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POLICY & ACTION FROM CONSUMER REPORTS

August 1, 2016

John B. King, Jr., Secretary
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Re: Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program [Docket ID: ED-2015-OPE-0103; RIN: 1840-AD19]

Dear Secretary King:

Consumers Union, the policy and advocacy arm of Consumer Reports,[1] appreciates the opportunity to comment on the Department's proposed rule to establish procedures for former students seeking to assert a defense to repayment of their federal education loans.

We appreciate the Department's work to develop specific processes and standards for discharging federal education loans where a school's behavior has caused its students harm. In particular, we are pleased to see that the proposal would permit group loan discharges, and that it would prohibit the use of mandatory arbitration and class action waivers in enrollment agreements.

However, we believe the proposal must be strengthened in a number of areas, to help ensure that borrowers have a clear path toward obtaining relief that makes them whole. The Department must seize this enormous opportunity to turn the tide on schools' abuse of the Title IV programs, and send a strong message that it will protect students from being tricked into signing up for bad programs and inescapable debts.

General Comments

In recent years, hundreds of thousands of college students have suffered harm at the hands of educational institutions that have treated them as little more than dollar signs. Students across the country – especially those from low-income communities and communities of color, as well as servicemembers and veterans – have been subjected to aggressive sale pitches that certain schools, especially for-profit career colleges, have made about great training and job prospects.[2] Relying on these promises, students

[1] Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of telecommunications, health care, food and product safety, energy, and financial services, among others. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

[2] *See* S. COMM. ON HEALTH, EDUCATION, LABOR & PENSIONS, FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS, S. REP. NO. 112-37, pt. 1 (2012).

have taken on significant debts to attend such programs. In light of the massive and unprecedented collapse of Corinthian Colleges,[3] students are struggling to find an end in sight to the harms they have experienced as a result of attending campuses that are now closing or being sold. Meanwhile, students at other colleges are in danger at other mismanaged schools, taking on onerous debts for programs that likewise may fall well short of delivering what they promise.[4]

Congress amended the Higher Education Act in 1994 to explicitly direct the Department to establish, via regulation, the specific acts or omissions of a school that a borrower could assert as a "defense to repayment" of federal education loans.[5] However, the Department set forth only minimal implementing regulations, at a time when the borrower defense option was not widely used. As a result, The Department did not further update its regulations to further clarify the process, or minimum evidentiary standards, for successfully discharging loans under that provision; the regulations simply stated that borrowers could obtain loan discharges if they demonstrate that the act or omission of a school would give rise to a cause of action under applicable state law.[6]

In the years since the borrower defense regulation was first implemented, higher education has become drastically more expensive[7] – and increasing numbers of students and families have been forced to borrow money to pay for postsecondary education. According the recent data, roughly 7 in 10 students leave postsecondary institutions today with a debt balance – whether or not they graduate.[8] This raises the stakes – and the potential magnitude of harm – for students who are lured to poor-quality educational programs.

Without clear rules for asserting a defense to repayment of federal loans, students in recent years have had few options for obtaining relief from the damages they've incurred as a result of schools' misconduct. Due to schools' prevalent use of arbitration provisions and class action waivers in their enrollment agreements, aggrieved students have frequently found themselves blocked from using the court system as a means of recovering their losses.[9]

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[3] *See, e.g.*, Katy Murphy, *Corinthian Colleges' Collapse Sparks Debate Over Future of For-Profit Colleges*, SAN JOSE MERCURY NEWS, Apr. 28, 2015, *available at* http://www.mercurynews.com/california/ci_27998047/corinthian-students-reeling-from-news-colleges-closure (discussing simultaneous closure of 28 campuses, and more than 100 former Corinthian students organizing "debt strike" in refusal to pay back loans from failed campuses).

[4] *See, e.g.*, Danielle Douglas-Gabriel, *Is This the Beginning of the End for ITT?*, WASH. POST, Oct. 19, 2015, *available at* https://www.washingtonpost.com/news/grade-point/wp/2015/10/19/is-this-the-beginning-of-the-end-for-itt/ (reporting that Dep't of Educ. officials confirmed new restrictions on ITT's access to federal funds in response to concerns over financial responsibility).

[5] Higher Education Act, Section 455(h), 20 U.S.C. 1087e(h) (2012 & Supp. IV).

[6] *See* 59 Fed. Reg. 61690 (Dec. 1, 1994) (finale rule); 60 Fed. Reg. 37768 (July 21, 1995) (notice of intent to suspend further regulatory activities on borrower defense).

[7] *See* College Board, Trends in College Pricing, Published Prices – National, Published Charges Over Time, Figure 6 – Published Tuition and Fees Relative to 1985-86, By Sector, https://trends.collegeboard.org/college-pricing/figures-tables/published-prices-national#Published%20Charges%20over%20Time.

[8] THE INST. FOR COLLEGE ACCESS & SUCCESS, STUDENT DEBT AND THE CLASS OF 2014 2 (2015), *available at* http://ticas.org/sites/default/files/pub_files/classof2014.pdf.

[9] *See, e.g.*, Ferguson v. Corinthian Coll., Inc., 733 F.3d 928, 933 (9th Cir. 2013) (alleging schools misled students to "entice enrollment" and misrepresented information about the actual cost of education at one of the schools, and "misinformed" students about "financial aid, which resulted in student loans that many

Given this track record of problems, it is crucial that the Department set forth processes that give wronged students a meaningful opportunity to be made whole again. The time is past due to provide sensible avenues to remedy the well-documented harms that certain schools have caused students, so that students can get relief from illegitimate debts and move on with their lives.

We are encouraged that the Department's proposal takes strides toward opening access to loan discharges, particularly through automatic group discharges. We also appreciate the proposed requirements that for-profit schools publicly disclose warning signs of distress, such as a zero or negative repayment rate, which suggests that students who attend those programs are not likely to be able to pay down their loans if they attend that institution. Finally, we strongly support the Department's proposed ban on class action waivers and mandatory pre-dispute arbitration provisions in enrollment contracts. We agree with the Department that mandatory arbitration and class action waivers have enabled school to evade responsibility for harming students, and have unfairly shifted burdens not just onto students but also onto the Department itself – as well as taxpayers – to bear the cost of schools' bad behavior.

However, we believe that the proposed rule must be strengthened in a number of ways, as discussed below, in order to fully protect students and taxpayers from schools' abuses.

Specific Recommendations

Allow students to assert borrower defenses under applicable state laws, and regardless of when they borrowed. The Department's proposal would create a bifurcated regime for people seeking to assert a defense to repayment of their loans. The standard under current regulations provides that "a borrower defense may be asserted based upon any act or omission of the school that would give rise to a cause of action against the school under applicable State law."[10] The proposal would generally keep this standard for loans disbursed prior to July 1, 2017, and then apply an entirely new federal standard for loans disbursed on or after July 1, 2017.

Creating an entirely new federal standard, for loans originated in 2017 and beyond, places an arbitrary distinction between older and newer loans, and could result in inequitable outcomes. Furthermore, the proposed federal standard provides significantly narrower grounds for relief. First, it permits claims where the borrower has obtained a contested judgment against the school – a very unlikely result, given that most lawsuits

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could not repay"); Reed v. Fla Metro. Univ. Inc., 681 F.3d 630, 632 (5th Cir. 2012) (alleging violations of the Texas Education Code based on solicitations of "students in Texas without the appropriate certifications."), *abrogated in part b*y Oxford Health Plans LLC v. Sutter, 133 S Ct. 2064 (2013); Fallo v. High-Tech Inst., 559 F.3d 874 (8th Cir. 2009) (alleging that school engaged in "fraudulent misrepresentation, violated the Missouri Merchandising Practices Act, [and] negligently trained and supervised employees"); Bernal v. Burnett, 793 F. Supp 2d 1280, 1282 (D. Colo. 2011) (alleging that schools misrepresented the type and quality of services including "the total cost of education at the schools, the prospect of job placement and salary expectations after graduation, the schools accreditation status, and the transferability of credits obtained at the schools."); Miller v. Corinthian Coll., Inc., 769 F. Supp. 2d 1336, 1339 (D. Utah 2011) (alleging misrepresentation of the "transferability of credits to other institutions" and the cost of the program).

[10] 34 C.F.R. § 685.206(c) (2015).

do not end in judgment and students face substantial barriers to filing suit, as discussed above. Second, it permits claims based on breach of contract, but only where the school has failed to meet "specific obligations" set forth in the contracts.[11] Third, it permits borrowers to assert claims based on an as-yet untested standard of "substantial misrepresentation" – which requires the borrower to show reasonable, actual reliance on a school's misrepresentation to the borrower's detriment – while excluding other unfair, deceptive, abusive, or unlawful practices from consideration.

We disagree with the Department's rationale that a federal standard is needed because the Department would otherwise be forced to engage in a "nuanced application of complex legal doctrines" in order to adjudicate claims based on state law.[12] The Department already applies the current standard, and must continue to do so under this proposal, for all borrowers with loans first disbursed prior to July 1, 2017. Indeed, a borrower's claims based on a contested judgment could be based on underlying state law, and a breach of contract claim under the proposed federal standard would likewise involve analysis of the relevant state common law of contracts.

Furthermore, the longstanding history of state UDAP laws, which are typically relevant to borrower defense claims, and their interpretation in the courts would give the Department much more precedent and analysis to work with than the analysis it will need to produce on its own using the new proposed "substantial misrepresentation" standard. By contrast, the proposed federal standard would be applied on a case-by-case basis by individual Department officials, without creating any binding legal precedent that could help inform borrowers and the public as to how the Department interprets its own standard.

Adding the proposed federal standard for future borrowers would substantially increase the complexity of the borrower defense process; we do not see how it could make the Department's job any simpler.

We also support the comprehensive analysis submitted by negotiator Margaret Reiter to this docket, with sets forth compelling arguments in favor of preserving all borrowers' rights to assert claims under existing Section 685.206(c).

Allow students to assert borrower defenses at any time, both for amounts outstanding and amounts already paid. There is no proper rationale for denying relief to students who already had to pay a portion or all of their education loans more than six years prior to learning of misrepresentation, or a school's breach of contract. This puts borrowers who have already put significant amounts of money toward their loans at an unfair disadvantage.

Federal education loans have important features that make them different from other kinds of unsecured loans. There is no statute of limitations on collecting them, and the federal government has extraordinary collection powers at its disposal – from administrative wage garnishment to Social Security offsets.[13] For these reasons, it is inappropriate to make comparisons to the treatment of other unsecured debts to justify a statute of limitations for claiming borrower defense on amounts already paid.

[11] 81 Fed. Reg. 39330, 39338 (proposed June 16, 2016).
[12] 81 Fed. Reg. at 39339-40.
[13] *See* 31 U.S.C. § 3716 (2012 & Supp. IV).

Allow legal aid attorneys, state attorneys general and other relevant third parties to submit group discharge claims. We greatly appreciate the Department's proposal to allow for automatic group discharges. However, we are concerned that the Department is granting itself sole discretion to identify groups of borrowers with common claims that form a basis for group discharge, and has not proposed a formal process for third-party representatives such as legal aid lawyers and state attorneys general to assert group claims.

In the absence of clear borrower defense regulations to date, legal aid attorneys have worked tirelessly to gather evidence of common problems across groups of borrowers. State attorneys general have likewise been on the front lines of investigating claims of misrepresentation and other troubling practices,[14] and they may have additional resources that borrowers and legal aid attorneys lack on their own to establish extensive findings of fact for a borrower defense claim. Even after the Department implements its final regulations, distressed borrowers will continue to seek advice from lawyers in order to understand their rights and get help with applications.

Instead of duplicating efforts to identify groups of borrowers who have a basis for asserting a defense to repayment, the Department should permit legal representatives to continue filing group claims. Although we note and appreciate that the Department welcomes collaboration with state attorneys general and other interested third parties,[15] we believe that a formal process for submitting group claims would better promote borrowers' interest.

During negotiations, the Department considered creating a petition process for third parties to submit group applications[16] – we urge the Department to include such a process in the final rule.

Ensure independence of Department officials adjudicating claims, and establish stronger due process controls for borrower defense claims. We have concerns about placing the

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[14] *See, e.g.*, Press Release, Attorney General Kamala D. Harris Files Suit in Alleged For-Profit College Predatory Scheme (Oct. 10, 2013), *available at* http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-files-suit-alleged-profit-college-predatory (California); Attorney General Suthers Announces Consumer Protection Settlement with Argosy University (Dec. 5, 2013), *available at* http://www.coloradoattorneygeneral.gov/press/news/2013/12/05/attorney_general_suthers_announces_consumer_protection_settlement_argosy_unive (Colorado); Press Release, Madigan Sues National For-Profit College (Jan. 18, 2012), *available at* http://www.illinoisattorneygeneral.gov/pressroom/2012_01/20120118.html (Illinois); Press Release, Attorney General Conway Files Lawsuit Against Third For-Profit School (Sept. 27, 2011), *available at* http://migration.kentucky.gov/newsroom/ag/nationalcollegesuit.htm (Kentucky); Dennis Domrzalski, *AG's Office Sues ITT Educational Services*, ALBUQUERQUE BUSINESS FIRST, Feb. 27, 2014, *available at* http://www.bizjournals.com/albuquerque/news/2014/02/27/ags-office-sues-itt-educational.html (New Mexico); Press Release, AG Schneiderman Announces Groundbreaking $10.25 Million Settlement with For-Profit Education Company that Inflated Job Placement Rates to Attract Students (Aug. 19, 2013), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-announces-groundbreaking-1025-million-dollar-settlement-profit (New York).

[15] 81 Fed. Reg. at 39348.

[16] U.S. Dep't of Education, Negotiated Rulemaking for Higher Education 2015-2016, Issue Papers 1-3 (redlined) – Federal Standard, at 8 (Mar. 18, 2016), *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2016/index.html (scroll down to header: "Materials provided by the Department to the negotiating committee at Session 3).

review and adjudication of claims in the hands of a sole Department official – without independent review, and with only narrow reconsideration rights for borrowers whose claims are denied.

Under the Department's proposal, the official may consider not only the information that the borrower submits, but also other information the Department has in its possession, such as information from schools or accreditors; the borrower may have no knowledge of what such information entails, or any opportunity to respond to assertions from the school or accreditor that are wrong or misleading.

Furthermore, proposed Section 685.222(e) would only permit borrowers to request consideration on the basis of new evidence not previously provided or relied upon as the basis for the final decision. If a borrower seeks reconsideration on other grounds – for example, over concerns that the Department official's judgment was flawed, discriminatory or otherwise lacking in objectivity – she wouldn't have a clear right under the Department's proposal to seek reconsideration from an oversight entity, or at least a different official. By contrast, we note that schools seeking to appeal a decision of liability can appeal the decision without having to present any new evidence.[17]

Relatedly, we have concerns that the Department's proposal does not place sufficient safeguards to ensure that Department officials will not consider the ability to recoup money from the school as a factor while a borrower's claim is in process.

The lack of independent checks and transparency in the proposed application process raises significant due process concerns. Given the potential conflicts that could arise while the Department is seeking to recoup funds from schools and review borrower defense claims from students who attended that school, we urge the Department to clarify that officials involved in Title IV school compliance cannot adjudicate borrower defense claims. We also urge the Department to clarify that borrowers have the right to appeal a denial on both substantive and procedural grounds, with at least as much leeway as schools appealing decisions of their own liability.

Presume that at borrower is entitled to full relief unless there is specific evidence to support a finding that partial relief is warranted. We are concerned that proposed Section 685.222(i) would permit the Department official reviewing a borrower's claim to apply, with sole and total discretion, any number of possible methods to calculate the amount of relief to which a borrower is entitled. For example, the Department would permit calculations that attempt to quantify "what a reasonable borrower would have paid" had the school made an accurate representation, or the "total amount of the borrower's economic loss, less the value of the benefit, if any, of the education obtained by the borrower.[18] Such determinations would be highly subjective, and could lead to unfair and inconsistent treatment of borrowers' applications. We believe a more equitable approach would be for the Department to presume full relief unless specific evidence indicates that a reduction in the proposed refund is warranted.

Clarify arbitration restrictions, to ensure they have their intended effect of preserving students' right to their day in court. We strongly support the Department's proposed ban on class action waivers, as well as the general ban on pre-dispute arbitration provisions

[17] 81 Fed. Reg. at 39349.
[18] 81 Fed. Reg. at 39350.

in enrollment contracts. We also appreciate that proposed Section 685.300 would ban schools from requiring students to use the school's internal complaint process before seeking remedies from outside entities such as the Department or the relevant accreditor.

However, we note that proposed Section 685.300 would ban schools from using "mandatory" pre-dispute arbitration clauses in their agreements with students: the Department's proposal defines "mandatory" arbitration clauses as those to which students must agree as a condition of enrollment.[19]

We have serious concerns that schools will exploit this loophole and continue to use arbitration clauses as a shield from liability. It would be all too easy for schools to exploit this loophole by placing arbitration clauses in "optional" forms among a stack of paperwork, and simply directing a student to sign in multiple places to complete the enrollment process, without the student realizing that she is signing away the right to access full legal rights and remedies if the school does not provided the education or training promised.

Students are often unaware that these clauses are buried in the contracts until they have already experienced harm and are seeking relief. Outcomes in arbitration tend to skew heavily in favor the company requiring it, making it a woefully inadequate forum for people who have been harmed to obtain justice and be made whole.[20] We urge the Department to ban pre-dispute arbitration clauses in the final rule, without qualification.

Ensure FFEL borrowers have equal access to relief. We have concerns that former students who still have FFEL loans will have relatively fewer options for obtaining relief through the borrower defense process as proposed. Under the proposal, FFEL borrowers who consolidate their loans into Direct loans – possibly in order to ensure eligibility for loan discharge options, and who do so after 2017 – would be subject to the narrower, post-2017 standard even though their claims would be based on the underlying FFEL loans, which were all originated prior to the FFEL program's discontinuation in 2010. This would place borrowers with older loans, who have already undergone many years of repayment, in a disadvantaged position as they attempt to obtain relief.

Conclusion

We appreciate the Department's efforts in this rulemaking to rein in school abuses and ensure that students seeking an education have reasonable access to debt relief when they have been wronged.

However, we urge the Department to strengthen the rule to better protect all students and ensure that schools cannot evade state and federal laws while participating in the Title IV program. The federal government must not enable fraud, waste and abuse by

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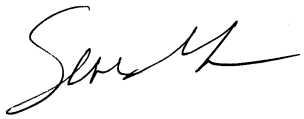
[19] 81 Fed. Reg. at 39384.

[20] *See, e.g.*, CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, SECTION 5: WHAT TYPES OF CLAIMS ARE BROUGHT IN ARBITRATION AND HOW ARE THEY RESOLVED? 13 (2015), *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (in study sample, consumers obtained relief only 20.3% of the time, and only 12 cents for every dollar they claimed).

allowing bad actors to engage in risky behavior with impunity, while students and families suffer the debt and broken dreams that occur as a result. The time is long overdue for the Department to restore integrity and balance to the Title IV programs by holding poor-quality schools accountable to students, communities, and the American public.

Sincerely,



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