August 1, 2016

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The Honorable John B. King, Jr.
Secretary of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue SW
Washington, DC 20202

Re: Notice of Proposed Rulemaking, 81 Fed. Reg. 39,330 (June 16, 2016)
Docket ID ED-2015-OPE-0103

Dear Secretary King:

The Center for Responsible Lending (CRL)[1] files this comment in response to the U.S. Department of Education's proposed rule that would amend the Borrower Defense to Repayment provision of the Higher Education Act (HEA). We thank the Department for its careful attention to this rulemaking, which goes a long way toward ensuring that students and taxpayers will not have to bear the economic burdens that arise when higher learning institutions make misrepresentations and fail to provide an adequate education to students. CRL applauds the Department for proposing a rule that requires schools to provide financial restitution for their actions and omissions, provides a process for loan discharge without individual claim submission, and addresses mandatory pre-dispute arbitration agreements. While we applaud the rule, we recommend the following improvements: 1) Restore the ability of student borrowers to bring a defense to repayment claim under state law regardless of the date of loan disbursement, making the new federal standard a floor, not a ceiling; 2) Ensure all claims are adjudicated by an impartial actor and ensure certification of group claims is subject to a fair and transparent process; and 3) Strengthen the pre-dispute arbitration provisions and close loopholes.

I. Background

For the past several years, CRL has conducted research on college affordability and the higher education landscape with a particular focus on North Carolina. While the issue of unscrupulous institutions affects all students whose detrimental reliance on information presented by these schools prompts them to take out student loans, we note that these problems

[1] The Center for Responsible Lending is a non-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices, including student loan debt incurred as a result of fraudulent representations by higher learning institutions. CRL's views on student lending are informed by its affiliation with Self-Help, one of the nation's largest nonprofit community development financial institutions. Self-Help has provided $6 billion in financing to 70,000 homebuyers, small businesses and nonprofits and serves more than 80,000 mostly low-income families through 30 retail credit union branches in North Carolina, California, and Chicago.

are particularly severe for students at for-profit colleges. Furthermore, students of color are disproportionally affected. In CRL's research on North Carolina student outcomes, we found that low-income students (as measured by the number of Pell Grantees) make up a far larger percentage of students at for-profit schools than their public and private school counter parts, as do African-American students.[2] Additionally, these for-profit, post-secondary institutions are more expensive than other schools and borrowers are less likely to be able to repay their loans when they leave. Unfortunately, this means that an inordinate number of low-income students and students of color are left with large loans that they cannot repay. By contrast, borrowers who attend public and private colleges have a smaller debt load and can afford to repay their loans when they leave school.[3] In addition to taking out loans that they cannot afford to repay, students of color at for-profit universities often borrow without ever receiving a degree. In a 2014 national research paper on student outcomes at for-profit institutions, CRL found that African Americans and Latinos attending for-profit colleges are far less likely to graduate than their peers at other schools. Nearly eighty percent of African-American and two-thirds of Latino students do not complete for-profit programs.[4] These outcomes cannot be attributed to the demographics of these students. Historically black colleges and universities (HBCUs) also have large low-income and student of color populations, but lower financial costs and significantly better outcomes.[5] The implications of this research are widely applicable. In 2012, over 1.5 million borrowers originated federal and private student loans at for-profit institutions.[6] Due to these staggering numbers, we urge the Department to use this rulemaking as an opportunity to focus on the disparate student outcomes at for-profit schools and curb the practices of predatory schools that are acutely affecting students of color.

II. The Proposed Rule Eliminates Important State Protections for Borrowers with Loans Disbursed After July 1, 2017

While we appreciate the Department's attempt to create a streamlined process for defrauded borrowers, the proposed Defense to Repayment Rule ultimately fails in the Department's stated goal to "establish a more accessible and consistent borrower defense standard."

As currently written, the proposed rule eliminates important state protections for borrowers with loans disbursed after July 1, 2017. Consequently, these borrowers would no longer be able to make claims for relief under state laws designed to protect consumers from unfair, deceptive, or abusive conduct. For many borrowers, these unfair and abusive practices are at the heart of their

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[2] Whitney Barkley & Robin Howarth, *NC Student Loan Calculus: What North Carolina Can Do to Ensure All of Its Students Receive an Affordable, Quality College Education* (Center for Responsible Lending, 2016).

[3] *Id*.

[4] Peter Smith & Leslie Parrish, *Do Student of Color Profit from For-Profit Colleges? Poor Outcomes & High Debt Hamper Attendees' Futures* (Center for Responsible Lending, 2014).

[5] Barkley & Howarth, *Supra.*

[6] Analysis of data from the office of Federal Student Aid (https://studentaid.ed.gov/sa/about/data-center/student/portfolio) compared with borrower statistics from the U.S. Senate Committee on Health, Education, Labor, and Pension, 112th US Cong., *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success*, (2012) (http://www.help.senate.gov/imo/media/for_profit_report/Contents.pdf).

complaints against predatory schools. Under the proposed rules, if a college is deceptive about the cost of a course, misleads the student about the accreditation or licensing of a program, enrolls the borrower in a course other than the one they signed up for, fails to provide promised career services, or manipulates their job placement rates, a borrower would no longer be able to make a claim under the borrower defense standard – even if state law prohibits schools from engaging in this kind of conduct. Borrowers whose loans were disbursed prior to July 1, 2017, however, will have access to the relief provided by state law.

This arbitrary line drawing by the Department of Education affords some borrowers access to stronger remedies under state law, while depriving them from others. The Department should not limit the ability to obtain relief under state law as a defense to repayment to borrowers whose loans were disbursed prior to July 1, 2017. We urge the Department to give all defrauded borrowers the opportunity to avail themselves of strong state laws meant to protect consumers from the very practices in which predatory colleges, such as Corinthian, engage.

The creation of federal law as a ceiling for distressed borrowers not only contradicts the stated goals of the Department by arbitrarily assigning an outcome for borrowers based solely on when they borrowed, it also disregards years of federal rulemaking that sets federal rules as a floor, allowing states to improve on those rules as they see fit. For example, the Dodd-Frank Consumer Protection and Wall Street Reform Act explicitly states that it nor the rules promulgated by the agency it created – the Consumer Financial Protection Bureau - pre-empt stronger state law. Under 12 U.S.C § 5551 (a) (2), titled "Greater Protection Under State Law", the statute reads "For purposes of this subsection, a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title (1) if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title." Like this proposed Defense to Repayment Rule, the rules issued by the Consumer Financial Protection Bureau are, at their core, primarily concerned with protecting consumers from exploitative financial practices.

Other federal consumer protection laws defer to stronger state laws as well. Under the Fair Debt Collection Practice Act, 15 U.S. Code § 1692n states "for purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter." The Fair Debt Collection Practices Act, much like the Defense to Repayment NPRM, is meant to regulate the relationship between debt collectors and borrowers. In the last several years, states like Maine, Massachusetts, and Maryland have endeavored to improve their state Fair Debt Collection Practices Acts to better protect their citizens from the abusive practices of debt buyers and debt collectors. Had the Fair Debt Collection Practices Act been written similarly to the proposed Defense to Repayment Rule, creating new laws and even judicial rules to protect citizens from an emerging and evolving industry would be impossible.

While the federal floor that the Department of Education can provide through this rulemaking has the potential to provide needed relief to students across the country, it should not do so at the expenses of undermining stronger state laws. States are and have long-been critical in protecting consumers from predatory practices, ranging from mortgages to small dollar loans. In many instances, states are at the forefront of protecting consumers from these practices in the face of emerging abuses or in the case of inaction at the federal level, as was clearly evident during the subprime mortgage lending crisis. Likewise, state law has thus far played an important role in adjudicating the claims of students who have been exploited by their college or university. It is unfair to deprive students of their rights to seek remedies and relief under strong state law, and not allow those state law determinations to be used as basis for relief under this rule. We encourage the Department to restore the ability of student borrowers to bring a Defense to Repayment Claim under state law regardless of the date of loan disbursement, making the new federal standard a floor, not a ceiling for Defense to Repayment adjudications.

III. The Process for Individual and Group Borrower Defense Claims Should Be Fair, Transparent, and Accessible

The Department took an important step in protecting students and taxpayers from harmful schools by creating processes through which the Department will handle claims from individual borrowers and from groups of borrowers. CRL commends the Department for including an ability to extend group relief to affected borrowers without individual application.

We encourage the Department to ensure that the processes outlined in the regulation are fair, transparent, and independent of any fiscal impact concerns. We strongly recommend that all claims be adjudicated by a designated impartial actor and that the Secretary's discretion in group claims is subject to public disclosure and supplemented by a process for third parties to submit claims on behalf of borrowers.

A. All claim decisions should be adjudicated by the Department's Office of Hearings and Appeals.

The proposed regulations would appoint a department official to handle each respective individual and group claim. In the case of individual claims, this official would serve as the finder of fact; for group claims, another official would be designated to serve as the hearing officer on the claim. This lack of an explicit separation of functions gives rise to conflicts of interest throughout the process. Such an arrangement necessarily implies a lack of impartiality, independence and fairness at each stage, even during the adjudication of individual claims where the proceeding to recover losses would follow in a separate hearing. For group claims, an administrative proceeding that determines "both the validity of the borrower's claims and the liability of the school to the department" directly implies a lack of neutrality on these conflicting concerns.

The Department can and should avoid any semblance of unfairness or concerns about the consideration of inappropriate factors such as fiscal impact and the ability for school recovery by allowing claims to be adjudicated by its Office of Hearings and Appeals (OHA). This office already exists and serves as an independent forum for the fair and impartial resolution of disputes involving the Department and recipients of federal education funds. The Secretary should create a unit within OHA specifically charged with handling borrower defense claims. With an office already dedicated and prepared to handle claims related to federal funds it is unnecessary for borrower defense claims to be decided under separate processes and in a distinct forum.

B. The Department should establish a fair and transparent process for group claims.

Under the proposed regulations, all group claims will be initiated by the Secretary. By placing the process for group claims solely in the discretion of the Secretary for the decision to review, certify and adjudicate, the Department fails to adequately create mechanisms for borrowers and other parties to assert claims or present evidence and obtain needed relief for borrowers. Such mechanisms should be added. Further, the regulations permit consideration of fiscal impact in the decision making process for group certification. The inclusion of fiscal impact should never be considered as a factor in deciding borrower defense claims—individual or group. The appropriate way to protect taxpayers from extraordinary losses is through curbing bad practices by unscrupulous schools, not by denying relief efficiently and fairly to borrowers.

Beyond giving discretion solely to the Secretary as to group certification, the proposed regulations fail to describe the requirements for group certification. Failing to provide clear guidelines and understanding of the parameters for group certification prevents full transparency as it gives unfettered discretion to the Secretary with no accountability or requirement for public disclosures about the decision-making process. In order for students, schools, and taxpayers to fully understand the process and available remedies in cases of misrepresentation, the Department should provide specific guidance on how it will determine whether to certify a group. The Department should also make all decisions about group claims publicly available in a timely fashion through the use of a public database that is searchable and updated at least quarterly. Public disclosure ensures accountability and consistent application of all standards.

The Department can further ensure transparency and fairness by creating mechanisms within the regulations for third party advocacy on behalf of students. Beyond the ability to provide requested evidence, the proposed group process regulations provide limited opportunities for borrowers to advocate for themselves or for others to do so for them. During the negotiated rulemaking, the Department proposed including language that would allow for state Attorneys General and legal aid groups to present evidence to the Department on behalf of groups of students, however, the Department declined to include this language in the final proposed regulations. Failing to include a process for third party advocacy on behalf of students leads to the result that the only entities that are adequately represented in the group process are the Department, taxpayers and the institution at issue—not borrowers.

Because decisions made by the Department are final unless new evidence is presented, the inability of borrowers to have their interests fully represented in the claims process is even more concerning. While we fully understand and support the Department's desire to avoid creating and encouraging another industry of bad actors who seek out students to create group claims, the Department's own previously proposed language, by extending outside advocacy only to state agencies and non-profit legal aid groups, would more than adequately prevent such a situation. Despite the Department's assertions that it is likely to have the most information regarding whether a group process is necessary, state Attorneys General and legal advocacy organizations that deal more closely and directly with borrowers are just as likely to have the necessary information. In fact, these entities have uncovered and exposed many unscrupulous actors over the past decade, including Corinthian.

Third party advocacy on behalf of students is also essential given that the regulations as written would only allow appeals by the school or the Department. A borrower's only recourse if there is an adverse adjudication on a group claim is to file an individual claim, during which the group decision would be considered substantial evidence, or to find new evidence and present it to the Department. Even if new evidence is found, it is unclear what type of submission would rise to the level necessary to merit reconsideration. The proposed regulations also do not specify the relationship between the borrower(s) and the designated Department official. If third party advocacy is not allowed, the Department should ensure that each designated official's duty is to the borrower—not to the Department.

CRL urges the Department to include the previously proposed language allowing for state Attorneys General and legal aid groups to request group certifications, formally submit evidence and share resources. The Secretary should also be required to respond to any such request or submission in writing, and both the request and the response should be recorded in the public database discussed previously.

IV. The Department's Proposed Arbitration Provisions Do Not Fully Cover the Harms They Seek to Address

The proposed rule attempts to codify critical protections for both students and taxpayers. We particularly support that the scope of the rule includes those students who pursue claims on their own or with small groups of classmates, not only those who bring a class-action claim. We also support the Department's decision to include students who have already been harmed, not solely those who enroll in a predatory school and may be harmed in the future. However, the proposed language falls short in several important ways. It is imperative to close loopholes to ensure that the arbitration provisions serve their intended purpose. A more robust explanation of these loopholes and recommendations to close them may be found in Public Citizen's comments to this rulemaking. The Center for Responsible Lending signed on to Public Citizen's comment letter and fully endorses the principles and recommendations stated within it.

The Department's proposal bans schools from using mandatory pre-dispute arbitration agreements if the school requires the student to agree to arbitrate either as part of the enrollment agreement or in any other form the student is required to execute in order to enroll or continue in school. The Department also states in its proposal that an arbitration agreement containing an opt-out clause is considered not mandatory. Unfortunately, this approach does not effectively address the harms of mandatory arbitration. The proposal would in fact permit schools to use pre-dispute arbitration agreements, so long as students' ability to enroll is not formally conditioned on the agreements. Predatory schools will undoubtedly find ways to insert mandatory arbitration clauses in "optional" agreements at or around the time of enrollment. Schools may mislead or pressure students into signing these documents, thus unknowingly waiving their rights. Students later challenging the agreements will have to overcome legal arguments that the agreements were voluntary. The Department should prohibit schools seeking participation in the Direct Loan program to enter into or rely on any pre-dispute arbitration agreement with students, as once students sign an arbitration agreement, they will be forced to arbitrate later claims. Prohibiting schools from entering into any pre-dispute arbitration agreement is consistent with the Department's proposal to forbid class-action waivers in these agreements. The class-action waiver provision applies whether or not the pre-dispute agreement is a mandatory condition of enrollment.

We also urge the Department to reject opt-out arbitration clauses, as we believe these clauses defeat the purpose of banning mandatory arbitration. If the default is arbitration, many students will sign these agreements without understanding their right to opt-out. Studies have found that opt-out clauses result in extremely low rates of actual opting out. The CFPB's arbitration study found, for instance, that even when consumers are afforded an opportunity to opt out of arbitration clauses, they are generally unaware of this option or do not exercise it.[7] The CFPB also found that most consumers are unaware of or confused about arbitration provisions generally.[8] Furthermore, in a case against Uber, only 0.17% of a class of drivers in California opted out of an arbitration agreement in their agreements with the company.[9] Permitting the use of opt-out clauses will likely result in business as usual.

Additionally, the proposal contains a huge loophole – one that could leave millions of students completely unprotected because they did not take out a federal loan in a particular year. The proposed amendments to § 685.300 should protect all students attending schools that participate in the Direct Loan program. Protection from the harms of mandatory arbitration must not only apply to students who take out a federal student loan in a given year. Expanding the scope of covered students is consistent with the Department's authority and responsibilities under the Higher Education Act. A student without federal student loans should still be able to challenge fraudulent practices in court, including as part of a class action. Moreover, this would allow the Department to learn about systematic practices that affect other students, including those who have federal student loans. It also helps deters bad behavior.

Furthermore, the proposal is ambiguous as to the scope of claims covered. Some protections under the proposed rule are limited to "borrower defense claim[s]," defined as claims that are "or could be asserted as a defense to repayment" on a Direct Loan. Other protections under the proposed rule require schools to provide contractual language (or in some cases, notice to students) protecting a student's right to bring a case in court for claims regarding the making of a Direct Loan or the provision of educational services for which the Direct Loan was obtained. Basing covered claims on what is or could be asserted as a "defense to repayment" as defined in the new regulations sets a confusing standard and will likely lead to onerous litigation disputes that delay the resolution of claims. The standard is also too narrow, excluding, for instance, claims based on state laws that forbid unfair and abusive trade practices. The scope of claims covered must be broad and clear. It should reach all claims related to the making of a Direct Loan or a Parent PLUS loan or to the educational services or programs provided by an institution participating in the Direct Loan program, regardless of how those services or programs are financed and to whom they are extended.

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[7] CFPB Arbitration Study and Report to Congress (March 2015), p. 11, *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.
[8] *Id.*
[9] *See* Appellees' Joint Response Brief at 8, *Mohamed v. Uber Techs., Inc.*, Nos. 15-16178, 15-16181, 15-16250 (9th Cir. Jan. 11, 2016).

We urge the Department to correct these deficiencies to fully protect students and taxpayers from the harms of mandatory pre-dispute arbitration clauses.

V. Conclusion

Creating borrower defense to repayment standards and processes that are fair and transparent and provide full relief to affected borrowers while holding schools accountable for their acts and omissions is essential to the integrity of our higher education system. Without strong regulations that enable broad access to relief, borrowers and taxpayers will continue to pay the high cost of fraud in this industry.

We thank you for the opportunity to provide our comments.

Sincerely,

The Center for Responsible Lending