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July 2, 2015

Jean-Didier Gaina
US Department of Education
1990 K Street, NW, Room 8055
Washington, D.C. 20006

Re: Department of Education; Notice of Proposed Rulemaking
[Docket No. ED-2015-OPE-0020]

Dear Mr. Gaina

This letter is submitted to the Department of Education (the "Department") on behalf of the Network Branded Prepaid Card Association ("NBPCA")[1] in response to the Notice of Proposed Rulemaking published in the Federal Register on May 18, 2015, at 28484 (the "Proposed Rule").[2] The Proposed Rule seeks to modify the cash management regulations of the Higher Education Act of 1965 (the "Act") and contains numerous new requirements for prepaid account products ("Campus Card(s)") offered to students or their parents in connection with the disbursement of funds under Title IV of the Act ("Title IV Funds"). The Proposed Rule seeks to impose burdensome regulatory requirements that will have a significant impact on colleges and universities ("School(s)"), their students, and the financial institutions ("Financial Institution(s)") and third-party servicers ("Third-Party Servicer(s)") that Schools engage as financial service providers. The NBPCA is concerned that the Proposed Rule will harm the interests of students by forcing providers of Campus Cards to cease offering such products and thereby deprive students of the ability to choose an innovative and beneficial product. The NBPCA appreciates the opportunity to comment on the Proposed Rule and share its concerns.

[1] The NBPCA is a nonprofit, inter-industry trade association that supports the growth and success of network branded prepaid cards and represents the common interests of the many participants in this new and rapidly growing payments category. The NBPCA's members include banks and financial institutions, the major card networks, processors, program managers, marketing and incentive companies, card distributors, payment industry consultants and law firms. The comments made in this letter do not necessarily represent the position of all members of the NBPCA.

[2] Federalregister.gov, Program Integrity and Improvement, available at https://www.federalregister.gov/articles/2015/05/18/2015-11917/program-integrity-and-improvement (last visited, June 1, 2015); 80 Fed. Reg. 28484 (March 18, 2015).

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I. General Comments

A. The NBPCA Believes the Proposed Rule is Outside of the Department's Authority, Experience, and Expertise and Should be Withdrawn

The NBPCA believes that the Department lacks the authority, experience, and expertise to regulate financial services in the manner contemplated under the Proposed Rule and requests that the Department withdraw the Proposed Rule and leave such regulation to the federal agencies in which Congress has already expressly vested regulatory authority in this area.[3] A federal agency can exercise only the authority delegated to it by Congress. Absent such delegation, action taken by the agency would be outside the bounds of the agency's jurisdiction,[4] and may be set aside by a court under the Administrative Procedure Act.[5] While the Department cites to numerous sections of the Act for its alleged authority to regulate in the manner contemplated by the Proposed Rule, it is highly unlikely that Congress intended the Department's authority to extend beyond the disbursement of Title IV Funds into the field of banking regulation. The Act authorizes the Department to and the Secretary of the Department to issue regulations carrying out the purposes of the "Direct Loan Program"[6] and, more specifically, to prohibit charging any student a fee for the processing or handling the student's application, including determining eligibility, for Title IV Funds.[7] Once these concerns are addressed, it is not appropriate for the Department to further regulate the terms of the accounts that may receive Title IV Funds, particularly where there is existing federal law to perform this function. Moreover, the Department's Proposed Rule seeks to regulate account terms on the mere possibility that Title IV Funds will be deposited onto Campus Cards. To this point, Congress has already established a complex and well-developed banking regulatory scheme that includes numerous prudential regulators charged with overseeing financial service providers. Such regulators include, among others, the OCC, the FDIC, the Federal Reserve, and the NCUA. These agencies already have the experience, expertise and authority to regulate in this area and the Department, by contrast, lacks the resources, knowledge, or the ability to issue, continually update, and enforce complex banking regulations.

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[3] Such regulatory authority includes several federal banking and credit union agencies that specifically regulate consumer bank accounts under statutes such as the Electronic Funds Transfer Act and the Truth in Savings Act.
[4] *See Lyng v. Payne*, 476 U.S. 926, 937 (1986); *Stark v. Wickard*, 321 U.S. 288, 309 (1944).
[5] 5 U.S.C. § 706(2)(C) (stating that a court will set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations.") .
[6] Higher Education Act, Section
[7] Higher Education Act, Section 487(a)(2)

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Further evidencing the Department's lack of authority to regulate consumer financial accounts is the fact that Congress has created another agency with the express purpose of overseeing such accounts and that agency has been active in supervising the provision of financial services to students. In particular, the Consumer Financial Protection Bureau ("CFPB") was specifically created in 2010 as an agency dedicated solely to consumer protection with respect to financial services.[8] The CFPB maintains a website dedicated to banking and financial services issues impacting college students[9] and has been actively engaged in this policy area, most recently by issuing a proposed Student Account Scorecard,[10] and a proposal to extend Regulation E consumer protections to “prepaid accounts”, which could include campus cards. The NBPCA is concerned that the Proposed Rule will ultimately conflict with actions or proposals put forward by the CFPB or the other appropriate federal banking regulators.

The NBPCA further notes that there is no record that the Department even consulted with the prudential banking regulators, and thereby learn from the experience and expertise they already have, in developing the Department's Proposed Rule. Indeed, rather than consult with the prudential regulators charged with overseeing this area, the Department appears to have based its research entirely on reports from consumer interest groups, which themselves were largely based on anecdotal accounts rather than any detailed analyses.[11] In the NBPCA's opinion, even if the Department arguably has authority to regulate financial services, it should have done so only in close consultation with the prudential banking regulators. The Department failed to do so and should withdraw its Proposed Rule.

Finally, the NBPCA believes that the Department's lack of experience and expertise in financial services is illustrated in looking at the specific requirements under the Proposed Rule. If the Department decides to move forward with its Proposed Rule, despite its lack of apparent authority and its failure to consult prudential banking regulators, these requirements would need substantial modification. Without such modification, it is unlikely that providers of Campus Cards will continue to be able to offer their products and services to students, notwithstanding their considerable benefits.

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8 Dodd–Frank Wall Street Reform and Consumer Protection Act, Title X, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

9 Consumerfinance.gov, Students and Young Americans, available at http://www.consumerfinance.gov/students/ (last visited, June 1, 2015).

10 Consumerfinance.gov, Request for Information Regarding an Initiative on Safe Student Banking, available at http://www.consumerfinance.gov/students/request-for-information-regarding-an-initiative-on-safe-student-banking/ (last visited, June 1, 2015).

11 The Proposed Rule cites to PIRG no less than 60 times, and Consumers Union no less than 26 times.

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B. The Proposed Rule's Fee Requirements are Impractical, will Result in Providers Leaving the Market and Depriving Students of Choice

1. Issues with the Proposed Rule's Fee Requirements Applicable to Tier 1 Arrangements

The Proposed Rule contains numerous and substantial restrictions on fees that may be charged to students under a Tier 1 arrangement.[12] In particular, the Proposed Rule prohibits students from incurring a fee for point of sale ("POS") transactions, for accessing any ATM belonging to a surcharge free regional or national network offered under the Tier 1 arrangement, within thirty days of the date Title IV Funds are deposited into the financial account offered under the Tier 1 arrangement, or for instances where a student exceeds the balance in the financial account, regardless of whether the full amount of the transaction is established at the time the transaction is authorized by the applicable financial institution.

While the NBPCA supports a requirement to provide students a fee free means of accessing their Title IV Funds, the NBPCA believes that the fee restrictions proposed by the Department go too far and, if not altered, will ultimately force providers out of the market and result in fewer products and services being offered to students.

a. Thirty Day Prohibition on Fees

The Proposed Rule contains a broad prohibition on students incurring any fees during the first thirty days following the date Title IV Funds are deposited into a financial account offered under a Tier 1 arrangement. In discussing the reasoning behind this requirement, the Department states that the purpose of this prohibition is to give students a reasonable opportunity to access their full Title IV Funds. The Department notes that a thirty day prohibition is necessary to ensure students are able to fully access the funds because of concerns regarding three specific types of fees: POS fees, out-of-network ATM fees charged by a Third-Party Servicer or associated Financial Institution, and overdraft fees.

First, the NBPCA notes that the Department's requirement to provide thirty days of fee-free access to Title IV Funds from the date such funds are deposited into an account offered under a Tier 1 arrangement is not necessary if the Department elects to proceed with prohibitions on POS fees, overdraft fees, and surcharge-free network requirements. Second, the NBPCA believes the proposed thirty-day fee free requirement is impractical. Specifically, the Department

[12] 80 Fed. Reg. 28583.

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fails to understand or account for the fact that Third-Party Servicers under Tier 1 arrangements may facilitate multiple disbursements of funds to a School's students over the course of a year. There is no discernable way for a Third-Party Servicer to know if such disbursements may or may not include any Title IV Funds. While existing law requires Schools and Third-Party Servicers to provide students both a fee free means of accessing their Title IV Funds and convenient access to ATMs or branch offices of financial service providers on or adjacent to campus for the express purpose of providing students the ability to access their full Title IV Funds at no cost; Schools and their financial service providers meet this requirement by providing a surcharge free network and the ability to transfer funds to another account without a fee. By contrast, the only way a Third-Party Servicer (which does not have the ability to determine whether a particular disbursement includes Title IV Funds) could comply with the 30-day fee prohibition under the Department's Proposed Rule would be to charge no fees to a student at all, ever. Such a result is untenable and would cause Third-Party Servicer's to stop providing these products and services and exit the market.

Further, while the Department cites three types of fees that it finds particularly troublesome as justification for its thirty day prohibition, the Department fails to account for several other instances where a student may incur a reasonable fee as part of their use of the financial account. Examples of such instances include currency exchange fees for students studying abroad, fees for replacing a card, for bill payment, for cash advances, and for overnight delivery. Such a result would be against the best interests of students as it would deprive them of many diverse and innovative products and services offered under Tier 1 arrangements if these providers leave the marketplace altogether.

Moreover, these onerous fee restrictions do not apply to other cards that receive some form of government payments. The Department itself notes the growing number of benefits that are distributed through government prepaid debit cards and, as an example, specifically cites the Treasury's Direct Express prepaid card program for the disbursement of social security benefits.[13] The Department fails to consider, however, that the terms and conditions of the Direct Express card do not include similar fee restrictions or initial 30-day prohibition on fees, likely because if such restrictions were to apply to those programs, the government would not be able to find any financial institution partners willing to provide these accounts.[14] Likewise, the 30-day prohibition should not be applied to Tier 1 arrangements.

[13] 80 Fed. Reg. 28497.
[14] USExpress.com, Terms of Use, available at https://www.usdirectexpress.com/edcfdtclient/docs/Terms_And_Conditions.pdf (last visited, June 2, 2015).

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With regard to the other types of fees the Department cites as particularly troubling, we note that POS fees are not commonly charged to students under financial accounts offered under Tier 1 arrangements. Similarly, the NBPCA is not aware of any Campus Card program where an overdraft service is currently offered.

However, with regard to out-of-network ATM fees – as well as other fees charged by a Third-Party Servicer or associated entity to recoup third party fees based on the student's use of the Campus Card but not directly charged to the student – the NBPCA points out that such fees are necessary to recover the Third-Party Servicer's costs incurred from the student's conscious choice to use an ATM outside of the program's network. Each time a student accesses an out-of-network ATM, the owner charges the issuer a fee for use of the network, whether in connection with a cash withdrawal or for non-monetary transactions such as a balance inquiry or a denied authorization. These are but a few of the many instances where a third party fee may be assessed against an issuer and not directly charged to the student, even though the occurrence of the fee is entirely in the student's control. Other examples include, but are not limited to, international ATM access, currency conversion, and over-the-counter bank transactions. Under the Proposed Rule, a student could conduct these transactions with impunity during the thirty day fee-free period. If Third-Party Servicers are not allowed to recoup reasonable costs from such out-of-network activity and third party fees, the Third-Party Servicer will be forced to limit the functionality of its Campus Cards, including turning off the out-of-network capability. Such a result harms students by depriving them of the ability to use their Campus Card out-of-network if they choose to do so. The NBPCA believes a far better requirement would be to disclose the fees for using an out-of-network ATM to the student, a requirement that already exists under current law, instruct the student on how to avoid such fees, and leave it in the student's control whether they want to use their card at an out-of-network ATM and thereby incur a reasonable fee for this service.

Finally, the Department specifically requested comment regarding whether thirty days following a disbursement is an appropriate timeframe to allow a Title IV Funds recipient an opportunity to reasonably access their Title IV Funds free of charge. As noted above, because Third-Party Servicers may facilitate multiple disbursements of payments to students over the course of a year, and any or all of these payments may include Title IV Funds, any requirement to provide access to an account offered under a Tier 1 arrangement completely free of charge for any period of time is impractical as it would require the account to offered for free in perpetuity.

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b. Overdraft and Force-Pay Transactions

As noted above, the Proposed Rule prohibits students from incurring a fee for exceeding the balance in their financial account, regardless of whether the full amount of the transaction is established at the time the transaction is authorized by the applicable financial institution. In its commentary discussing this portion of the Proposed Rule, the Department notes that it is aware that there are circumstances in which a transaction exceeds the balance in a financial account even though the account contained sufficient funds to pay the initial charge for the transaction when authorized.[15] These circumstances could include, for example, automated fuel transactions, hotel and car rentals, and service tip environments such as restaurants and taxi rides. The Department further notes, however, that the Proposed Rule will not create exception to the ban on overdraft fees to address such situations. Instead, the Department proposes leaving the issuer responsible for placing such limits on its authorization process necessary to address these situations.[16]

The NBPCA has grave concerns regarding this portion of the Proposed Rule and the accompanying commentary. The NBPCA believes without further guidance from the Department, it will be far more likely that consumers will be denied authorization for transactions in which the final amount of the transaction is not known at the time of the transaction. Should the Department nevertheless deem it necessary to prohibit overdraft fees, we request that the Department clarify that the prohibition applies only to fees charged for an financial institution's affirmative extension of credit (i.e., fees charged for providing an overdraft service) to avoid subjecting institutions to further compliance risk for other permissible fees that are unrelated to the institution's extension of credit.

2. *Issues with Fee Requirements Applicable to Tier 1 and Tier 2 arrangements*

a. Requirement that students incur no cost for opening or receiving an access device is unworkable in the case of access devices that also function as student identification card

Under both Tier 1 and Tier 2 arrangements, the Proposed Rule will require that students incur no cost for opening or receiving an access device.[17] The NBPCA is concerned that, in the case of cards distributed by a School that serve another institutional purpose, such as for student identification, which can later be linked to a financial account once a payment functionality is

[15] 80 Fed. Reg. 28508 – 28509.
[16] 80 Fed. Reg. 28508 – 28509.
[17] 80 Fed. Reg. 28533 – 28534.

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activated, this requirement is unworkable. Schools incur substantial costs in maintaining campus access control systems. To cover these costs, schools typically charge students fees to obtain and replace student identification cards. Under the Proposed Rule, it would appear that if the student identification card also serves as a potential access device to a financial account, a School will no longer be able to charge such fee. This would have the negative result of increasing School administrative expenses that may otherwise go to enhancing campus security and other student programs. For these reasons, the NBPCA urges the Department to modify the Proposed Rule or any subsequent rule covering Campus Cards to clarify that any requirement that students incur no costs for opening or receiving an access device does not apply in the case of cards distributed for institutional purposes that happen to have an incidental payment functionality.

C. The Proposed Rule's Obligations on Schools to Develop a "Student Choice Process" and to Ensure the Terms and Conditions of Both Tier 1 and Tier 2 Arrangements are Not Inconsistent with the Best Financial Interests of Students are Impractical as Written and Impose Substantial New Burdens on Schools, Financial Institutions, and Third-Party Servicers

The Proposed Rule contains new requirements for Schools and financial services providers to develop and implement processes in order to ensure student choice and to ensure that the terms and conditions of financial accounts offered to students under a Tier 1 or Tier 2 arrangement are not inconsistent with a student's best financial interests.[18] Among the obligations imposed on Schools relating to these processes are requirements (i) to periodically conduct due diligence on financial services providers, (ii) to ensure the School has a contractual right to terminate applicable agreements based on student complaints, and (iii) to present students with a choice of payment options for receiving their Title IV Funds that must list a student's pre-existing financial account as the first, most prominent, and default option.

While the NBPCA fully supports the right and ability of students to choose the method of payment for receiving Title IV Funds that best meets their individual needs, as well as offering terms and conditions that are in the student's best financial interests, the NBPCA is concerned that many of the specific requirements under the Proposed Rule are impractical or unnecessary given the current regulatory landscape of providing financial services to students.

[18] 80 Fed. Reg. 28532 – 28533.

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1. *Specific Aspects of the Processes Required Under the Proposed Rule are Impractical*

   a. The Proposed Rule's Disclosure Requirements are Impractical in Light of Similar Requirements Proposed by the CFPB and will Lead to Student Confusion

As part of the "student choice process," the Department proposes giving students a disclosure with the major features and commonly assessed fees of Tier 1 and Tier 2 arrangements.[19] While the Department notes that the CFPB has already proposed a similar short-form disclosure for prepaid card accounts, the Department does not believe the CFPB's proposed short-form disclosure is appropriate for financial accounts offered to students under a Tier 1 or Tier 2 arrangement because, among other reasons, (i) Tier 1 and Tier 2 arrangements encompass both checking and prepaid accounts, and (ii) the model forms proposed by the CFPB include fees and terms – namely POS fees, out-of-network ATM fees, and disclosures relating to overdraft – not applicable to students under the Proposed Rule.[20] For these reasons, the Department proposed working with the CFPB to develop the Department's own disclosure for use under the Proposed Rule.

The NBPCA believes that the Department's proposal to develop its own short-form disclosure, particularly as it pertains to Campus Cards, will lead to confusion for students. Under the CFPB's proposed rule, the short-form disclosure requirement applies to all prepaid accounts, including Campus Cards. Therefore, under the Proposed Rule, a student who is offered a Campus Card would potentially receive at least two short-form disclosures, the CFPB's and the Department's, in addition to a potential long-form disclosure under the CFPB's prepaid account rule. Moreover, these disclosures may contain disparate or incompatible information.[21] In order to minimize consumer confusion, the NBPCA urges that any disclosure requirement under the Proposed Rule be issued jointly with the CFPB to include only one short-form disclosure

[19] 80 Fed. Reg. 28532 – 28533.
[20] 80 Fed. Reg. 28503.
[21] The Department's short-form would apparently omit information required by the CFPB's short-form because it is inapplicable in the context of accounts offered to students under the Proposed Rule (e.g. POS fees and overdraft fees, *See* 79 Fed. Reg. 77317 – 77318). In its proposed rule, the CFPB noted the importance of including such information, whether the particular required fee or condition actually applied under the program in question or not. It is unclear how a final disclosure issued by the CFPB and the Department would handle this discrepancy and the NBPCA is concerned that it may result in multiple disclosures and increased consumer confusion.

b. Default Option is Impractical

Under the Proposed Rule, a student's pre-existing account is required to be listed as the first, most prominent, and "default" option for a student to receive payment of their Title IV Funds.[22] However, as a practical matter, a student's pre-existing financial account cannot be the "default" option for receipt of their Title IV Funds, because it would require the student to first provide their account information to the School, Financial Institution, or Third-Party Servicer. If the student does not provide such information, it is impossible to issue a "default" payment of the Title IV Funds to the student's pre-existing financial account. In light of this concern, the NBPCA requests that the Department revise the Proposed Rule and any subsequent rule governing Campus Cards to remove the requirement that a student's pre-existing financial account be the "default" account for receiving Title IV Funds and instead allow the applicable School and provider of financial services to determine the appropriate default method of payment. The NBPCA also urges the Department refrain from finalizing this Rule until the industry has had a chance to review and provide comment on the joint Department/CFPB short form.

c. Termination Based on "Complaint"

As part of a School's obligation to ensure financial services offered to students under a Tier 1 or Tier 2 arrangement are in the best financial interests of the students, the Proposed Rule would provide Schools with a contractual right to terminate Tier 1 or Tier 2 agreements based on "complaints" the School receives and if the School determines that fees charged under the applicable program are excessive.[23] The Proposed Rule gives no guidance into what constitutes a "complaint," or how the determination of "excessive" fees is to be made by a School. It is similarly unclear whether the parties under the Tier 1 or Tier 2 arrangement will have the ability to place any limits on such a termination right. If the Department proceeds with its Proposed Rule, it should clarify both what constitutes a "complaint" and the objective criteria a School should use in determining whether fees charged under a program are "excessive" and whether parties may place contractual limitations around termination rights relating to these points.

[22] 80 Fed. Reg. 28532.
[23] 80 Fed. Reg. 28533 – 28534.

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2. *The Proposed Rule's Requirements will Require School's to Become De-Facto Regulators of Financial Service Providers*

As noted above, under the Proposed Rule, Schools must develop and establish a "student choice process" and take administrative actions, such as conducting regular due diligence, to ensure compliance with the Proposed Rule's standards.[24] The NBPCA believes that these requirements, as written, would negatively impact Schools by forcing them to operate as de-facto financial regulators. Specifically, the Proposed Rule's requirement that Schools ensure that Tier 1 and Tier 2 arrangements are evaluated in light of the "best financial interests of students" will require Schools to obtain significant knowledge regarding the financial services industry and the various products and services offered by banks and non-banks alike. For example, Schools will be forced to regularly evaluate the pricing and other features of the myriad financial products and services provided to students by Financial Institutions, Third-Party Servicers, credit unions, retailers and others and to monitor and keep track of the constantly evolving technology and regulatory landscape governing such products. Such a result would impose a substantial administrative burden on Schools. The NBPCA believes it is not appropriate to make Schools the arbiter of what is or is not in the best financial interests of students, particularly if such a determination is to be made solely on cost considerations and not on the other features of the account in question. If the Department continues with its Proposed Rule, it should remove this requirement.

D. The Proposed Rule's Obligations to Obtain Student Consent Prior to Distributing an Unactivated Campus Card or Linking a Student Identification Card to a Financial Account Harms the Interests of Students by Depriving them of Earlier Access to Valuable Financial Services and Other Benefits

Under the Proposed Rule a School must obtain a student's consent to open a Tier 1 or 2 financial account before either (1) sharing personal information of the student or parent with the financial account provider (other than name, address, and e-mail); and (2) sending an access device to the student or parent, or linking the student's identification card to a financial account.[25] The NBPCA is concerned, however, that these requirements will prevent students from being able to obtain convenient and fast access to both their Title IV Funds and important School services. Moreover, the NBPCA notes that this proposed requirement is unnecessary given that

[24] 80 Fed. Reg. 28532.
[25] 80 Fed. Reg. 28532.

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existing regulations already require consent from a student prior to opening an account for the disbursement of Title IV Funds.[26]

1. *Financial Institutions and Third-Party Servicers Need More Information from Schools to Provide Accounts to Students and Access to Title IV Funds in a Timely Manner*

First, the NBPCA notes it will often be necessary to obtain more than a student's name, home address, and e-mail address in order to give Financial Institutions or Third-Party Servicers sufficient information to identify a student. For example, if students at a particular School have the same name, this creates substantial confusion that could result in the misrouting of funds, or it could result in increased instances of fraud by someone who wrongfully purports to be the student. Thus, proper customer identification on the front end will prevent misrouting of funds and fraud. To accomplish this proper identification, at a minimum, a student identification number is required. Further, other government programs use Customer Identification Program ("CIP") information to validate a consumer including date of birth. To further prevent fraud or misrouting of Title IV Funds, it would be advisable to allow additional items that help specifically identify students, such as date of birth. The student identification number may help delineate between two students with the same name, and it provides one more item to prevent fraud. Finally, it is worth noting that none of this information can be used beyond identification according to existing regulations. For these reasons, the NBPCA requests that the Department revise the Proposed Rule to allow Schools to provide enough information to Financial Institutions and Third-Party Servicers to allow them to properly identify students in accordance with established regulatory requirements so that students may receive their Title IV Funds in a timely manner, and prevent fraud or unnecessary routing of Title IV Funds without unnecessary delays.

2. *Prohibiting the Disbursement of Unactivated Cards Prior to Receiving Student Consent to Open a Financial Account Will Harm the Interests of Students*

While the NBPCA fully supports a requirement to obtain a student or parent's consent prior to opening a financial account for them, the NBPCA is concerned that the Proposed Rule's requirement to obtain consent prior to distributing an unactivated access to device to the student or parent under a Tier 1 or Tier 2 arrangement would present unnecessary delays to a student's ability to access critical loan proceeds. The student may rely on the unactivated card in order to receive payments as fast and conveniently as possible, or to make important purchases before

[26] 34 C.F.R. § 668.164

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ever arriving on campus. For example, a student living in California and attending college in Texas may need to purchase books for class, and that student may rely on his or her Campus Card to make that purchase online rather than having to wait until the student physically arrives on campus. Further, the NBPCA believes that the Department's regulations requiring full disclosure of all terms and conditions and the student's consent before an account is opened already provides sufficient protection that the student will not unknowingly be enrolled in an account. Requiring a separate written consent from the student in order to receive an unactivated access device puts unnecessary burdens on Financial Institutions, Third-Party Servicers, and Schools.

Finally, the NBPCA believes that the Proposed Rule's requirements regarding student consent are redundant with existing law and are therefore unnecessary and unreasonable. Strict guidelines apply to any financial service provider opening a new account for a student. Such guidelines include providing the student with all of the account terms and conditions to the student prior to opening.[27] Moreover, because Campus Cards are bank offered products, they are subject to federal and state statutes that provide full and meaningful disclosure of account terms, including, among others, the Electronic Funds Transfer Act (EFTA).[28] In light of the comprehensive guidelines for account opening disclosures that already exist, the NBPCA is concerned that the Proposed Rule's requirements are unnecessary and create a substantial risk of compliance ambiguity.

For these reasons, the NBPCA thus asks that this requirement be removed from the Proposed Rule or any subsequent rule governing Campus Cards.

E. Contract Disclosure issues

Under both Tier 1 and Tier 2 arrangements, in order to facilitate more transparency and student choice, the Proposed Rule states that, no later than sixty days after the most recently completed award year, a School must provide the Department, and disclose conspicuously on the School's website, the contract between the School and applicable Financial Institution or Third-Party Servicer.[29] The contract must be displayed in its entirety except for portions that would compromise personal privacy, proprietary information technology, or the security of information technology or of physical facilities. Additionally, a summary must be provided to the Department, and similarly posted on the School's website, containing the total consideration for

[27] 34 C.F.R. § 668.164
[28] 15 U.S.C. 1693 et seq.
[29] 80 Fed. Reg. 28533 – 28534.

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the most recently completed award year (monetary and non-monetary) paid or received by the parties under the contract, the number of students and parents who had accounts under the contract at any time during this period, and the mean and median of actual costs incurred by those account holders. Finally, the School must submit to the Department a URL where the contract and summary can be found on the School's website, which the Department will then make publicly available.

The NBPCA has several concerns regarding the Proposed Rule's requirements for the public disclosure of agreements between Schools and Financial Institutions or Third-Party Servicers. In particular, the NBPCA is concerned that the Proposed Rule's posting requirements still require Schools, Financial Institutions, and Third-Party Servicers to disclose proprietary and confidential information despite the included exception for information that would compromise proprietary information technology. Further, requiring such posting does not promote student choice and is therefore unnecessary to promote transparency. Finally, certain characteristics of the information required to be included in posted summaries are impractical and create numerous challenges for Schools and their financial services providers. For these reasons, the NBPCA asks the Department to remove these requirements from the Proposed Rule.

1. *The Proposed Rule's Posting Obligations are Likely to Cause the Disclosure of Proprietary and Confidential Information*

Under the Proposed Rule, the parties are required to provide summaries containing information on royalty payments, revenue sharing, and other consideration received between and among them. The NBPCA is concerned that including royalty and revenue sharing provisions in publicly posted agreements and summaries implicates significant antitrust concerns. Specifically, the Federal Trade Commission's ("FTC") restrictions on price fixing prohibit competitors from agreeing to take actions that have the effect of raising, lowering, or stabilizing the price of any product or service.[30] Schools and their financial service providers heavily negotiate revenue sharing and royalty provisions and would never voluntarily share the details of these provisions with one another. The NBPCA has concerns that making such information available publicly where anyone could access it could cause prices to rise, lower, or stabilize in violation of FTC rules.[31] Such a result is exactly what the FTC's prohibitions on anti-competitive pricing seeks to prevent as it results in a decrease in competition and robs students of

[30] FTC.gov, Price Fixing, available at http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing (last visited, March 1, 2015).
[31] FTC.gov, Price Fixing, available at http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing (last visited, March 1, 2015).

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the benefits of higher quality products and services, more choices, and greater innovation. The NBPCA further notes that while a similar requirement may apply to the terms of credit card agreements, that posting requirement was enacted by Congress and arguably provides some protection from antitrust concern through the separate legislative action. Here, the Department is proposing to adopt a requirement that Congress has not deemed necessary and that could potentially subject issuers and schools alike to antitrust risk. The Department should not put issuers or Schools in this position.

2. *The Public Posting of the Agreements and Summaries is Unnecessary as it Presents Little Potential Benefit to Students*

The NBPCA does not believe that posting agreements between a School and a Financial Institution will have the effect the Department desires. In the experience of the NBPCA's members, it is highly unlikely that a consumer, including a student, would visit a website to review a program agreement that the student is not a party to. As noted above, the persons most likely to view such agreements are industry competitors, and the practice of publicly posting such agreements would thus provide little benefit to actual consumers. Further, it should be noted that agreements between a School and its financial services provider contain numerous terms and conditions, many of which are not applicable to the student in any way. So, even if a student actually reviewed a posted agreement, they would be exposed to pages of complex legal provisions that are irrelevant to the student's tenure with the School and may be confusing for the student. The NBPCA believes the requirement to publicly post the agreements is unnecessary as it poses very little potential benefit for students and will likely result in confusion.

3. *The Public Posting of the Agreements and Summaries is Unnecessary to Promote Transparency*

The NBPCA believes that current federal regulations, and the NBPCA's own Campus Card leading practices,[32] already ensure that students have sufficient information upon which to base a financial decision, making the posting of these agreements and summaries unnecessary. In particular, the NBPCA's Campus Card leading practices require transparency between Schools, Financial Institutions, and Third-Party Servicers regarding their relationships with one another.[33] Further, as noted above, current law requires disclosure of the full terms and conditions of a product or service prior to a student opening an account. The NBPCA believes

[32] Campus Payment Card Leading Practices, available at http://www.nbpca.com/~/media/D730BC6D00694AFD9F0C3AD3A6AD14D1.ashx.
[33] Campus Payment Card Leading Practices, available at http://www.nbpca.com/~/media/D730BC6D00694AFD9F0C3AD3A6AD14D1.ashx.

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that a student's knowledge of the relationship between the student's School and the Financial Institution or Third-Party Servicer, along with all of the terms and conditions of the financial account provides the student with sufficient information on which to base a financial decision and an additional requirement to post agreements and summaries is unnecessary.

4. *Particular Information Required in the Proposed Agreement Summaries are Impractical or Unnecessary*

Additional concerns are created by the Proposed Rule's requirement that the posted agreement summaries include (i) the mean and median of actual costs incurred by account holders over the course of an award year, and (ii) the number of students and parents who had accounts under the agreement at any time during this period. First, it is important to note that Financial Institutions and Third-Party Servicers have no way of knowing if a particular account holder is a student, the parent of a student, or a former student. As such, there is no way to accurately disclose the number of student and parent accounts. The Proposed Rule's requirement would force Schools and their financial services provider to publicly post inaccurate and misleading information.

Further, the NBPCA believes that requiring the posting of the mean and median account costs will not serve the public in the manner anticipated by the Department. In fact, two providers with the same fee structure may report different mean and median numbers based on the size of a particular program or individual characteristics of a particular customer base. Moreover, requiring the posting of such information would cause providers that offer more services for a reasonable fee to look worse than those providers that offer fewer services, which may in turn harm students by leading to fewer products and services being offered to them.

For all of the reasons outlined above, the NBPCA requests that the Department remove the posting requirements from the Proposed Rule. In the alternative, the NBPCA would suggest revising the Proposed Rule to require a School to post a summary of the agreement, without any royalty or revenue sharing information or information regarding the mean and median costs and number of student and parent accountholders. The NBPCA believes that such a revision would be more beneficial to students as it would ensure that any information reviewed by a student avoids potentially confusing or extraneous information not relevant to the student.

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F. The Effect of the Proposed Rule on Existing Agreements is Unclear

The NBPCA notes that the Proposed Rule does not address how the proposed requirements will effect existing agreements. If the Department continues with its Proposed Rule, it should provide clarification on this point.

G. If the Department Establishes Its Own Method of Direct Title IV Funds Disbursement to Students, it will Likely Stymie Innovation

The Department reserves the right, in the Proposed Rule, for the Secretary of Education to establish his or her own method, including through the use of a prepaid card, for the payment of Title IV Funds directly to students.[34] The NBPCA has several concerns with this broad grant of authority to the Secretary for the purpose of establishing a direct method of payment of Title IV Funds.

First, even if the Department pays students their Title IV Funds directly, Schools will still be responsible for handling other financial aid disbursements. As a result, each School will still have to maintain a parallel system for student disbursements, which highlights the extreme inefficiencies created by the Department disbursing Title IV funds directly, and the challenges created for Students having to maintain multiple financial services products to receive loan proceeds and other financial aid.

Second, Campus Cards already exist in an incredibly competitive market, where industry members compete with one another to offer students the most innovative and convenient financial services products. Supplanting this market with one government issued product would hurt students by eliminating competition and thereby stunting the growth of new and innovative products to offer to them.

Third, requiring a government issued Campus Card attempts to make a one-size fits all product work for all colleges and universities and their students. The government issued Campus Card would not likely take into account the unique and individualized needs of the various colleges, universities, and student bodies that would be utilizing the product. By contrast, the current system allows schools to work with a myriad businesses in order to tailor a Campus Card program that meets both that school's individualized needs and the unique needs of the school's student body. A single government issued Campus Card would foreclose the ability of colleges, universities, and industry participants to tailor financial services products to

[34] 80 Fed. Reg. 28496 – 28497.

meet unique and individualized needs of both students and their schools.

Finally, the NBPCA believes that such a proposed change, were it to go forward, should be first be subject to its own negotiated rulemaking as well as public review and comment.

H. The Department's Cost Benefit Analysis is Does Not Adequately Address the Costs and Benefits That the Proposed Rule will Have on Students, Schools, and Financial Services Providers and is Therefore Inconsistent with Federal Law

In promulgating regulations, federal agencies are required to take into account the benefits and costs, both qualitative and quantitative, of their proposed regulation and propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs.[35] Here, the Proposed Rule's cost-benefit analysis focuses on the Proposed Rule's impact on the student loan programs and relies only on subjective estimates of the time it could take to implement various aspects of the Department's proposed regulation without any indication that the Department consulted with issuers, third party servicers or schools to determine the steps or processes required for any necessary changes.[36] The reliance on Bureau of Labor Statistics wage data also fails to take into consideration of any software or hardware costs that may be necessary to establish new systems to comply with the new rule. It therefore appears that little to no analysis was conducted into the actual costs and benefits, qualitative and quantitative, that the Proposed Rule poses on students, School's, Third-Party Servicer's, and Financial Institutions. Because the Department failed to provide any credible cost-benefit analysis as required by federal law, the NBPCA again urges the Department to withdraw its Proposed Rule.

I. The Proposed Rule's Splitting of Campus Card Providers into Tier 1 and Tier 2 Arrangements is Unclear and Poses Numerous Challenges and Obligations

1. The Department Should Clarify the Definitions for Tier 1 and Tier 2 Arrangements

As noted above, aside from being unnecessary and arbitrary, the NBPCA is also concerned that, as written, the definitions of Tier 1 and Tier 2 arrangements lack clarity and, given the array of relationships a School and Financial Institution or Third-Party Servicer may

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[35] Executive Order 13563, January 18, 2011, available at http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf (last visited, June 13, 2015).

[36] 80 Fed. Reg. 28517 – 28522.

enter into, will result in confusion regarding whether a particular relationship is properly categorized as a Tier 1 or Tier 2 arrangement.

Of particular concern are the exact arrangements and accounts the Proposed Rule seeks to cover in its definition of a Tier 1 arrangement. Specifically, under the Proposed Rule, a Tier 1 arrangement applies to Schools entering into arrangements with Third-Party Servicers to perform "*one or more functions*" associated with processing direct payments of Title IV Funds to "*one or more accounts*" offered by the Third-Party Servicer or an associated entity offering the account. The NBPCA is concerned that, in certain instances, this wording will create confusion regarding whether a particular account offered by a Financial Institution is a Tier 1 or Tier 2 arrangement. The NBPCA asks the Department to clarify that the Proposed Rule only applies to accounts established to receive Title IV Funds. Also concerning is the fact that the term "third-party servicer" is not actually defined under the Proposed Rule. The lack of clarity as to the meaning of this term has created concern regarding whether certain banking activities that have heretofore been excluded by the Department from the sort of activities that make an entity a "third-party servicer", such as lockbox processing and performing EFTs, may cause a Financial Institution or other entity performing only these previously excluded activities to become a Tier 1 entity. For this reason, the NBPCA asks the Department to clarify the definition of "third-party servicer."

2. The Proposed Rule's Definition of what Constitutes "Direct Marketing" is Unclear

As noted above, the definition of Tier 2 arrangements under the Proposed Rule encompass relationships between a School and Financial Institution under which financial accounts are offered, and marketed directly to, students. The Department considers "direct marketing" to include all of the following: (i) the School communicates information about the account and how it may be opened directly to students; (ii) the account or access device is co-branded with the School's logo, mascot, or other affiliation; or (iii) an institutional device provided to the student by the School is linked to the account or access device.[37] The NBPCA points out that several aspects of "direct marketing" as described under the Proposed Rule are unclear.

For example, while the Department states it will consider a School communicating information regarding the financial account to the student as "direct marketing," it does not address a scenario in which the Financial Institution communicates with a student with no assistance from the School. In such a scenario, if the Financial Institution referenced the School in some manner, would this constitute "direct marketing" under the Proposed Rule? Similarly,

[37] 80 Fed. Reg. 28583.

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the term "co-branded" is undefined under the Proposed Rule and its intended meaning is thus unclear. The NBPCA requests that the Department revise the Proposed Rule to clarify the requirements surrounding "direct marketing" and what constitutes "co-branding" as contemplated by the Proposed Rule, in order to provide Schools and Financial Institutions the guidance they need to comply.

3. *The NBPCA Believes That the Department Has Not Provided a Sufficient Reason to Treat Campus Cards Offered by a Third Party Servicer Differently, Especially Considering that Campus Cards are Subject to the Same Rules and Legal Requirements, Regardless of Who Offers the Account*

As noted above, the Proposed Rule would differentiate between two kinds of relationships a School may enter into in order to disburse Title IV Funds to students.[38] First, the Proposed Rule would define a "Tier 1" arrangement as one where a School enters into a contract with a Third-Party Servicer under which the Third-Party Servicer performs one or more functions associated with processing direct payment of Title IV Funds to students to financial accounts offered by the Third-Party Servicer or an affiliated entity. Second, the Proposed Rule would define a "Tier 2" arrangement as a contractual relationship between a School and Financial Institution under which financial accounts are offered to students and are marketed directly to students. Certain obligations and requirements, namely far more restrictive provisions on the assessment of cardholder fees, differ depending on whether the relationship in question falls under the Tier 1 or Tier 2 arrangement.

The NBPCA does not believe that the Department has sufficiently made the case that students are more vulnerable if they obtain an account through a Third Party Servicer than directly through a Financial Institution. The NBPCA notes that same rules apply to Campus Cards today regardless of who is providing the account. Specifically, the NBPCA points out that all Campus Cards offer the following protections:

- Campus Cards are network branded and issued by a financial institution that ultimately holds the student's account.

- The Department's existing regulations mandate that students not incur any cost in opening the account or initially receiving a Campus Card.

[38] 80 Fed. Reg. 28533.

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- The Department's existing regulations mandate that the educational institution ensure that students using a Campus Card have convenient access to a branch office of the bank or an ATM of the bank in which the account was opened (or an ATM of another bank), so that the student does not incur any cost in making cash withdrawals from that office or these ATMs. This branch office or these ATMs must be located on the School's campus, in School-owned or operated facilities, or immediately adjacent to and accessible from the campus.

- Campus Card funds are protected if lost or stolen. Like holders of debit cards, Campus Cards have the protections of Regulation E, as well as the zero liability policies of the card brands. Students are protected against lost or stolen cards, and unauthorized transactions.

- Campus Cards are subject to regulatory oversight from numerous prudential banking regulators such as the OCC, the FDIC, the Federal Reserve, and the NCUA.

- Campus Cards are subject to further oversight and control of the CFPB.

Moreover, the NBPCA believes that the Proposed Rule appears to be directed towards the practices of a single provider, and that provider's practices have since been addressed through supervisory and enforcement action. Consequently, the actions of a single provider that has already been subject to a supervisory and enforcement action for its practices, does not warrant taking such a draconian approach across the entire industry of Third-Party Servicers. Further, Third-Party Servicer's fill an important role for Schools as the services and programs offered by Third-Party Servicers are generally more flexible than those offered by other providers and allow Schools to tailor programs to the individual needs of their respective students. For these reasons, the NBPCA does not believe that there is any legitimate reason to impose stricter requirements on Campus Cards offered through the assistance of a Third-Party Servicer than to other products offered by Financial Institutions to Students without the use of such Third-Party Servicers. Attempting to do so, as detailed below, will likely lead to misunderstanding and confusion and evidences the kinds of problems that the Department's lack of experience and expertise in this subject matter can create, which signals the need for the Department to withdraw its Proposed Rule or to substantially modify it.

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II. Responses to Specific Questions Posed by the Department

Please find below responses to particular comments requested, and questions posed, by the Department.

- **Whether the option to receive a check should continue to be affirmatively offered to students as provided under proposed § 668.164(d)(4)(i)(B)(4)**

The NBPCA believes that electronic disbursements offer a safer, cheaper, and faster payment method when compared with paper checks, and particularly the costs associated with check cashing. As such, the NBPCA does not believe that the option to receive a paper check should continue to be affirmatively offered to students.

- **Whether there is a need to establish a minimum number of credit balance recipients at an School before the School must comply with the provisions of proposed § 668.164(f)(4) (Tier 2 Arrangements)**

The NBPCA believes, given the administrative and regulatory burdens contained in the Proposed Rule, it would be appropriate to establish a minimum number of credit balance recipients at a School before the School is required to comply with either §§ 668.164(f)(4) or 668.164(e)(2). The NBPCA suggests exempting School's with 5,000 or fewer students from the requirements of those sections.

- **Whether the personal information that a School may provide before a student or parent consents to open a financial account, as provided under §§ 668.164(e)(2)(i)(A) and (f)(4)(i)(A), is sufficient to meet the needs of a Third-Party Servicer or Financial Institution**

Please see response in Section I.E. above.

- **Whether the Department should take more proscriptive action than the one proposed in this NPRM to prevent abusive marketing practices with respect to institutional devices such as student IDs and associated financial accounts**

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As noted above, because the NBPCA does not believe the Department has the authority, experience, or expertise to regulate financial services in the manner contemplated by the Proposed Rule, the NBPCA urges the Department to withdraw its rule or substantially modify it after close consultation with prudential banking regulators.

- **Whether 30 days following a disbursement is an appropriate timeframe to allow a title IV aid recipient an opportunity to reasonably access aid dollars free of charge as provided under proposed § 668.164(e)(2)(iii)(B)(4)**

As noted in Section I.C. above, because Third-Party Servicers make multiple disbursements of payments to students over the course of a year, and any or all of these payments may include Title IV Funds, such a requirement would make the providing of financial services to students under Tier 1 arrangement impractical and lead to fewer products and options being offered to students.

- **Whether, as proposed in §§ 668.164(e)(2)(vii) and (f)(4)(vii), it would be in the best financial interests of students to require School's that have a T1 or T2 arrangement to periodically conduct reasonable due diligence reviews to ascertain whether the fees imposed under the arrangement are excessive**

Please see response to in Section I.D.2. above.

[Continued on Following Page]

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CONCLUSION

The NBPCA appreciates the opportunity to share its concerns with the Proposed Rule. The NBPCA does not believe the Department has the authority, experience, or expertise necessary to regulate financial services in the manner contemplated by the Proposed Rule as evidenced by numerous requirements in the Proposed Rule that lack clarity and/or fail to account the existing regulatory and operational landscape of the financial services market. As shown above, substantial regulations already apply to financial services offered to students. Moreover, prudential banking regulators already serve to protect the interests of students and their parents in the financial services area. Consequently, the NBPCA believes that further regulation by the Department is not necessary and may harm students by potentially forcing providers to exit the marketplace and thereby restrict student choice in their financial services products. For these reasons, the NBPCA asks the Department to withdraw its Proposed Rule or to substantially modify it after close consultation with prudential banking regulators.

Sincerely,

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