes to add the word “complete” to its references to applications in §685.215(d)(2) and (3).<sup>57</sup> We urge the Department to remove this word in both instances. It only serves to reject good-faith effort applications from borrowers who may unknowingly miss information that may be needed. The forms are currently dense and complicated, and as a result borrowers often inadvertently miss answering questions or make technical errors. Therefore, the Department should delete the word “completed” to at least allow for the servicer or the Department to continue to suspend collection while notifying the borrower of the incomplete application and allowing her time to re-submit a complete application.

### **B. The Department should retain language on automatic false certification discharge for Satisfactory Academic Progress (SAP) from the 2016 rule.**

The 2016 borrower defense rule added language to the existing false certification regulation allowing the Secretary to grant a false certification discharge without an application, and specified that the Secretary should do so in instances of school falsification of satisfactory academic progress (SAP). In this NPRM, the Department states that it intends to remove this addition 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” (p. 37270).

However, program reviews do not and cannot address the purpose of the 2016 rule on this matter: to permit loan discharges for the affected borrowers when the Department uncovers 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, such procedures often leave borrowers with little to no relief. The 2016 rule sought to provide clarity for the Secretary and the public as to when the false certification regulatory provision regarding automatic discharges would occur.

We believe the SAP example is one of many such instances in which the Department has information in its possession that borrowers do not have access to, which could be used to enable them to seek relief. We urge the Department to reinstate the 2016 language on this provision.

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<sup>57</sup> “(2) If the borrower fails to submit a *completed application* within 60 days of the date the Secretary suspended collection efforts, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended. The Secretary may capitalize any interest accrued and not paid during that period. (3) If the borrower submits a *completed application* the Secretary determines whether to grant a request for discharge under this section by reviewing the application in light of information available from the Secretary’s records and from other sources, including, but not limited to, the school, guaranty agencies, State authorities, and relevant accrediting associations.” 83 FR 37329.

### **C. The Department should retain 2016 language on borrower qualification for discharge.**

In the existing 2016 regulation, there is much more detailed language in “borrower qualification for discharge.”<sup>58</sup> The rule requires the Secretary to provide interim information regarding the basis of its decision to the borrower:

“[T]he Secretary issues a decision that explains the reasons for any adverse determination on the application, describes the evidence on which the decision was made, and provides 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.”<sup>59</sup>

The Department has removed this language without any explanation. We believe that borrowers should be able to receive a copy of the evidence the Department uses to make its false certification determinations, and request that the Department reinstate this 2016 language.

## **VI. Financial responsibility (§668.171 General)**

We urge the Department to strengthen the financial responsibility portion of the NPRM by reinstating the full list of triggers provided in the 2016 final rule. As the Department recognizes, the goals of the borrower defense regulation include deterring wrongdoing by colleges and, when it does occur, protecting students and taxpayers from the financial consequences. However, the Department’s own estimates show that it will collect from colleges only about one percent of the loan volume associated with illegal conduct.<sup>60</sup> A strong borrower defense rule must include provisions that ensure the Department is protecting students and taxpayers from potential school liabilities and closures.

## **VII. Regulatory impact analysis**

### **A. Discussion of the impact of proposed rule**

The Department asserts that its proposed regulations are designed to provide a “balanced, meaningful process,” which ensures that “borrower defense to repayment discharges are handled swiftly, carefully, and fairly” (p. 37242), but its own projections show that the proposed rule would provide very little loan relief to borrowers exposed to misrepresentation by their colleges and recover only a small fraction of those loan dollars from colleges.<sup>61</sup>

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<sup>58</sup> §685.215(c)(3).

<sup>59</sup> 81 FR 76082.

<sup>60</sup> Calculations by TICAS using data from the U.S. Department of Education, 83 FR 37298. For more information, see page 29.

<sup>61</sup> Calculations by TICAS using data from the U.S. Department of Education, Notice of Proposed Rulemaking, Docket ED-2018-OPE-0027, Table 5, as published in the Federal Register on July 31, 2018. Projections apply to the first year of implementation (2019 loan cohort). Calculations assume that “borrower percent” projections in the NPRM represent the share of the loan volume of potential borrower defense claims that is expected to lead to successful discharges, and that borrower percent does not include the Department’s proposed limitation to defensive claims. The NPRM estimates of potential borrower defense claims refer to loans made due to an illegal misrepresentation (i.e., school conduct that meets the proposed Federal standard for misrepresentation).

Under the Department's primary proposal to only allow defaulted borrowers in certain collections proceedings to apply for borrower defense to repayment ("defensive claims"), hardly any of the loan dollars (less than 2.0 percent) held by borrowers whose colleges committed misrepresentation would be discharged. Additionally, the Department projects that, under the proposed rule's Alternative A, colleges will be expected to pay back less than 1.2 percent of the student loan volume made due to an illegal misrepresentation. Compared to what the 2016 rule would have provided, the proposed rule would provide less than 5 percent of the relief to borrowers whose colleges committed misconduct that meets the standard for borrower defense.

Even if the Department allowed "affirmative claims" from borrowers not in default, the Department's projections show very few of the loan dollars (less than 6.0 percent) held by borrowers whose colleges committed misrepresentation would be discharged under the proposed borrower defense rule. The Department projects that, under the proposed rule's Alternative B, colleges will be expected to pay back less than 3.0 percent of the student loan volume made due to an illegal misrepresentation. The proposed rule's Alternative B would provide less than 13 percent of the relief to borrowers whose colleges committed misconduct that meets the standard for borrower defense, compared to what the 2016 rule would have provided.

In order to evaluate the impact of the proposed borrower defense regulations, additional calculations had to be made to the figures presented in Table 5, using the assumptions listed below. The Department does not provide these estimates in a transparent way, and does not lay out its assumptions clearly or grounded in evidence. Additionally, it is also not possible to assess the overall impact of the proposed rule across all institutions; as discussed below, our calculations instead identify the upper limit of each projection. In its final rule, if moving forward with the proposed defensive claims requirement, the Department should provide overall projections across all institutions, and provide comprehensive estimates of the share of loan volume made due to misrepresentation that would ultimately be discharged by the agency - including the defensive claims requirement.

The above calculations assume that "borrower percent" is the share of the loan volume of potential borrower defense claims that is expected to lead to successful discharges, and does not include the Department's proposal in Alternative A that only defaulted borrowers in certain collections proceedings can apply for borrower defense. Calculations also assume that the "defensive applications percent" is the share of loan dollars held by borrowers exposed to misrepresentation that are expected to end up in default at some point; the "recovery percent" is the share of the loan volume of approved borrower defense claims that the Department expects to recover from colleges; and the "conduct percent" is the share of loan volume exposed to school misconduct that meets the borrower defense standard. The 2019 President's Budget baseline assumes that the 2016 borrower defense regulations would go into effect in 2019.

Given the Department's statement that it provided a separate assumption for the defensive claims provision and its proposed calculations for net budget impact, our calculations assume that borrower percent does not incorporate the "defensive applications percent." The Department writes, "A separate assumption for the defensive claims provision was explicitly included so it could be varied in sensitivity runs or in response to comments" (p. 37299). The net budget impact formula for gross applications includes the borrower percent and defensive applications percent separately (p. 37297), which would not make sense if the borrower percent incorporated the defensive claims requirement.

Due to limitations in the data provided in the Department’s net budget impact analysis, our calculations identify the upper limit for each projection. In other words, the actual projections for all colleges may be lower. Because the borrower percent, defensive applications percent, and recovery percent projections are provided separately for different college types, calculations were done separately for each college type. Given the range for each projection by college type, the upper limit was identified; mathematically, the overall projection across all colleges must be lower than those upper limits. The Department did not provide projections for all colleges or projected loan volume for each college type, so it was not possible to calculate overall figures for all colleges combined.

## **B. Flaws with the Department’s assumptions**

The Department has failed to fully explain or justify several of its assumptions, making it difficult or even impossible for the public to grasp the real impact of its proposal or provide informed comments about it. There are also inconsistencies within the Department’s assumptions that raise questions about its analysis.

### **1. Costs, benefits, and transfers**

The Department asserts, “Borrowers are also more likely to have their defense to repayment applications processed and decided more quickly if the Department has a smaller volume of unjustified or ineligible claims” (p. 37288). However, the Department does not provide a justification for why it expects to have a smaller volume of “unjustified or ineligible claims.” While the Department will likely receive fewer claims overall under Alternative A, the requirement that borrowers default and enter collections proceedings does not distinguish between valid and invalid claims; the Department is just as likely to have to investigate claims that prove not to meet the standard or that lack sufficient evidence as if it accepted affirmative claims. In fact, the Department’s own projections expect almost the same amount (95 percent) of loan dollars to meet the borrower defense standard under the proposed rule as under the 2016 rule.<sup>62</sup> As explained in the “Borrower responsibilities and defenses” section of these comments, the Department fails to justify its proposed limits to applications, which are in no way targeted to reduce unjustified or ineligible claims.

Regarding its proposed changes to closed school discharges, the Department discusses benefits of teach-out programs but does not provide evidence that they would have better served students. For example, the Department asserts:

“In the case of two large, precipitous closures in 2015 and 2016, it is possible that enabling those institutions to teach-out their current students—including by arranging teach-outs plans delivered by other institutions or under the oversight of a qualified third party—would have benefited students and saved hundreds of millions of dollars of taxpayer funds (p. 37289).”

However, after the Corinthian Colleges closure in 2015, many of the schools listed as transfer options were under investigation for fraud or being sued by a state or federal agency for fraud. A coalition of 35 groups sent the Secretary of Education a letter urging the Department to remove these schools from its

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<sup>62</sup> “The conduct percent is assumed to be 95 percent of the PB2019 baseline level.” 83 FR 37299.

lists.<sup>63</sup> Additionally, the teach-out agreements offered by Zenith Education Group, which purchased and operated certain campuses that were formerly owned by Corinthian Colleges, were criticized by Zenith's own independent monitor, Clark Ervin:

“Finally, given the foregoing concerns and those expressed in previous reports, the Monitor believes that it would be in the best interest of students if there were some independent review of the ‘teachout’ of the schools being closed. Given the inevitable cost pressures and the fact that these schools will be ceasing operations in the not too distant future, there will doubtless be a temptation to cut corners as the closing dates near.”<sup>64</sup>

The Department does not address concerns about low-quality teach-outs, instead merely asserting that they “better serve students and reduce the risk to taxpayers, and therefore should be incentivized” (p. 37290). This assertion is used to justify the Department’s proposed changes to closed school discharges, but presented without any evidence. Under current rules, students may still choose available teach-outs if they deem it in their best interest, and there is no reason to deny them that choice.

## 2. Net budget impact & accounting statement

### ***a. The Department assumes an unsupported and unreasonable deterrent effect from its proposed borrower defense rule.***

The net budget impact analysis includes projections for “conduct percent,” which is the “share of loan volume estimated to be affected by institutional behavior resulting in a defense to repayment application” (p. 37297). The Department projects a decline in conduct percent between the 2019 and 2028 loan cohorts, assuming a deterrent effect:

“We believe that institutions will not want to suffer the scrutiny that a significant number of borrower defense to repayment applications would invite. As expected, when regulatory provisions target specific institutional action or performance, institutional behavior changes over several years, resulting in removal of the worst performers and adaptation of other institutions’ behavior so that a lower steady state is established” (p. 37299).

The Department assumes the same deterrent effect for the proposed rule as for the 2016 rule - that between 2019 and 2028, the share of loan volume affected by institutional misconduct that meets the borrower defense standard will decrease by 37 percent to 39 percent, depending on college type.<sup>65</sup> However, this deterrent effect is likely overstated, given the Department’s own projections of relief under the proposed rule, key differences between the proposed rule and the 2016 rule used as a baseline, and other Department actions that could actually lead to an increase in unlawful conduct from colleges.

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<sup>63</sup> Coalition letter to Secretary of Education Arne Duncan about the closure of Corinthian Colleges. May 1, 2015. <https://bit.ly/2okCGjd>.

<sup>64</sup> Zenith Education Group. *Report of Independent Monitor, July 2017-December 2017*. <https://bit.ly/2PP8Obe>.

<sup>65</sup> Calculations by TICAS using data from Table 5, 83 FR 37298. Figures represent the change in “conduct percent” for public, private nonprofit, and for-profit colleges between cohort years 2019 and 2028, for the President’s Budget 2019 baseline and the NPRM main estimate.

As discussed above, the Department’s own projections show that the proposed rule would fail to provide any loan relief to the large majority of borrowers exposed to misrepresentation by their colleges and would recover only a small fraction of those loan dollars from colleges, even if “affirmative claims” are allowed. Compared to the 2016 rule, the proposed rule would provide less than 5 percent (if limited to defensive claims) or less than 13 percent (if affirmative claims are allowed) of the relief to borrowers whose colleges committed misconduct meeting the standard for borrower defense. Consequently, it’s not clear why the Department assumes the same deterrent effect from the proposed rule as the 2016 rule.

Furthermore, the Department does not address key substantive differences between the proposed rule and the 2016 rule which would influence the deterrent effect. Any possible scrutiny under this proposed rule would also have been in place under the 2016 final rule. Yet the 2016 rule also 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 disallowance of pre-dispute arbitration agreements and class-action waivers by colleges seeking to receive federal funds. In contrast, the proposed rule contains a much lower potential for significant institutional liabilities and many fewer financial protection triggers. Therefore, in examining the totality of possible reasons institutions would be deterred from misconduct, it’s effectively impossible to be the same under both rules.

Moreover, the Department’s other recent actions could actually lead to further increases in misconduct from colleges. Through a separate rulemaking, the Department has proposed rescinding the gainful employment rule, which enforces the Higher Education Act’s requirement that all career education programs receiving federal student aid “prepare students for gainful employment in a recognized occupation.”<sup>66</sup> The rule uses debt-to-earnings ratios to assess whether career education programs at public, nonprofit, and for-profit colleges are leaving their graduates with reasonable debt burdens. Programs that exceed allowable thresholds—those consistently leaving their graduates with more debt than they can repay—must improve or lose eligibility for federal funding. Rescinding the gainful employment rule would allow the worst-performing programs to continue enrolling students, with no incentives to improve, which would likely increase students’ exposure to colleges committing misrepresentation. Additionally, the Department has been dismantling its Student Aid Enforcement Unit, which had been investigating widespread abuses committed by for-profit colleges.<sup>67</sup> The halting of those investigations removes additional deterrents to school misconduct. As a result of these changes, poor-quality programs that misrepresent their outcomes to recruit students are more likely to flourish within the federal financial aid marketplace. The Regulatory Impact Analysis fails to address these Department actions and their impact.

***b. The Department’s assumptions around the “defensive claim” requirement are not sufficiently justified.***

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<sup>66</sup> TICAS. Press release. August 10, 2018. “Trump Administration Proposes Erasing Nearly a Decade of Progress Protecting Students Against Unaffordable Debts.” <http://bit.ly/2LCqYti>.

<sup>67</sup> Ivory, Danielle, Erica Green, and Steve Eder. May 13, 2018. “Education Department Unwinds Unit Investigating Fraud at For-Profits.” *The New York Times*. <https://nyti.ms/2wz11GS>.

The Department proposes only allowing defaulted borrowers in certain collections proceedings to apply for borrower defense to repayment. The Department appears to have used lifetime default rates to estimate the effect of this “defensive claims” proposal -- likely a dramatic overestimation of borrowers' eligibility under Alternative A, given that borrowers who default on their loans do not always enter collections proceedings immediately and may not be aware of the exceedingly short timeframe for filing borrower defense claims after they default. The Department should clarify its assumptions for this component in the final rule, including evaluating the percentage of borrowers in default who enter collections proceedings each year and estimating any potential increases in that share as borrowers may be incentivized to default in order to file a borrower defense claim.

***c. The Department’s assumptions for “conduct percent” are not sufficiently grounded in evidence.***

The Department assumes that the 2018 proposed standard covers 95 percent of the same conduct as the 2016 standard.<sup>68</sup> In other words, no more than five percent of the loan volume of possible borrower defense claims are expected to be issued under breaches of contract, final judgments, or unintentional misrepresentations. Given the substantive differences between the 2018 proposed standard and the 2016 standard, the Department should justify its assumption that the share of loan volume exposed to school misconduct meeting the borrower defense standard would be so similar between both rules.

***d. The Department’s use of the 2016 final regulation as the baseline for its Regulatory Impact Analysis is inconsistent with its consideration of the 1995 borrower defense regulation as the “current regulation” throughout the preamble.***

Though the Department states in the preamble that it has delayed the 2016 final borrower defense regulation and is proposing changes based on the currently effective 1995 regulations,<sup>69</sup> it goes on to note that “for purposes of determining the budget impact of the regulation, we utilize the 2019 President’s Budget Request, which assumed the implementation of the 2016 regulation” (p. 37251). As a result, the Department has created an extremely confusing NPRM without a consistent baseline. The public cannot properly comment on the Department’s proposal when its preamble suggests one approach but its budgetary estimates display another.

Any legitimate rulemaking requires clear, well-founded, and honest budget assumptions. This Regulatory Impact Analysis falls short of those standards, instead forcing the public to read between the lines of the Department’s estimates to understand the true potential impact of its proposed borrower defense regulations. The Department owes it to students and taxpayers to improve its cost estimates; base its assumptions on clear and open data on student loans, defaults, and institutional misconduct; and transparently lay out the full impact of its proposals on students and colleges.

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<sup>68</sup> “The conduct percent is assumed to be 95 percent of the PB2019 baseline level.” 83 FR 37299.

<sup>69</sup> 83 FR 37250-37251. “We now propose rescission of the 2016 final regulations that we delayed through previous notification. In this preamble, we describe the proposed changes to the regulations based on the currently effective regulations and not the delayed provisions of the 2016 final regulations. In light of the withdrawal (i.e. rescission) of the delayed provisions of the 2016 final regulations, this approach is required under 1 CFR part 21, which provides that each agency that drafts regulations must do so as an amendment to the Code of Federal Regulations. The 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.”