Americans for Financial Reform Education Fund

August 24, 2018

Secretary Betsy DeVos
U.S. Department of Education
400 Maryland Ave, SW
Washington, DC 20202

Re: Proposed Rule Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, Docket ID ED-2018-OPE-0027

Dear Secretary DeVos:

Americans for Financial Reform Education Fund ("AFR Ed Fund") appreciates this opportunity to comment on the abovementioned proposed rule (the "Proposed Rule") by the Department of Education (the "Department"). AFR is a coalition of more than 200 national, state, and local groups who have come together to advocate for reform of the financial industry. Members of AFR include consumer, civil rights, investor, retiree, community, labor, faith based, and business groups.[1]

I. Introduction

As a coalition formed in the wake of the subprime mortgage crisis to lay the foundation for a strong, stable, and ethical financial system, AFR Ed Fund is highly attuned to the similarities between the subprime crisis and the recent crises in the for-profit education sector. In both cases, bad actors specifically targeted vulnerable populations – veterans,[2] minorities,[3] and low-income people.[4] Both used high-pressure sales tactics to push borrowers into high-interest loans with deceptive terms. Both have armies of lobbyists to seek favorable regulatory treatment,[5] and receive extensive taxpayer support in a variety of ways.[6]

[1] A complete list of Americans for Financial Reform Education Fund's coalition members is available at http://realbankreform.org/about/our-coalition/.
[2] Jacob Davidson, How For-Profit Colleges Target Military Veterans (and Your Tax Dollars), TIME, http://time.com/money/3573216/veterans-college-for-profit/
[3] Kai Wright, Young, black and buried in debt: How for-profit colleges prey on African-American ambition, SALON (June 9, 2013), http://www.salon.com/2013/06/09/young_black_and_buried_in_debt_how_for_profit_colleges_prey_on_african_a merican_ambition/.
[4] John Hechinger, For-Profit Colleges Fail Poor Students, Report Says, BLOOMBERG (Nov. 23, 2010), http://www.bloomberg.com/news/articles/2010-11-23/for-profit-colleges-fail-to-help-poor-minorities-educationtrust-says.
[5] David Halperin, The Perfect Lobby: How One Industry Captured Washington, DC, THE NATION (Apr. 3, 2014), http://www.thenation.com/article/179161/perfect-lobby-how-one-industry-captured-washington-dc.
[6] Chris Kirkham, Corinthian, Department of Education reach deal; campuses to be sold, LA TIMES (June 23, 2014), http://www.latimes.com/business/la-fi-corinthian-deal-20140623-story.html.

The Department, in its proposal, has often invoked the specter of student loan borrowers exploiting the system. This, too, echoes the mortgage crisis, where allegations about homeowners "exploiting" the system were deployed to block sensible and fair policies that would have helped homeowners and communities and blunted the impact of the crisis. In reality, fewer than 1% of households that had the means to pay actually chose to strategically default on a mortgage.[7] Similarly, the Department's focus on an invented, hypothetical borrower who might exploit a borrower defense process ignores the real and research-supported harm that for-profit institutions do to the earnings of their attendees. For-profit schools have saddled borrowers with federal loans they cannot repay, as their earnings actually *decreased by eleven percent* following their attendance, when compared with those who attended public institutions.[8]

We are also highly aware of the way for-profit colleges exploited the economic devastation that followed the bursting of the housing bubble – where, according to Pew, Black wealth fell by more than half, and Latino wealth fell by 66 percent[9] – to increase enrollment from the ranks of the newly unemployed. In internal documents obtained by the Department of Justice, Corinthian described its target demographic as people who were "isolated" and "stuck."[10] This targeting worked: the biggest increase in enrollment in for-profit schools came in the immediate wake of the crisis, from 2008-2009, when many Americans were feeling stuck. And many of these same communities targeted in the subprime crisis were targeted once again by for-profit schools. Between 2004 and 2010, Black enrollment in four-year for-profit schools jumped 264 percent (contrasted with just a 24 percent growth in black student enrollment in four-year public colleges during the same time period).[11] As the Department knows, in too many cases, these institutions provided terrible outcomes for their students. In addition to experiencing a reduction in their earnings,[12] borrowers who attended for-profit colleges default at twice the rate of public two-year borrowers.[13] Because for-profit students are more likely to borrow, the rate of default among all for-profit entrants is nearly four times that of public two-year entrants.[14] To make matters worse, the debt burden imposed on attendees of for-profit colleges that were rated as "failing" or "zone" in the Department's existing gainful employment rule are astronomical. A recent analysis by The Institute for College Access and Success (TICAS) showed that more than 350,000 students graduated from the worst-performing career education programs with nearly $7.5 billion in student loan debt. Under the gainful employment rules, those programs would eventually lose access to federal financial aid if they did not improve, thus

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[7] Kristopher Gerardi, Kyle F. Herkenhoff, Lee E. Ohanian, and Paul S. Willen, Can't Pay or Won't Pay? Unemployment, Negative Equity, and Strategic Default, The Review of Financial Studies (2015), https://www.frbsf.org/economic-research/files/S05_P2_KrisGerardi.pdf.

[8] Stephanie Riegg Cellini and Nicholas Turner, Gainfully Employed? Assessing the Employment and Earnings of For-Profit College Students Using Administrative Data, The National Bureau of Economic Research (May 2016), http://www.nber.org/papers/w22287. They found that "certificate-seeking students in for-profit institutions are 1.5 percentage points less likely to be employed and, conditional on employment, have 11 percent lower earnings after attendance than students in public institutions."

[9] Rakesh Kochhar, Richard Fry and Paul Taylor, Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics, Pew Research Center (July 26, 2011), http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-riseto-record-highs-between-whites-blacks-hispanics/.

[10] Attorney General Kamala D. Harris Files Suit in Alleged For-Profit College Predatory Scheme, State Of California Department Of Justice, Office Of The Attorney General (Oct. 10, 2013), https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-files-suit-alleged-profit-college-predatory.

[11] Julianne Hing, Are For-Profit Colleges the Answer for Black Students?, Colorines (Sept. 10, 2016), http://www.colorlines.com/articles/are-profit-colleges-answer-black-students.

[12] Stephanie Riegg Cellini and Nicholas Turner, *supra* note 8.

[13] Judith Scott-Clayton, The looming student loan default crisis is worse than we thought Brookings (Jan. 2018), https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/ (last visited Aug 23, 2018).

[14] *Id*.

throwing into question the wisdom of the Department's allocation of taxpayer-backed dollars to those institutions in the first place.

Unfortunately, the Department's Proposed Rule does nothing to address the fallout for students who experienced illegal acts by schools entrusted with educating them. Instead, the overarching theme of this proposal is the Department's clear intention to defend schools that commit fraud, and narrow students' ability to seek borrower defense discharges as much as they can, creating as restrictive of a standard it can, so that almost no one qualifies for relief. By contrast, there is little to no focus in the Proposed Rule on negative behavior by schools attempting to exploit the Title IV dollars, a federal asset, that for so long have flowed to institutions, irrespective of educational quality.

Finally, in a true abuse of the rulemaking process, the Department attempts to justify only allowing defensive claims with no less than twenty-five false statements throughout the proposal, as meticulously documented by the Project on Predatory Student Lending at the Legal Services Center of Harvard Law School.[15] The Department repeatedly fabricates a claim that from 1994-2015 only defensive claims were accepted, a claim easily disproved by Department of Education emails compiled by the Project on Predatory Student Lending.[16] We join with the Project on Predatory Student Lending and California Attorney General Xavier Becerra in calling on the Department to withdraw the Proposed Rule immediately, and begin the public process again, in light of the systemic misstatements and errors contained in the Proposed Rule.[17]

II. Borrower Defense to Repayment—Assertion of Defenses to Repayment in Collection Proceedings and Federal Standard for Asserting a Borrower Defense to Repayment

The Department must allow both affirmative and defensive claims from borrowers. Only allowing defensive claims has the potential to encourage students to default on their loans, and removes rights from defrauded borrowers who manage, against the odds, to stay out of default. Part of the Department of Education's core mission is "ensuring equal access;" denying students who are not in default the ability to access their right to pursue a borrower defense discharge, a right they've had for over twenty years, is a flagrant example of unequal access to core borrower rights.[18]

The Department asked for comment on how to "discourage the submission of frivolous claims." The focus in this proposal on so-called "frivolous" claims is insulting to borrowers, students who've been defrauded, and to the mission the Department is entrusted with, of "promoting student achievement,"

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[15] Preliminary Comment Letter on 2018 Borrower Defense Notice of Proposed Rulemaking, Project on Predatory Student Lending, Legal Services Center of Harvard Law School (Aug. 2, 2018), https://predatorystudentlending.org/wp-content/uploads/2018/08/LSC-Prelim-Cmt-FINAL.pdf (last visited Aug 23, 2018).

[16] *Id*. "These documents show that, in 2015, the Department affirmed, rather than changed, its longstanding interpretation that the governing regulation allows borrowers to affirmatively seek loan cancellation based on school misconduct at any time, whether in repayment, forbearance, or default."

[17] California Attorney General Xavier Becerra, Preliminary Comment Letter on 2018 Borrower Defense Notice of Proposed Rulemaking, State Of California Department Of Justice, Office Of The Attorney General (Aug. 8, 2018), https://predatorystudentlending.org/wp-content/uploads/2018/08/California-Attorney-General-Borrower-Defense-proposal-extension-1.pdf (last visited Aug 23, 2018).

[18] Overview and Mission Statement, U.S. Department of Education (2018), https://www2.ed.gov/about/landing.jhtml (last visited Aug 23, 2018), "ED's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access."

instead accusing students who were doing nothing but trying to make a better life for themselves of somehow trying to deceive the Department. It belies the facts and history, as the Department has more than twenty years of experience in receiving affirmative claims (contrary to the Department's repeated and false assertion, discussed above, that it didn't receive affirmative claims until recently), and the process has been working well.[19] It also shows a deep ignorance of how difficult it is for borrowers to file claims even under the existing process. Students who have already wasted years of their life at a school whose degree has not led to gainful employment must, under the 1994 regulations: know that a process exists (many do not); find the means and time to determine which form to fill out; and document the harm done, including which state and/or federal laws have been violated. And these students must do this all while they are chasing calls in many cases from collection agencies, and trying to find an elusive job after being told to simply take the name of the for-profit college off their resume, as it was better off without it. To name just one example, Jessica King, who attended an Everest campus in Newport News, VA, sent out hundreds of resumes but was never able to find a job in her field of study, nursing.[20] She was eventually told by prospective employers that they would not hire graduates from Everest,[21] and that she was better off leaving her Corinthian education off her resume entirely.[22]

The Department also claims it wants to discourage any frivolous claims because they are "costly for the Department and institutions to adjudicate."[23] But later on in the Proposed Rule, the Department changes the financial responsibility standards to remove hard triggers on an institution being more than 120 days delinquent in making a payment, and instead allow for "a discretionary trigger that looks more holistically at the nature and outcome of loan violations," which will *also* be costly to examine.[24] The burdens of cost in this proposal seemed to be borne only by students, and not by the institutions who are receiving federally-backed loan money.

III. Defense to Repayment—Federal Standard (Misrepresentation)

Americans for Financial Reform argued during the 2016 borrower defense rulemaking, and argues again now, that any new Federal standard not limit any rights a borrower has in their own state when it comes to pursuing federal loan forgiveness. States should have the right to protect their own consumers, and ensure the quality of institutions licensed to operate in their states; maintaining the standard set by the 1994 Borrower Defense regulations, where violations of State law serve as the basis for a borrower

[19] Department of Education's Borrower Defense Includes Fundamental Lie, Documents Show, The Project on Predatory Student Lending, Legal Services Center of Harvard Law School (2018), https://predatorystudentlending.org/press-releases/department-educations-borrower-defense-includes-fundamental-lie-documents-show-press-release/ (last visited Aug 23, 2018), noting that the Department's inaccurate claims of failing to accept affirmative claims undermines the rationale that affirmative claims invites "frivolous" claims.

[20] https://www.marketwatch.com/story/why-some-defrauded-college-students-cant-get-debt-relief-2015-12-14

[21] Aimee Picchi, Feeling burned, for-profit college grads want loans erased, CBS: MONEY WATCH (Jan. 27, 2016), http://www.cbsnews.com/news/feeling-burned-for-profit-college-grads-want-loans-erased/. (See: "After graduation, she sent out 150 resumes but didn't get a bite. Finally, she asked a doctor for honest feedback and was told that the school had a negative reputation. He offered to hire her as a receptionist, but said he couldn't hire her as a medical assistant.").

[22] Casey Quinlan, Why Graduates Of For-Profit Colleges Are Struggling To Pay Back Student Loans, THINK PROGRESS (Sept. 14, 2015), http://thinkprogress.org/education/2015/09/14/3700687/the-recession-changed-the-faceof-student-debt-but-regulators-have-been-slow-to-react/. (Jessica King was "advised by a potential employer that she should remove Everest from her resume").

[23] 83 FR 37252.

[24] 83 FR 37273.

defense discharge, would ensure that. Instead, the Department is considering a standard for misrepresentation that includes "intent to deceive" by the school. This is an utterly draconian standard to impose on a student who has no subpoena power, limited resources, no legal team at their disposal, and, if the student is pursuing a discharge, is likely contending with a host of challenges, from ruined credit to difficulty finding a job in their field of study.

The Department also points to differences among State laws as a reason to have a single Federal standard—but the Department's answer is not to ensure that all students have a strong ability to pursue claims from many illegal acts by schools, but instead to restrict every borrower to one tremendously high misrepresentation standard they will face extreme difficulties in meeting.

IV. Borrower Defense—Judgments and Breach of Contract

The Department shouldn't be in the business of removing rights from borrowers. But in the proposed rule, it eliminates not only the judgment-based standard for claims outlined in the 2016 regulations, but also breach of contract as a standard for claims. It has also removed the 2016 rule's inclusion of a non-default, favorable contested Federal or State court judgment as a basis for borrower defense claims. The Department's decision here is insulting to State law enforcement and the judgments they pursue, and leaves it solely in the hands of individual borrowers to root out illegal conduct at schools.

The Department says it has eliminated the right to pursue a claim based on a breach of contract because the majority of discharge applications received were not breach of contract claims. The Department has no more insight into future claims than we do—but as we are reminded often in an economic context, the next crisis will rarely look like the last one. The Department should not be outright eliminating borrower's rights simply because it did not find a sufficient number of borrowers asserting those rights in the past.

V. Borrower Defense—Evidentiary Standard for Asserting a Borrower Defense

We believe the evidentiary standard for asserting a borrower defense should match the standard for State consumer protection law, and thus believe that the preponderance of the evidence standard is appropriate. The Department's alternative proposal, which considers a clear and convincing evidence standard, will leave too many defrauded borrowers out in the cold. Borrowers are not going to have access to evidence that their school acted with "intent to deceive, knowledge of a falsity of a misrepresentation, or a reckless disregard for the truth" because they lack subpoena power, have no access to a school's internal records, and are not themselves lawyers or detectives. This absurd standard will create barriers to relief, and it appears that this is the intent.

VI. Borrower Defense—Financial Harm

The Department's proposal to only grant discharges to borrowers when misrepresentation by the school resulted in financial harm to the borrower is an absurd standard. It makes the Department willfully blind to illegal acts, so long as a borrower was lucky enough to not be financially impacted by those illegal acts. If an individual's property is stolen from their home, but they do not face any economic impact because they are lucky enough to be able to afford homeowners insurance, law enforcement does not refuse to pursue the crime because of a lack of financial harm; there was still a violation of law. The same must be true with the borrower defense standard. The Department must eliminate financial harm from its standard for using misrepresentation as a basis for discharges.

VII. Borrower Defense—Filing Deadline for Asserting a Borrower Defense Claim

The Department has two proposals with respect to deadlines for asserting a borrower defense claim. The first allows a borrower a mere thirty days to raise a borrower defense claim following a wage garnishment or consumer reporting proceeding, and only sixty-five days following a tax refund or salary offset proceeding.[25] This is a vastly insufficient amount of time for a borrower who is clearly already in financial distress. Giving them only thirty to sixty-five days to obtain the legal help that is required to submit a defense to repayment claim is a hurdle only the most economically well-off borrowers will be able to clear—and financially well-off borrowers are not the ones in default. The second proposal would have the Department set a three-year time limit on affirmative claims.

The Department's proposals are both completely out of synch with the complete lack of deadlines when it comes to collection of federal student loans. There is no limitation on the Department's ability to collect on a Direct Loan until it is paid in full or discharged. If there is no statute of limitation on the ability to collect on a Direct Loan, there shouldn't be one of any kind on borrower defenses—regardless of how the Department characterizes that deadline.[26]

VIII. Borrower Defense Adjudication Process (§§ 685.206, 685.212)

The Department has proposed adjudicating borrower defense claims by throwing students into grievance processes with the school that scammed them. This suggestion originated from for-profit representatives at the Borrower Defense negotiated rulemaking. Such a process would be entirely rigged because the school's side is flush with money, attorneys, and legal expertise, and it pits them against a student, who is almost never a lawyer themselves. If a student has been scammed by their institution, insisting that they work with that school to address the harm is not only unfair to the student, it could silence them further, covering up misconduct that is important for the Department to know about in order to address problems.

The Department is also subjecting borrowers to undue and insulting scrutiny by requiring them to submit information about "whether, for reasons other than the education received, the borrower has been removed from a job due to on-the-job performance, disqualified from work in the field for which the borrower was trained, or working less than full-time in the chosen field."[27] The Department does not make clear which party gets to determine whether a borrower is unable to find full-time work due to an inadequate education. Many students have become indebted with federal loans due to obviously subpar education, and could not find work through no fault of their own. Heather Beckstead, who attended Art Institute of Phoenix, was educated by fellow students or YouTube videos, rather than qualified instructors.[28] Michael Adorno, who attended Everest Colorado Springs, studied IT but could not even get a job at Best Buy because he was "learning how to work with operating systems that were 10, 15 years old."[29] The Department's approach to adjudication presumes the student, not the school, is the guilty

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[25] 83 FR 37260.

[26] 81 FR 39345.

[27] 83 FR 37262.

[28] Senator Elizabeth Warren & Senator Dick Durbin, Insult to Injury: How the DeVos Department of Education is Failing Defrauded Students, U.S. Senator Elizabeth Warren (Nov. 2017), https://www.warren.senate.gov/files/documents/2017_11_Warren_Durbin_Borrower_Defense_Report.pdf (last visited Aug 23, 2018), "Some teachers had work experience in the field but their knowledge was very limited, not as qualified as we were led to believe. A lot of the time students taught the class or we watched tutorial videos on YouTube."

[29] Abby Jackson, Guy who spent $37,000 on a computer-science degree can't get a job at Best Buy's Geek Squad Business Insider (Apr. 14, 2015), https://www.businessinsider.com/profile-of-corinthian-student-michael-adorno-2015-4 (last visited Aug 23, 2018).

party, despite the fact that the school stands to benefit the most from Title IV funds, and these questions appear to be designed as a deterrent to borrowers asserting their rights after illegal acts by their school, as well as a mechanism for discounting legitimate claims. The only information relevant to a borrower defense discharge is whether or not the school violated the law.

IX. Group Process

We strongly object to the Proposed Rule's elimination of the 2016 rule's group discharge language, which defined a process to provide relief to groups of students who were subject to widespread misconduct or fraud. We have advocated for years about the importance of a group, automatic discharge process.[30] Such a process not only ensures justice for all the borrowers impacted by systemic misconduct and widespread fraud at an institution, it also eliminates the administrative burden on the Department to review claims one by one.

The Department is suggesting that illegal acts by schools need only be rectified when an individual student pursues a claim. If a student is harmed by a misrepresentation or an illegal practice, the law must still apply, regardless of whether a student has the time, resources, documentation and expertise to pursue a borrower defense or not. To argue otherwise is to argue that the law only applies for those fortunate enough to have the resources to pursue justice.

Only allowing individual applications for relief shifts the burden of pursuing justice onto borrowers themselves, and, if they are lucky enough to have access to them, legal aid groups in their community with already limited resources. Denying the ability to grant discharges as a group effectively makes borrowers individually responsible for cleaning up the mess of a predatory school that the Department should not have been supporting with Title IV funds. It is akin to Jeff Sessions and the Department of Justice (DOJ) arguing in court that the ACLU should pay to find and reunite families that the federal government deported, under the direction of the DOJ's "zero tolerance" policy (something the judge in the case rejected as "unacceptable"[31]).[32] Neither borrowers nor legal aid groups should be responsible for cleaning up the mistakes of the Department of Education any more than the ACLU is responsible for fixing problems the Department of Homeland Security and DOJ created.

X. Relief

The Department should ensure that wronged borrowers are entitled to a full discharge of their debt. Insisting that there be a mechanism to provide only partial relief in the Proposed Rule creates the potential to squeeze wronged borrowers once more, especially given the profits the Department of Education makes off the student loan program.[33]

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[30] Joint Letter, 34 Orgs Press for Automatic Relief to Groups of Students Victimized by Predatory Practices, Americans for Financial Reform (2016), http://ourfinancialsecurity.org/2016/03/afr-31-orgs-press-for-automatic-relief-to-groups-of-students-victimized-by-predatory-practices/ (last visited Aug 23, 2018)..

[31] Tal Kopan, Judge slams Trump admin for suggesting ACLU, others should find deported parents, CNN (2018), https://www.cnn.com/2018/08/03/politics/trump-administration-aclu-deported-parents/index.html (last visited Aug 23, 2018).

[32] Ted Hesson & Michael Kruse, Trump administration tells ACLU to find deported parents, Politico (2018), https://www.politico.com/story/2018/08/02/deported-parents-children-trump-administration-aclu-721151 (last visited Aug 23, 2018).

[33] E.g. Merkley Statement on Student Loans Deal, U.S. Senator Jeff Merkley (July 24, 2013), http://www.merkley.senate.gov/news/press-releases/merkley-statement-on-student-loans-deal; and Letter from

Students harmed by misrepresentations or by deceptive and illegal practices by their schools can never get back the time they invested, or the wages they may have lost due to hours spent in school classrooms that provided them no employable skills. Further, the illegal conduct schools are held accountable for through enforcement actions may be only a subset of the fraudulent and deceptive acts that occurred.[34] As attorneys general from 17 States and the District of Columbia noted in their letter on the 2016 Proposed Borrower Defense Rule, allowing partial relief "erroneously affords a culpable school—already proven by the borrower to have egregiously violated the law—the presumption that its education had at least some value to the borrower."[35]

If the Department allows itself to only provide partial relief, it will reduce the incentive the Borrower Defense rule provides to the Department itself to ensure that they are monitoring schools appropriately on the front end, and preventing scams from happening in the first place.

XI. Pre-Dispute Arbitration Agreements and Internal Dispute Processes (§§ 668.41 and 685.304)

The 2016 Borrower Defense rule update prohibited the use of forced arbitration clauses at schools that receive federal financial aid. Forced arbitration is a practice that denies students the right to hold their school accountable in court when it breaks the law. Repealing the 2016 prohibition on forced arbitration clauses will mean that countless students wronged by their schools will be denied access to their day in court.

The proposed rule takes great pains to outline the so-called benefits of arbitration. But any benefits of forced arbitration will be seen only by schools, and not by students. Research has shown that consumers obtain relief regarding their claims in only nine percent of disputes. Companies, on the other hand, are given relief by arbitrators 93 percent of the time--relief that is provided by the consumer.[36] And the

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6 Senators to the Department of Education: Stop Profiting Off Student Loans and Fulfill Congressional Directives to Help Struggling Borrowers, U.S. Senator Elizabeth Warren (Feb. 25, 2015), http://www.warren.senate.gov/files/documents/2015_25_02_Letter_to_Secretary_Duncan_re_Student_Loan_Profits .pdf.

[34] The Department of Education and the California Attorney General pursued two joint enforcement actions against Heald, and Everest and Wyotech, respectively. These two enforcement actions have served as the basis for the former Corinthian students who have obtained relief to date. However, the Consumer Financial Protection Bureau also received a default judgment in their lawsuit against Corinthian for predatory lending, and Corinthian also faced charges of securities fraud from the Securities and Exchange Commission. E.g.: CFPB Wins Default Judgment Against Corinthian Colleges for Engaging in a Predatory Lending Scheme, Consumer Financial Protection Bureau (Oct. 28, 2015), http://www.consumerfinance.gov/about-us/newsroom/cfpb-wins-default-judgment-againstcorinthian-colleges-for-engaging-in-a-predatory-lending-scheme/; and Matt Reynolds, Corinthian Colleges Deal Sends Appeal Packing, Courthouse News Service (Oct. 14, 2016), http://www.courthousenews.com/2014/10/14/72410.htm.

[35] Attorney General Kamala D. Harris, 16 states, and the District of Columbia, Call for More Student Loan Debt Relief for Students Harmed by Predatory For-Profit Colleges, State Of California Department Of Justice, Office Of The Attorney General (Aug. 1, 2016), http://oag.ca.gov/news/press-releases/attorney-general-kamalad-harris-16-states-and-district-columbia-call-more

[36] Correcting the record: Consumers fare better under class actions than arbitration, Economic Policy Institute (Aug. 1, 2017), https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/ (last visited Aug 23, 2018).

Economic Policy Institute noted that the average consumer is ordered to pay $7,725 to the bank or lender.[37]

In addition, no less than the Department of Defense has raised the alarm about the dangers of arbitration, noting in a 2006 report that "loan contracts to Servicemembers should not include mandatory arbitration clauses or…require the Servicemember to waive his or her right of recourse, such as the right to participate in a plaintiff class [action lawsuit]." [38]

The prohibition on forced arbitration and class action bans present in the 2016 rule are necessary to ensure taxpayers and defrauded students are not left to bear the cost of wrongdoing by for-profit schools that violate the law. As the Education Department's Inspector General concluded, "If the new borrower defense regulations are enforced, [the Education Department's Office of Federal Student Aid] should receive important, timely information from publicly traded, private for-profit, and private non-profit schools that experience triggering events or conditions," and "make it easier for FSA to obtain financial protection…from Title IV schools that may be at increased risk of potential closure."[39] Had Corinthian students had access to the courts and the Department of Education obtained a letter of credit from the company, taxpayers would not now be on the hook for the more than $550 million in federal student loan discharges for former Corinthian students.

Upholding the 2016 prohibition on forced arbitration and class action bans would also help root out fraud and widespread misconduct by ensuring schools cannot bury student claims in secret proceedings. Legal claims brought by students – individually or as a class – function as a market-based mechanism to ensure the costs created by systemic misconduct fall solely on the bad actor school, rather than being borne by the entire industry, taxpayers, or defrauded students. Since arbitration clauses often also bar students from making their allegations public, forced arbitration allows bad actors to pocket millions in profits from fraudulent practices, and in fact, gain a competitive edge in the marketplace by ripping off students.

The Department should also retain the requirements that schools submit information about arbitration awards or judicial proceedings to the Secretary. The Department's excuse for no longer requiring this information is that it would be a "burden to the Department" to review such records. But no such concern about burden appears to exist later in the rule, when mandatory financial responsibility triggers are removed in favor of far more time-intensive discretionary ones, including a promise to "work with the institution or accreditor to determine whether the action has or will have a material or adverse effect on the institution's condition."[40] Here, as in so many other places in the Proposed Rule, it is schools before students.

XII. Closed School Discharges (§§ 674.33, 682.402, and 685.214)

The Department is explicitly proposing to remove borrower's long-held rights with its closed school discharge proposal. Historically, when a school has shut down, borrowers had the right to pursue a discharge of their loan if they were enrolled at the time of closure, or withdrew within 120 days of the

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[37] *Id*.

[38] Report On Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents, U.S. Department of Defense (Aug. 9, 2006), http://archive.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf (last visited Aug 23, 2018).

[39] *Federal Student Aid's Processes for Identifying At-Risk Title IV Schools and Mitigating Potential Harm to Students and Taxpayers*, United States Department of Education, Office of Inspector General, (Feb. 24. 2017) https://www2.ed.gov/about/offices/list/oig/auditreports/fy2017/a09q0001.pdf.

[40] 83 FR 37237.

closure. In the proposal, the Department suggests outright denying any borrower the right to a closed school discharge should the school provide an opportunity to complete the program of study through a teach-out.[41] This ignores the fact that a teach-out program may fail to meet a student's needs, or properly match their program of study, or that it may occur at a neighboring school that isn't realistic for a student to attend. We strongly oppose the Department's proposal to deny discharges to students when a teach-out program is offered.

We also oppose the Department's deletion of several of the exceptional circumstances that allow the Secretary to extend the period of time to provide a closed school discharge. The Department should not be tying its own hands and foreclosing its future ability to assist students dealing with an abrupt school closure.

In isolation, we would support the extension of the window to qualify for a closed school discharge from 120 Days to 180 Days. But as discussed above, the additional changes the Department has proposed to closed school discharges eliminate any benefit of this specific change.

XIII. False Certification Discharges (§ 685.215)

We object strongly to the addition of 685.215(c)(ii), which would allow schools, in cases where a school is unable to obtain a high school transcript or diploma, to rely on a borrower attestation that they earned a high school diploma, and bar the borrower from obtaining a false certification discharge if they obtain such an attestation. This may lead, as it has in the past, to schools rushing students through the attestation forms. We have see this type of abuse historically, where schools not only rush students through forms, but even complete the FAFSA for a borrower, inserting the name of a high school the borrower either never attended or did not graduate from—something the Department took action against the Marinello Schools of Beauty for.[42] The borrower will then sign the form without knowledge of the false information the school has inserted on their behalf. We have also seen similar behavior with FastTrain College. In 2017, a court entered a $20 million judgment against FastTrain and its president, who "instructed and counseled ineligible prospective students to provide false high school completion attestations and further coached them to lie on their Free Application for Federal Student Aid ("FAFSA")."[43] We have also seen schools direct students to diploma mills, businesses that set up online multiple-choice tests for a fee, and then provide a fake transcript and high school diploma, which the school can then use to qualify the students for federal student loans.[44] Denying a student a right to a false certification discharge should the school be able to present a borrower attestation is ripe for future abuse by schools intent on exploiting Title IV funding. The Department should rescind 685.215(c)(ii).

XIV. Financial Responsibility (§ 668.171 General)

[41] 83 FR 37266.

[42] For example, in 2016, the Department took enforcement actions against Marinello Schools of Beauty campuses for precisely these sorts of violations. See U.S. Department of Education Takes Enforcement Against Two School Ownership Groups, U.S. Department of Education (Feb. 1, 2016), https://www.ed.gov/news/press-releases/us-department-education-takes-enforcement-against-two-school-ownership-groups (last visited Aug 23, 2018).

[43] *United States v. FastTrain II Corp.*, Case No. 12-CIV-21431, 2017 WL 606346, at *9-10 (S.D. Fla. 2017).

[44] *See* Press Release, Federal Trade Commission, FTC Action Halts Online High School Diploma Mill That Made $11 Million Selling Worthless Diploma to Students (Sept. 19, 2014).

The Proposed Rule suggests changing some of the mandatory triggers from the 2016 rule into discretionary triggers. The proposal even suggests that the Department meet with a school in some cases (such as an institutional accreditation show-cause order) to discuss whether or not there will be a "material adverse effect" on the school before making the financial responsibility determination, which will undoubtedly be time-consuming and costly. We recommend retaining the triggers as laid out in the 2016 regulation, and oppose the Department's proposal to relax accountability on schools by shifting many triggers from mandatory to discretionary.

XV. Conclusion

The Proposed Rule is a brazen attempt to dismantle more than 20 years of borrowers' rights to a defense to repayment on their loans when schools break the law. This dismantling will do nothing more than unleash a new wave of waste, fraud and abuse. This country teaches people that education is a path to a better life. For far too many years, allowing Title IV funds to flow to institutions engaging in fraud has turned this dream into a nightmare for their students. If the Department continues down this path of dismantling the right to a borrower defense, its legacy will be condemning students to lives full of poverty, while allowing executives of predatory proprietary institutions to become wealthy at their expense.

We thank you for the opportunity to comment. We hope that you will seriously consider the recommendations we have set forth, which will allow the Department to protect both students and taxpayers from abuse of the federal fisc. For questions, please contact Alexis Goldstein, AFR's Senior Policy Analyst, at 202-466-1885.

Sincerely,

Americans for Financial Reform