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February 23, 2015

Ms. Ericka Miller, Acting Assistant Secretary
Office of Postsecondary Education
U.S. Department of Education
1990 K St., NW
Washington, DC 20006

RE: HEA Authority to Promulgate Rules Pertaining to Cash Management

Dear Ms. Miller:

On August 20, 2014, the Department received a joint memorandum from the American Bankers Association (ABA) and Consumer Bankers Association (CBA),[1] arguing that the Department did not have authority under Title IV of the Higher Education Act (HEA) to promulgate rules on campus banking products of the scope proposed during negotiated rulemaking in spring 2014. The ABA's analysis is incomplete, superficial, and incorrect. It should not disturb the Department's rulemaking efforts.

The Department has clear authority to regulate accounts that may receive Title IV funds, because: (1) the plain language of other Title IV provisions confers such authority; (2) such an interpretation ensures consistency within the language of the larger statute; and (3) such an interpretation is consistent with the goals and purpose of the Title IV program – to ensure affordable access to education by providing taxpayer-funded assistance to college students.

Proposed Cash Management Rule Amendments

The 2014 negotiated rulemaking committee considered whether to amend the Department's Cash Management rule to address banking products offered to students pursuant to marketing agreements between colleges and financial institutions. The Department initiated the negotiations in the wake of reports that the Title IV program may have been coopted by school-bank financial partnerships that steer students into accounts that are not in their best interests, and result in high fees taken out of their Title IV funds. Many parties have expressed concern about the resulting harms to students, competition, and the integrity of the Title IV program.[2]

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[1] Memorandum from Nessa Feddis & David Pommerehn to Lynn Mahaffie, Acting Assistant Secretary, Office of Postsecondary Educ., U.S. Dep't of Educ. (Aug, 20, 2014), *available at* http://www.cbanet.org/documents/2014%20Comment%20Letters/2014-08-20%20Joint%20letter%20to%20DOE;%20Analysis%20of%20Legal%20Basis%20for%20DOE%20Proposal%20to%20Regulate%20Campus%20Bank%20Accounts.pdf) (analysis prepared by Covington & Burling LLP).

[2] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, COLLEGE DEBIT CARDS: ACTIONS NEEDED TO ADDRESS ATM ACCESS, STUDENT CHOICE, AND TRANSPARENCY (2014), *available* at http://www.gao.gov/assets/670/660919.pdf.; OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., FINAL MANAGEMENT INFORMATION REPORT: THIRD-PARTY SERVICER USE OF DEBIT CARDS TO DELIVER TITLE IV

Colleges may receive a share of the revenue or a discount on services in return for allowing banks to have exclusive marketing access to students during the disbursement selection process or at other key times. This financial incentive turns the Title IV disbursement process into a lucrative marketing channel for banks to get new customers, rather than a neutral and efficient way to get taxpayer funds to students.

The Department's most recent proposal, released in May 2014 in advance of the last negotiating session, would define "sponsored accounts" as any account offered to students pursuant to an agreement between the bank and college.[3] The terms of a sponsored account must be in the best interests of the student. It must also adhere to a list of consumer protection features, such as a prohibition on harmful overdraft fees and the ability to withdraw Title IV funds without fees. When offered directly during the financial aid disbursement process, the school must also present the accounts in a neutral manner and not engage marketing tactics that push students into the sponsored account.

The negotiators did not reach a consensus on the issue, leaving the Department to finalize a proposed rule on its own.

The Plain Language of the HEA Gives the Department Ample Authority to Promulgate Cash Management Rules on Sponsored Accounts

The ABA/CBA memorandum claims that the HEA does not give the Department regulatory authority to promulgate a rule of the scope proposed during the negotiated rulemaking. It focuses solely on one HEA provision, Section 487(a)(2), which forbids institutions of higher education from charging students fees to process financial aid applications. The plain language of this provision, they argue, does not confer authority to regulate "sponsored accounts" offered to students pursuant to an arrangement between a school and a financial institution or third-party servicer.

However, the ABA/CBA interpretation is wrong, because it is incomplete. It completely ignores other provisions of the HEA beyond section 487(a)(2). These provisions give the Department clear authority to regulate accounts that may receive Title IV funds.

FUNDS, DEPARTMENT OF EDUCATION 15 (2014), *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2014/pii2-lindstrom1-oig.pdf; Consumer Fin. Protection Bureau, Perspectives on Financial Products Marketed to College Students, Presentation to the Department of Education Negotiated Rulemaking Session 14 (Mar. 26, 2014), *available at* http://files.consumerfinance.gov/f/201403_cfpb_presentation-to-department-education-rulemaking-committee.pdf; CONSUMER REPORTS, CAMPUS BANKING PRODUCTS: COLLEGE STUDENT FACE HURDLES TO ACCESSING CLEAR INFORMATION AND ACCOUNTS THAT MEET THEIR NEEDS (2014), *available at* https://consumersunion.org/wp-content/uploads/2014/08/Campus_banking_products_report.pdf; RICH WILLIAMS & ED MIERZWINSKI, U.S. PIRG, THE CAMPUS DEBIT CARD TRAP (2012), *available at* http://www.uspirg.org/sites/pirg/files/reports/thecampusdebitcardtrap_may2012_uspef.pdf.

[3] U.S. Dep't of Educ., Negotiated Rulemaking 2013-2014, Program Integrity and Improvement, http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/programintegrity.html ("Issue 4 - Cash Management" under "Session 4 Materials").

HEA Section 487(a)(2), on which the ABA/CBA memorandum so heavily relies, states that for institutions to participate in the Title IV program, "The institution shall not charge any student a fee for processing or handling any application, form, or data required to determine the student's eligibility for assistance under this subchapter…or the amount of such assistance."[4] The ABA/CBA memo argues that this is the "most relevant" section of the HEA at issue, and that its plain language does not confer explicit authority to regulate sponsored accounts.

However, this is not the only relevant provision at issue – indeed, it is far from the most relevant, since it does not pertain at all to the administration of financial aid disbursement after Title IV award eligibility is determined.

The Department's specific authority for the regulations lies later, in related section 487(c)(1)(B). That provision reads:

> "(1) Notwithstanding any other provisions of this subchapter…the Secretary shall prescribe such regulations as may be necessary to provide for—
> …
> (B) in matters not governed by specific program provisions, the establishment of reasonable standards of financial responsibility and appropriate institutional capability for the administration by an eligible institution of a program of student financial aid under this subchapter…*including any matter the Secretary deems necessary to the sound administration of the financial aid programs ….*"[5] (emphasis added)

When interpreting a statute, one must look at a specific provision in its greater context. Courts have long held that the interpretation of one clause must fit coherently into the greater whole in order to effect the intent of a legislative body.[6]

This is precisely the problem with interpreting Section 487(a)(2) out of context. Its plain language does not refer to disbursement procedures at all. However, Section 487(c)(1)(B) gives the Secretary authority to prescribe regulations "*notwithstanding any other provisions* of this subchapter" to establish standards for "any matter" deemed necessary for the sound administration of Title IV programs. Reading these two provisions together, it would indeed be absurd to conclude that 487(a)(2) trumps the rest of Section 487 and restricts the Department from writing regulations to set standards for how institutions receiving the benefit of Title IV funds administer the remaining proceeds to students. The ABA/CBA interpretation of Title IV would suggest that the Department has no authority to promulgate *any* rules relating to the financial aid disbursement process. As shown above, this is clearly an untenable view.

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[4] 20 U.S.C. § 1094(a)(2)(2012 & Supp. II).
[5] 20 U.S.C. § 1094(c)(1)(B).
[6] *See, e.g.*, United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988); Kokoska v. Belford, 417 U.S. 642, 650 (1974). The so-called "whole act rule" for interpreting statutes has a long history in American common law, dating back to the earliest years of the Supreme Court. *See, e.g.*, United States v, Fisher, 6 U.S. (2 Cranch) 358 (1805); United States v. Priestman, 4 U.S. (Dall.) 29 (1800).

Implicit Congressional Authorization

The Department has had cash management regulations, with provisions pertaining to disbursement, since 1996.[7] The Department amended its cash management regulations in 2007 to include minimum standards for accounts opened by a school on behalf of a student or parent.[8] The 2007 amendments required prior written consent before opening, no account opening fees, and reasonable free ATM access among other things.[9] Subsequent to promulgating the 2007 amendments, Congress reauthorized the HEA in 2008 without making changes to the Department's existing authority to promulgate cash management regulations under Section 487(c) of the Act.[10] The Supreme Court often presumes that an agency's interpretation of a statute is known to members of Congress, and that Congress accepts that interpretation if it reenacts a statute without changing the relevant language in question.[11] Therefore, Congress has implicitly affirmed the Department's ongoing authority to regulate the disbursement of Title IV funds as it sees fit to ensure proper administration of the program.

Purpose of the Title IV Program

A statute must be interpreted in a manner consistent with its purpose.[12] The purpose of the Title IV program is to provide financial aid to help students go to college. The growth of campus banking products has raised many concerns that the Title IV program has turned into a marketing opportunity for banks and financial firms, which can siphon off a portion of students' Title IV aid through account fees. Institutions of higher education may also benefit financially from revenue-sharing agreements with these firms. The Department has the authority to write regulations that protect the integrity of taxpayer funds so that they are used for their intended congressional purpose.

The Department has Authority to Regulate Sponsored Accounts Offered Both Within and Outside the Title IV Disbursement Selection Process

The Department's final draft proposal would define "sponsored account" to include any financial account marketed to students pursuant to a "contract or arrangement between an institution and any entity."[13] There is no requirement that the account first be offered by a school or third party servicer at the time a student is selecting his or her disbursement

[7] Student Assistance General Provisions, Federal Perkins Loan Program, Federal Work-Study Program, Federal Supplemental Education Opportunity Grant Program, Federal Family Education Loan Programs, William D. Ford Federal Direct Loan Program, and Federal Pell Grant Program, 61 Fed. Reg. 60578, 60604-06 (Nov. 29, 1996).
[8] Federal Student Aid Programs, 72 Fed. Reg. 62014, 62028-29 (Nov. 1, 2007).
[9] 72 Fed. Reg. at 62029.
[10] Higher Education Opportunity Act of 2008, Pub. L. No. 110-315, 122 Stat. 3078, 3309 (2008) (amending Section 487(c)(1)(A), but leaving (B) untouched).
[11] *See, e.g.*, Lorillard v. Pons, 434 U.S. 575, 580-81 (1978); Nat'l Lab. Rel. Bd v. Gullett Gin Co., 340 U.S. 361, 365-66 (1951).
[12] *See, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Department of Educ., 550 U.S. 81, 93 (2007); Massachusetts v. EPA, 549 U.S. 497, 532 (2007); Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 63 (2006).
[13] U.S. Dep't of Educ., *supra* note 4 (proposed § 668.161(a)(2)(x)).

method. Accordingly, the rule would also cover accounts marketed to students in other settings, such as freshman orientation or when getting a student ID card that doubles as a debit card for the account.

Both scenarios are subject to the Department's oversight, because they enable schools and banks to steer students into specific accounts that siphon off Title IV dollars for the financial benefit of the school and bank.

The Department's authority to regulate accounts offered via third party servicers during the Title IV disbursement selection process is clear.[14] The Department's Inspector General report illustrates how some servicers deliberately push students to open a sponsored account when making their disbursement method selection.[15] Among other tactics, the servicer may deposit funds into the sponsored account instantaneously, while the student would have to wait several days for funds to his or her pre-existing account. In other cases, the school may allow the servicer to pre-open an account and send the incoming student a debit card before even setting foot on campus. Both of these tactics clearly leverage the Title IV disbursement process to directly steer students toward a particular disbursement option, despite the Department's longstanding requirement that students be given a choice for how to receive their aid.

The Department also has clear authority to regulate contractual arrangements between schools and financial institutions to market financial accounts opened outside the disbursement selection process, such as those linked to student ID cards. As discussed above, the purpose and goals of the Title IV program are to provide financial aid to students – and the Department has the responsibility to protect the federal government's interest in how those funds are used.[16] Banks entering into these partnerships with schools are just as motivated to gain priority access to Title IV dollars as are banks and servicers directly involved in disbursement. The contracts between banks and schools may legally obligate the school to market the account.[17] This could be interpreted as placing a contractual obligation on the school to market the account to students during the Title IV disbursement process, even if the account had been opened at an earlier time. In addition, schools may receive a percentage of the bank's interchange fees earned for every debit card transaction. [18] This incentivizes schools to ensure that students deposit their Title IV funds into that account, which will increase the students' use of the card and the schools' take.

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[14] A "third party servicer" administering a student aid program under the HEA is already subject to the Department's oversight. 20 U.S.C. § 1094(c)(1)(H), (I); 20 U.S.C. § 1088(c) (2012 & Supp. II) (defining "third party servicer" as any individual or business entity that contracts with "any eligible institution of higher education to administer, through either manual or automated processing, *any aspect* of such institution's student assistance programs under this subchapter") (emphasis added). The ABA/CBA memorandum's claim that a servicer does not have to adhere to Department regulations is therefore incorrect. Memorandum, *supra* note 1, at 13.

[15] OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., *supra* note 2, at 10.

[16] *See supra* note 7.

[17] *See, e.g.*, Agreement at 14-15, ¶14, Univ. of Illinois & TCF Nat'l Bank (Feb. 27, 2007), *available at* https://www.tcfbank.com/resources/images/7808.pdf.

[18] *See, e.g.*, Agreement at 5, Univ. of Iowa & Hills Bank and Trust Co. (Dec. 28, 2011), *available at* http://www.hillsbankui.com/uploads/6/3/6/0/6360098/hills-bank-university-of-iowa-agreement.pdf.

The Cash Management Proposal Does Not Conflict with Bank Regulation

The ABA/CBA memorandum states that the Department's proposal would interfere with other bank regulators' authority over financial accounts, and that Congress did not intend the Department to "regulate in this space."[19] These vague admonishments fall wide of the mark.

Congress made the Department the steward of federal student aid dollars. Almost $170 billion in federal student aid is slated to be disbursed in FY 2015 alone.[20] To suggest that the Department has no regulatory interest in how those dollars reach students is absurd. As outlined above, the Department has clear authority to "prescribe such regulations as may be necessary" to administer the Title IV program and ensure that those dollars reach their intended recipients.[21] The Department, based on reports by its own Inspector General, the GAO, and the CFPB, has rightfully identified school-bank partnerships as a threat to the integrity of the Title IV program. It has more than enough authority to ensure that the Title IV disbursement process is not turned into a revenue-generating mechanism for schools, as well as a marketing tool for financial institutions.

Furthermore, the ABA/CBA memorandum seems to suggest that the Department's May proposal would directly regulate financial institutions. This is incorrect. The proposal imposes requirements on schools when they enter into contractual agreements with financial institutions to market financial accounts. Banks voluntarily enter into partnerships with schools. The proposed draft rule would place no direct Department of Education obligations on the banks themselves.

Conclusion

The ABA/CBA memorandum is based on an incorrect and incomplete review of the law governing the administration of Title IV funds. The Department has ample authority to issue cash management regulations within the scope of its May proposal to the negotiated rulemaking committee.

We appreciate the Department's important work so far on this issue, and look forward to seeing a proposed rule in the near future. Please do not hesitate to contact us with any questions.

Sincerely,

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[19] Memorandum, *supra* note 1, at 10.
[20] U.S. Dep't of Educ., Student Aid Overview, Fiscal Year 2015 Budget Request 2 (2015), *available at* http://www2.ed.gov/about/overview/budget/budget15/justifications/p-saoverview.pdf.
[21] 20 U.S.C. § 1094(c)(1)(B) (2012 & Supp. II).

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