July 2, 2015

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The Honorable Arne Duncan
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: **Comment of the Center for Responsible Lending and the National Consumer Law Center (on behalf of its low income clients) on the Proposed Amendments to the Cash Management Rule, 34 C.F.R. Part 668**
Docket ID ED-2015-OPE-0020

Dear Secretary Duncan:

Thank you for the opportunity to comment on the proposed amendments to the Department of Education's cash management rules governing the disbursement of federal financial aid (the "Cash Management Rule").

The Center for Responsible Lending is a nonpartisan research and advocacy group dedicated to ending abusive financial practices and ensure that lending and banking practices serve to strengthen young, low-income, and minority borrowers' financial health, rather than harm them. Our research spans a wide range of consumer financial products, including deposit accounts, prepaid accounts, and federal and private student loans. We have engaged in extensive research and analysis of high-cost overdraft fees demonstrating that overdraft fees on college bank accounts can exceed a student's textbook budget. Accordingly, we have a particular interest in ensuring that student loan borrowers are protected from abusive banking fees and marketing practices.

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications, including the legal treatise Consumer Banking and Payments Law; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

The Department's proposed Cash Management Rule would bring robust and needed reforms to campus-bank marketing partnerships that allow banks, with the cooperation of colleges, to skim fees off of students' federal grant and aid money.[1] Title IV money has become a conduit for campus-bank marketing partnerships, and the Department must take strong steps to restore the integrity of the program. It should act quickly to stop colleges and banks from using federal financial aid as a marketing platform to steer students into high-fee bank accounts.

The proposals' key strengths include:

- Restoring neutral, fair choice when accounts are marketed to students during the financial aid process. Banks will be limited in how they can use disbursement to target students.
- Banning overdraft fees on ATM and debit card transactions, and other abusive fees on some accounts.
- Requiring that all campus-bank marketing agreements, and fees charged under those agreements, be disclosed to the public. This injects needed transparency and helps educate students and parents shopping for an account.

Although the proposal is strong, it should be strengthened in key areas:

- Extend full fee protections, including a ban on overdraft fees on ATM and debit card transactions, to all accounts offered to students pursuant to a marketing contract.
- Further protect students' data from marketers.
- Ensure that all accounts are in the students' financial best interests, with the college acting as a fiduciary towards students, rather than just meeting prevailing market conditions.
- Ban revenue sharing and stop servicers from offering affiliated accounts during the Title IV disbursement process.

[1] 80 Fed. Reg. 28484 (May 18, 2015).

I. Campus-Bank Marketing Partnerships Threaten the Integrity of the Title IV Program

A. Widespread Concern about Campus-Bank Marketing Agreements

Multiple governmental[2] and nongovernmental[3] investigations, bank regulator enforcement actions,[4] members of Congress,[5] and consumer class actions[6] have raised serious concerns about college-bank partnerships. According to these investigations, colleges and financial institutions enter into contracts that give rise to unfair and opaque marketing practices, which steer students into high-fee bank accounts. These exclusive agreements permit banks to get priority or even exclusive access to students at a key point in their financial lives, including during the financial aid disbursement process. In some cases, third-party financial aid

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[2] Government Accountability Office, *College debit cards: Actions needed to address ATM access, student choice, and transparency* (2014) [hereinafter GAO Report], *available at* http://www.gao.gov/assets/670/660919.pdf; Department of Education, Office of Inspector General, *Third-party servicer use of debit cards to deliver Title IV funds* (2014) [hereinafter IG Report], *available at* http://www2.ed.gov/about/offices/list/oig/auditreports/fy2014/x09n0003.pdf; Consumer Financial Protection Bureau, *College credit card agreements* 34-39 (Dec. 2014) (section on "Debit card and checking account agreements"), *at* http://files.consumerfinance.gov/f/201412_cfpb_college-card-agreement-report-2014; Consumer Financial Protection Bureau, *Perspectives on Financial Products Marketed to College Students*, Presentation to the Department of Education Negotiated Rulemaking Session 14 (Mar. 26, 2014) [hereinafter CFPB Presentation to Neg Reg], *available at* http://files.consumerfinance.gov/f/201403_cfpb_presentation-to-department-education-rulemaking-committee.pdf; Consumer Financial Protection Bureau, *Banking on Campus Forum* (Sept. 30, 2013) [hereinafter CFPB Forum], *at* http://files.consumerfinance.gov/f/201309_cfpb_banking-on-campus-forum.pdf.

[3] *See, e.g.,* Leslie Parrish and Maura Dundon, Center for Responsible Lending, *Overdraft U: Student Bank Accounts Often Loaded with High Overdraft Fees* (2015) [hereinafter CRL, Overdraft U], *at* *http://www.responsiblelending.org/student-loans/research-policy/overdraft_u_final.pdf;* Suzanne Martindale, Consumer Reports, *Campus banking products: College students face hurdles to accessing clear information and accounts that meet their needs* (2014), *available at* http://consumersunion.org/wp-content/uploads/2014/08/Campus_banking_products_report.pdf; Richard Williams and Edward Mierzwinski, U.S. PIRG, *The campus debit card trap: Are bank partnerships fair to students?* (2012) [hereinafter PIRG, Debit Card Trap], *available at* http://www.uspirg.org/sites/pirg/files/reports/thecampusdebitcardtrap_may2012_uspef.pdf.

[4] Consent Order, *In the Matter of Cole Taylor Bank*, FRB Docket Nos. 14-021-E-SMB and 14-021-CMP-SMB (Federal Reserve June 24, 2014) (consent order between Federal Reserve, Illinois Department of Financial and Professional Regulation, and Higher One's partner bank Cole Taylor Bank), *at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20140701b1.pdf; Consent Order, *In the Matter of Higher One, Inc., and the Bancorp Bank,* FDIC Docket Nos. 11-700b and 11-704k (FDIC Aug. 7, 2012), *at* https://www.fdic.gov/news/news/press/2012/pr12092.html.

[5] Bicameral letter from twenty-four members of Congress to Arne Duncan, April 14, 2014 (expressing support for campus bank account marketing reforms), *at* http://www.warren.senate.gov/files/documents/debit%20card%20letter%200423.pdf.

[6] *In re: Higher One OneAccount Marketing and Sales Practices Litigation,* 908 F.Supp.2d 1371 U.S. Jud. Pan Mult. Lit. (2012).

disbursement servicers are also involved, acting as an intermediary between the college and a bank, and deriving revenue from bank fees marketed to receive students' Title IV funds.

The school's involvement, including cobranding debit cards and other marketing assistance, suggests to the student that the school has determined that the account is safe and in their best financial interests. Servicers or banks may imply to the student that they are required to use the services offered. In many cases, these accounts have had a set of high, unfair, or unusual fees, including high overdraft fees on ATM or debit card transactions; sustained overdraft fees; debit card transaction fees ("swipe fees"); or the inability to access fee-free ATMs. These fees make the bank account more expensive than alternatives that have not been presented to the student, or that the student could find on her own.

In return for giving banks this access to students, colleges get a share of the bank's revenue, or discounted or free financial aid or student ID card processing services.

According to the GAO, at least 852 schools currently have a college-bank marketing partnership. This encompasses 40% of all students in the nation.[7] The partnerships tend to focus on large campuses, which present the largest pool of deposits for banks. For example, at Florida State University, the banks received $100 million in deposits.[8] The vast majority of these accounts can be used to receive federal financial aid.[9] The marketing agreements can be very effective: up to 75% of students targeted by the joint marketing will agree to open an account.[10] However, the amount of aid deposited in these accounts is unknown, in part because the Department does not collect data on the number of students receiving direct disbursements.[11]

Incoming college students are a plum demographic for banks to target. Banks are keenly motivated to get exclusive access to college students, especially on large campuses where they can secure a large volume of deposits and fee income. Half of the incoming students arrive on campus without a bank account, but are credit-worthy to get an account.[12] Bank accounts are "sticky" – since consumers find it difficult to change them, they tend to stay in the same account for long periods of time.[13] And since college students have a reliable current income stream and future earning potential, they are guaranteed sources of deposits and fees for years to come.

These practices particularly impact the student body of lower-income, first-generation, and students of color who enroll in community colleges, many of which have bank marketing

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[7] GAO Report 9-10, *supra* n.2. Marketing agreements tend to be in place at colleges with larger student bodies.
[8] PIRG, Debit Card Trap, *supra* n.3.
[9] *Id.* at 9.
[10] *Id.* at 12.
[11] *Id.* at 12 n.17.
[12] *See* CFPB Presentation to Neg Reg 8, *supra* n.2.
[13] Suzanne Martindale, et al., Consumers Union, *Trapped at the Bank*: *Removing Obstacles to Consumer Choice in Banking* 15 (May 30, 2012), *at* http://defendyourdollars.org/wordpress/wp-content/uploads/2012/05/TrappedAtTheBank-Complete.pdf.

agreements. Community college students are more likely to receive a financial aid credit balance because their tuitions are lower. A greater share of their aid may be available directly to them as a disbursement after tuition is deducted. They are therefore more likely to have funds, and a higher amount of funds, deposited in a college-bank sponsored account.[14]

B. Banks Market Accounts through the Financial Aid Disbursement and Student ID card Process

College-bank marketing agreements mainly cover two distinct, but interrelated, contexts: the Title IV federal financial aid disbursement process, when the school disburses a student's federal financial aid dollars to them in the form of a check or electronic funds transfer to an account; and other on-campus marketing, such as the student ID card distribution process, when a bank may offer to tie a bank account to the student's college ID card. The school may pressure students to deposit future Title IV money into the student ID card-linked account, because the school is contractually obligated to encourage the deposits or receives additional revenue from the bank for the deposits. Although these two marketing channels happen at different places and times, they are equally facilitated by banks and colleges motivated to skim fees from Title IV dollars. Marketing materials and practices, cobranding, and the exclusivity of the marketing itself often give the students the impression that the accounts are safe, college-approved places to deposit their financial aid funds. By design, the agreements mingle the college and the bank in the students' minds.

C. Servicers and Banks Hijack the Title IV Disbursement Process

Colleges act as an intermediary between the Department of Education and students in managing the approximately $150 billion in federal financial aid dollars (both loans and grants) spent by taxpayers each year to support higher education. The Department of Education's current Cash Management rule regulates how these funds are drawn down and disbursed to students by colleges.[15]

Colleges draw down the pool of their eligible students' funds from the Department, deduct their tuition and other fees directly, and then disburse any remaining balance to students.[16] The disbursement can be via cash, check, or increasingly, an electronic funds transfer to a deposit account or prepaid card designated by the student.[17] This money is intended by the federal government to pay for expenses that support college attendance, such as books, transportation, and rent.

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[14] *Id.* at 12.
[15] 34 C.F.R Part 668, Subpart K. The provision specifically governing deposit of funds into student bank accounts is at 34 C.F.R. § 668.164.
[16] *See* IG Report, *supra* n.2, at 2.
[17] About 80% of accounts offered pursuant to a campus-bank marketing agreement are traditional deposit accounts. 20% are prepaid accounts. GAO Report, *supra* n.2, at 8.

Colleges perform their disbursement functions on behalf of students, to whom the grant funds belong and the loan obligations accrue, and on behalf of the Department, which is charged with ensuring that the funds Congress makes available to finance higher education serve their purpose. However, the current Cash Management Rule has not been able to protect the integrity of the system. Colleges are supposed to ensure that aid funds reach students intact, holding and passing through federal funds accurately and for the students' benefit.[18] Despite these requirements, the disbursement process has been turned into a marketing opportunity by colleges, banks, and third-party servicers for their own benefit, at the expense of students and federal funds.

The rise of third-party servicers has been a key driver in the problem. For-profit corporations, such as Higher One, contract with schools to manage all or part of the disbursement process. They step into the school's shoes, but acting as private companies with the financial motive to market their own affiliated financial accounts to students.

Servicers, who are not banks themselves, partner with a bank to offer the accounts; but the servicers may receive all the income from the account fees, plus interchange fees for the use of the debit cards.[19] Schools, for their part, receive a share of the fee revenue, or discounted services and goods – such as $1.1 million in free computer software, in one case.[20]

Although the Department of Education imposes controls on third-party servicers, these controls have been inadequate to stop them from turning the disbursement process into a marketing platform for their own financial accounts.[21]

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[18] The Higher Education Act (HEA) specifies that Title IV aid dollars are only to be used by colleges "solely for the purpose specified in and with the provision of that program" – i.e., the educational purposes of the Direct Loan, Pell Grant, and other Title IV programs. HEA Section 487, 20 U.S.C. § 1094(a)(1). The current Cash Management Rule states that these funds are to be "held in trust for the intended student beneficiaries" by the college and requires that 34 C.F.R. § 668.164(b).

[19] *In the matter of Cole Taylor Bank*, *supra* n.4, at ¶E

[20] PIRG, Debit Card Trap, *supra* n.3, at 23.

[21] The Department of Education recently warned colleges to exercise greater oversight over their third-party servicers, defined as any third party to whom the school outsources any part of its management of Title IV federal student aid programs. This includes, but is not limited to, disbursing credit balances to students. *See* Dear Colleague Letter, DCL ID: GEN-15-01 (Jan. 15, 2015), *at* http://ifap.ed.gov/dpcletters/GEN1501.html. Colleges must report their servicers' names to the Department and contractually require that servicers abide by all Higher Education Act requirements. *Id.* Servicers must also file an annual compliance audit with the Department. *Id.* The Department has the authority to require immediate cancellation of servicer contracts, levy civil penalties, and other actions against servicers that are in violation of the HEA. 20 U.S.C. § 1094(c)(1)(H) and (I).

Furthermore, an institution of higher education may not contract with a servicer that has been "judicially determined to have committed fraud involving" Title IV funds. 20 U.S.C. § 1094(a)(16). It is worth noting that Higher One's settlements with the FDIC and Federal Reserve are based on violations of the Federal Trade Commission Act. FTC Act claims have been held by some courts to "sound in fraud," and thus required to meet the heightened pleading standards in the Federal Rule of Civil Procedure 9(b) for claims "alleging fraud." *See, e.g., Federal Trade Com'n v. Ivy Capital, Inc*., 011 WL 2118626, 3 (D. Nev. 2011); *In the matter of Cole Taylor Bank*, *supra* n.4; *In the matter of Higher One, Inc.*, *supra* n.4.

Servicers exercise a great deal of control over the disbursement process, and use it to steer students into their affiliated accounts. The servicer often controls much of the information the student may receive in the mail before beginning school about how to obtain their loan or grant money, and the online process to select where to have the money deposited. The servicer may use this access and position of power to induce students to open the servicer's partner account, using a variety of unfair tactics. This interferes with students' ability to make a free choice between accounts and disbursement methods. Without the servicer's undue influence, the student would be more free to choose an account with lower fees and features better suited to their needs.

Servicers have used many tactics to get students to open these accounts. The servicer may design the website the student must visit to select a method of disbursement. This website may be purposefully designed to deter students from choosing their own financial account. It may prominently feature the sponsored account and make it difficult from a user perspective for the student to select a different method – for example, by making the student click through several additional screens or submit additional documentation.[22] The servicer may also delay disbursement to other kinds of accounts or via paper check, inducing the student to choose the sponsored account.[23]

Schools may provide student information to servicers and banks in advance, so that they can send solicitations and even a debit card before the student even arrives on campus. This may lead students to believe that they must open the sponsored account to receive their financial aid money.[24] In contrast, schools or servicers may not contact students early in order to encourage the student to submit advance information necessary to set up direct deposit into an account of the student's choice as soon as the funds are available.

Cobranding and allowing the debit card to double as a student ID, and the fact that the account is being offered directly during the disbursement process, also lead students to believe that the school endorses the account.[25] Finally, the materials and website may hide or fail to disclose the fee structure, including high or unusual fees like swipe fees and overdraft fees.

Put together, these tactics result in banks and servicers unfairly leveraging the disbursement process into market power over students. Instead of having a truly free and informed choice, students are steered into the sponsored account. The servicers' website designs may be intentionally designed to deceive consumers by failing to disclose or obscuring material information.

[22] GAO Report 27, *supra* n.2.
[23] IG Report 22-23, *supra* n.2.
[24] PIRG, Debit Card Trap 20-21, *supra* n.3.
[25] *Id.* at 21, *supra* n.3; IG Report, *supra* n.2., at 11.

Federal bank regulators that oversee the servicers' partner banks have taken strong action to address some of the consumer abuses occurring during the disbursement process. In 2014, The Federal Reserve and Illinois Department of Financial and Professional Regulation sanctioned Higher One's partner bank Cole Taylor, which lead to almost 500,000 new Higher One accounts opened by students.[26] The regulators found that the Higher One disbursement websites and materials were "likely to mislead students," in violation of the Federal Trade Commission Act and banking regulations.[27]

According to the Federal Reserve consent order, the Higher One refund disbursement home page contained "no information … about ACH transfer to another bank account and paper check options, either of which may have enabled students to access their student financial aid refunds without fees."[28] The pages included no or hidden information about high, unusual fees associated with the Higher One account and access to fee-free ATMs, which impeded students' ability to make a "fully informed decision."[29] Finally, the Federal Reserve noted that the website "featured the school logo more prominently than the Higher One logo … which may have erroneously implied that the school endorsed the Higher One account."[30] In short, the Federal Reserve found that Higher One's financial aid disbursement website was designed to misleadingly steer students into high-fee accounts.

Despite this enforcement action against Higher One's bank partner Cole Taylor Bank, Higher One – now using WEX Bank – continues to delay student access to their funds unless they elect to use the Higher One account. The Higher One website emphasizes "same business day" access if the money is deposited to the Higher One account, but "2-3 business days" – with a graphic showing a complicated several step process -- if the money is deposited in the student's own account.[31]

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[26] *In the matter of Cole Taylor Bank* at 5, *supra* n.4.
[27] *Id.* at ¶F.
[28] *Id.* at ¶F.i.
[29] *Id.* at ¶F.ii-iv.
[30] *Id.* at ¶F.vi.
[31] *See* http://www.myonemoney.com/yourrefundchoices.

Same business day deposit to the OneAccount	Deposit to another account	Paper check via US mail
OneAccount		
University Releases Money	University Releases Money	University Releases Money
Money Available to Spend	Submit ACH Information to Higher One	Check Printed
Money Deposited into Account Same Day	Higher One Sends Money to Federal Reserve	Higher One Mails Check Within One Business Day
	Federal Reserve Sends Money to 3rd Party Bank	U.S. Postal Service Delivers Check
	Money Available to Spend	Receive Check in Mail
	2-3 Business Days	Check Cashed
		Money Available to Spend
		5-7 Business Days

Financial aid can easily be directly deposited to the student's own account just as quickly as into a Higher One card account. Students could be encouraged to submit their bank account information to the school early, before funds arrive, to enable direct deposit immediately.

D. Student ID Card Marketing Agreements

Colleges and banks also partner to market bank accounts to students as part of the student ID card issuance process. The ID can also function as a debit card tied to the account. The GAO found that one-third of accounts issued pursuant to marketing agreements could double as student ID cards.[32] Accounts may also be marketed at other moments and places in campus life where students can be easily influenced en masse and/or in person, like orientation.[33]

Banks may be extremely closely involved in the student ID card issuance process, referred to as "carding events." Pursuant to the bank-college contract, colleges may provide students with blank bank account applications and information about the account at the time they receive their ID card. The card itself may have a pre-assigned debit card number ready to be linked to the account, regardless of whether the student choses to link the account. Banks may also take an active role in actually issuing the ID card during carding events at which bank personnel issue the ID card and offer the linked account.

The bank's involvement with the student ID card process may be extremely pervasive. For example, under the University of Minnesota's contract with TCF bank, the bank actually

[32] GAO Report, *supra* n.2, at 9.
[33] PIRG, Debit Card Trap 23, *supra* n.3.

staffs the student ID card office, and commits to providing additional staff to help run the student ID distribution process during peak times. The bank was also given special access to market to students under the guise of providing information about the student ID card: the contract allows the bank staff to serve a "dual role," providing information about the ID card and the linked bank account to students and parents at orientation and new student events.[34] Similarly, the agreement between Ohio State University and Huntington Bank requires the university to "integrate" the bank "as a feature of its enrollment and orientation."[35]

In addition to this priority marketing access to students, banks and colleges also use a variety of incentives, like prizes, contests, and free gifts, to induce students to sign up for the account. The TCF-Minnesota contract includes a wide list of such inducements, including a $50 sign-up bonus, free sweatshirts, and scholarship contests.[36] Notably, giving such inducements on campus would be illegal for credit card marketing under the CARD Act.[37]

In some cases, the ID card might be issued by the aid disbursement servicer, such as Higher One; in other cases, the card may be issued by a financial institution that may not be a servicer.[38] Even in cases where the bank is not a servicer, however, the contracts often expressly obligate the school to push the account on students during the financial aid disbursement process. For example, the Ohio State – Huntington agreement provide exclusive access to Ohio State students in the "application, enrollment, and financial assistance process." [39]

In return for allowing exclusive marketing access to their student bodies, colleges may receive millions of dollars in payments.[40] These payments incentivize both enrollment in the account, and the ongoing deposit of funds (e.g., financial aid disbursements) in the account. Schools may receive a bounty for each student who signs up, which incentivizes them to use every effort to get the students into the account. Schools may also receive a bonus in subsequent years for accounts that remain "active." For example, the University of Minnesota receives a payment for every account opened, and then additional payments in subsequent years if the account remains active.[41]

Some agreements also give colleges a share of the ongoing fees, such as swipe fees or interchange fees (fees charged per transaction), in addition to initial enrollment fees. The

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[34] University of Minnesota Contract with TCF Bank at H-2, ¶D.1, *at* http://blogs.mprnews.org/oncampus/2013/09/university-of-minnesotas-deal-with-tcf-bank-questioned/.
[35] Contract between Ohio State University and Huntington National Bank, ¶ 5.5, *at* http://files.consumerfinance.gov/f/201402_cfpb_agreement_huntington_national_bank_ohio_state_university.pdf.
[36] *Id.* at H-4, ¶D.4.
[37] 15 U.S.C. § 1650(f)(1).
[38] IG Report, *supra* n.2, at 11 (noting that Higher One account debit cards are in some cases integrated into student ID cards).
[39] *See supra* n.35.
[40] PIRG, Debit Card Trap, *supra* n.3, at 23.
[41] *See* Minnesota-TCF contract at A-2, ¶3.01.

contract between Hill Bank and the University of Iowa gives the school a significant share of interchange fees.[42] Both of these fee structures greatly incentivize the school to induce students to deposit their future student loan disbursements in the sponsored accounts, since this will lead directly to increased payments to the school as the account remains open and the student conducts more transactions.

II. Campus-Bank Partnerships Steer Students into High-Fee Accounts

Colleges could bargain on behalf of students to find bank partners that offer top-of-the-market, consumer-friendly accounts. But instead, these accounts may come with high, risky, or unusual fees, like overdraft fees and swipe fees on debit card PIN transactions. In addition, students may not have sufficient access to fee-free ATMs to withdraw their loan money. These fees can end up have a large impact on students, eating away at their Title IV dollars. It is simply inappropriate and abusive for colleges to use the Title IV disbursement process to place students into accounts that diminish their Title IV dollars or any other income, particularly when there are better alternatives on the market.

A. Overdraft Fee Programs on ATM and Debit Card Transactions are Unfair and Abusive

Overdraft fee programs on ATM and debit card transactions have a long history of abuse, and schools should use their bargaining power to eliminate them from campus financial products. Banks' overdraft policies can result in very large fees for very small overdrafts. Among checking accounts generally, overdraft fees average $35 per incident, regardless of the amount by which the account is overdrawn.[43] Previous CRL research found that a significant share of overdraft fees were triggered by debit card transactions in which the amount of credit extended by the bank to cover the shortfall was often *substantially less* than the fee charged. This leads to the "$35 cup of coffee" – where a very small overdraft of just a few dollars can have an outsized cost.[44] Banks and credit unions typically allow consumers to be charged several overdraft fees or more per day, and—if the account remains overdrawn for several days—often charge additional "sustained overdraft" fees that take the account farther into the red.

Banks can easily prevent overdrafts on debit card and ATM transactions. Banks are able to decline these transactions at no charge when the account lacks sufficient funds. Thus, banks reap these outsized fees without justification based on their own costs or technological limitations. Many banks have begun to eliminate these fees, indicating that the market may be moving away from high-cost overdraft fees on ATM and point-of-sale debit card transactions.

Some banks compound the unfairness by deliberately "reordering" transactions to ensure that the account overdrafts as many times as possible. Using software algorithms, these banks

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[42] *See* Iowa-Hill Bank Contract at 3, *at* http://www.hillsbankui.com/uploads/6/3/6/0/6360098/hills-bank-university-of-iowa-agreement.pdf.

[43] Rebecca Borné and Peter Smith, Center for Responsible Lending, *The State of Lending: High-Cost Overdraft Fees* (2013), *available at* http://www.responsiblelending.org/state-of-lending/overdrafts/.

[44] *That $35 Cup of Coffee*, N.Y. Times, Nov. 13, 2009, at A22, *available at* http://www.nytimes.com/2009/11/14/opinion/14sat2.html?_r=0 .

change the orders of transactions in a day to deduct the largest ones first, so that the rest of the transactions all overdraft.[45] Although some banks have stopped this practice, others still reserve the ability to engage in it.[46] For example, TCF Bank, a key player in the campus account market, notes that "The order in which we process transactions may result in more overdraft and returned item NSF fees than if we processed transactions in a different way." The bank also reserves the right to "change the way we process transactions at any time regardless of any request or instruction you give us. We may do so in our sole discretion without notifying you."[47]

In light of the abuses of overdraft fees, the Federal Reserve published a rule in 2009 requiring banks to obtain consumer consent ("opt-in") before allowing customers to overdraw their account through a debit card transaction or ATM withdrawal and assessing a fee. While the opt-in rule has reduced the incidence of overdraft fees charged, it has not fixed the problem. Indeed, as the Bureau notes in its 2013 white paper addressing overdraft fees, the problems identified in the market prior to the opt-in rule still persist, as even consumers with relatively moderate overdraft use may pay hundreds of dollars in fees annually.[48]

Further, our research indicates that banks engage in aggressive and misleading marketing to get consumers to opt-in.[49] We found that 60% of consumers who opted in to overdraft coverage had an exactly opposite understanding of what it did: they believed that overdraft coverage *protects* them from a fee for a declined debit card transaction. But, as noted above, there is typically no fee for a declined debit card transaction. Instead, opting in actually *permits fees* to be charged on transactions when the account lacks sufficient funds, but the bank allows the transaction to go through anyway.[50] In addition, 50% of consumers reported that they opted in simply to get banks to stop bombarding them with advertising.[51]

B. Students Are Especially Vulnerable to Overdraft, Which Can Lead to Lost Bank Accounts

Federal regulators report that young adults—who are often the least experienced and maintain relatively low balances—are at the greatest risk of overdrawing their bank accounts.[52] Because young adults also use debit cards more frequently than other accountholders, they are

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[45] The Center for Responsible Lending, *Re-ordering Transactions: A Costly Overdraft Abuse*, *at* http://www.responsiblelending.org/overdraft-loans/tools-resources/re-ordering.html.

[46] Ann Carnns, *Customers Can Lose When Banks Shuffle Payments*, N.Y.Times, (Ap. 11, 2014), at B6, *available at* http://www.nytimes.com/2014/04/12/your-money/customers-can-lose-when-banks-shuffle-payments.html.

[47] TCF checking account contract at 20-21, *at* https://www.tcfbank.com/resources/images/4994.pdf.

[48] CFPB, *CFPB Study of Overdraft Programs: A white paper of initial data findings* at 61 (Jun. 2013), *available at* http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf.

[49] Center for Responsible *Lending, Banks Collect Overdraft Opt-Ins Through Misleading Marketing* (Ap. 2011), *available at* http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/banks-misleading-marketing.html.

[50] *Id.*

[51] *Id.*

[52] Consumer Financial Protection Bureau, *Data point: Checking account overdraft* (2014), *at* http://www.consumerfinance.gov/reports/data-point-checking-account-overdraft/; Federal Deposit Insurance Corporation, FDIC study of bank overdraft programs, *at* https://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_Final_v508.pdf.

also more vulnerable to overdrafts that are most expensive relative to the size of the transaction but completely preventable if the bank declined the transaction, as it easily could.

Overdraft fees that cause vulnerable accountholders to quickly get in over their heads are a leading reason that consumers lose access to the banking system.[53] Thus, campus accounts with overdraft risk creating new unbanked consumers, instead of helping students start off their financial lives on strong footing.

C. Existing Sponsored Campus Account Overdraft Fees Can Cost Student More than Textbooks Every Year

Recent CRL research, submitted as an appendix to this comment, indicates that harmful overdraft fees are prevalent in current campus accounts.[54] Our analysis shows that these accounts can accrue overdraft fees of more than $100 per day. For the heaviest users, overdraft fees could amount to $700 a year – more than the average cost of textbooks.

Our analysis also finds that there are many examples of widely-available bank accounts with more consumer-friendly features than those currently available through school-bank partnerships. At best, many student bank accounts offered through these exclusive deals have no better overdraft policies than accounts that a student could obtain on their own.

Accordingly, there is no justification for schools to enter into marketing partnerships with banks that would include high-cost overdraft fees on their accounts.

III. College-Bank Partnerships Impede Consumer Choice

Defenders of campus-bank marketing partnerships claim that limitations on these products will cause a “chilling effect” that would “deprive students of choice.”[55] This Orwellian take on the situation turns the facts their head. In reality, exclusive campus-bank marketing agreements distort the market and suppress consumer choice by creating reverse competition that drives up prices. The lack of competition results in higher-priced, riskier products than students could find on their own.

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[53] M. Barr, *Financial services, savings and borrowing among low- and moderate-income households: Evidence from the Detroit area household financial services survey* (2008), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121195; D. Campbell, A. Jerez, and P. Tufano, *Bouncing out of the banking system: An empirical analysis of involuntary bank account closures* (2008), at http://www.bostonfed.org/economic/cprc/conferences/2008/payment-choice/papers/campbell_jerez_tufano.pdf; Federal Deposit Insurance Corporation, *National survey of unbanked and underbanked households* (2009), *at* https://www.fdic.gov/HOUSEHOLDSURVEY/2009/full_report.pdf.

[54] Leslie Parrish and Maura Dundon, Center for Responsible Lending, *Overdraft U: Student Bank Accounts Often Loaded with High Overdraft Fees* (March 2014), at http://www.responsiblelending.org/student-loans/research-policy/overdraft_u_final.pdf. The report has also been submitted as an appendix to this comment.

[55] Testimony of Richard Hunt, Consumer Bankers Association, before the Senate Committee on Banking, Housing, and Community Affairs (Jul. 31, 2014), *at* http://consumerbankers.com/cba-issues/testimonies/richard-hunt-testimony-senate-banking-committee.

Regulating campus-bank marketing partnerships will restore competition to the market. When all financial service providers can compete equally for students' business – instead of partner banks being given the unfair platform of the Title IV disbursement process – students will benefit. They will be able to access lower price options, with features they prefer.

A. Campus-Bank Marketing Partnerships Create Reverse Competition

College-bank marketing agreements create a market failure known as "reverse competition." Normally, a well-functioning market with free competition would reduce prices and improve product features for consumers.[56] But market failures interfere with this process, resulting in harms to consumers and competition. "Reverse competition" is a type of market failure where sellers (in this case, the banks) and a middleman (in this case, colleges) team up to limit consumer choice.

Structurally, reverse competition has the following features:

1) **Broker/Middleman structure.** Reverse competition involves a seller, middleman/broker, and consumer.
2) **Financial incentive between seller and middleman to jointly increase price to consumer.** The seller may pay kickbacks or give other financial incentives to the middleman in order to secure access to the consumer via the middleman, knowing that the middleman will pass these costs on to the consumer in the form of a raised price. Both the middleman and the seller have a shared incentive to extract and share the additional profit from the consumer that is available due to market failure.
3) **Consumer has little or no power of choice ("captive market").** The middleman holds disproportionate power over the consumer in the transaction, and the consumer has decreased or no market power to make a choice different from the middleman's choice on her behalf. This makes the consumer unable to avoid increased prices or suboptimal product features.[57]
4) **Sellers compete to bid up compensation they pay to middleman, which is passed on to consumer in the form of higher price.** The first three factors lead to sellers competing with each other to increase compensation to middlemen to access consumers via the middleman. The compensation paid to the middleman is then passed on to the consumer in the form of a higher price.

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[56] *See, e.g.,* Rory Van Loo, *Helping the Buyers Beware*, 163 U. Pa. L. Rev. 1311, 1325 (2015).

[57] For example, in forced-placed home insurance, the mortgage lender (playing the role of the middleman/broker) contractually requires the consumer to pay for insurance but also has the contractual power to select the policy itself. Other factors could include a subprime consumer with no other options on the market; a complex transaction where the consumer is a one-time participant with little expertise as compared to the middleman; high transaction costs involved in gaining information and shopping around (e.g., the seller doesn't even market directly to consumers); other behavioral economics impediments to the consumer gaining information about the product (e.g., the product in question is a bundled add-on the consumer does not notice or is told is necessary; or is subsidiary feature to what the consumer considers to be the main transaction, such as the auto loan for auto purchase); and the consumer's incorrect belief (possibly due to fraud, deception, or unfairness) that the broker's interests are aligned with her own.

Campus-bank partnerships fit this model of reverse competition. Since college students are such attractive new customers for banks, in a functioning market, banks and financial companies would freely compete for their business. This competition would produce lower prices and better features. But in the campus banking market, the college, utilizing its position of power over a captive audience of students, essentially selects a provider for the students. So instead of all the banks bidding for students' business, they bid for the school's business as a gatekeeper to the student body. The bank that pays the most *to the school* wins, rather than the bank providing the best price and features to the student. And the school is not sensitive to price when making this deal. Instead, the school's incentive is to *increase* the price. The school receives goods and services or kickbacks from the bank, and sometimes a share of the fees, which means that the school's interests are aligned with the bank's revenue-maximizing interests.

Reverse competition has been a fundamental, repeated problem in consumer financial protection over the past decade. It has been found in mortgage brokering, indirect auto lending, title insurance, force-placed homeowners insurance, and credit insurance. In all of these settings, two parties—a seller and a middleman—team up against the consumer in a way that impedes consumer choice and steers them into a worse product. Instead of market competition leading the way to better products and features, the marketing alliance results in decreased value to the consumer.

Efforts to control reverse competition have a long history. It has been a focus of regulators and advocates dating back to the 1950s[58] in the contexts of credit insurance, title insurance, and, most recently, lender-placed (or "force-placed") home insurance.[59] A significant body of state and federal court cases discusses reverse competition.[60] Several states also have

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[58] 19 Fordham J. Corp. & Fin. L. 278 (2014).

[59] In title insurance, the real estate broker or lender selects the title insurance policy for the borrower. Since title insurance is commonly bundled as part of the larger real estate transaction, and not typically marketed to or understood by consumers, consumers had little effective market choice other than to accept the policy offered to them. In credit insurance, an insurance policy is bundled into a credit contract by the lender, who receives compensation from the insurance company. The consumer has little choice in the matter, since the insurance may be presented as necessary or bundled as an unnoticed line-item in the contract. And in forced-place insurance, lenders have the contractual right to select an insurance policy for borrowers, but no incentive to reduce the costs. For all three products, the dynamics resulted in sellers competing to increase compensation to the middleman, which was passed on to the consumer in higher prices: reverse competition.

[60] Title insurance: *Chicago Title v. Washington State Office of Ins. Com'r,* 178 Wash. 2d 120, 127 (Wash. 2013); Edwards *v. The First American Corp.*, 385 Fed. Appx. 629, 6331 (9th Cir. 2010); *In re California Title Ins. Antitrust Litigation*, 2009 WL 1458025, 1 (N.D. Cal. 2009); *Aspen Title & Escrow v. Jeld-Wen, Inc*, 677 F. Supp. 1477, 1481 (D. Or. 1987).

Credit insurance: *TEW v. Dixieland Finance, Inc.*, 527 So. 2d 6655, 670 (Miss. 1988); *Spears v. Colonial Bank of Alabama*, 514 So. 2d 814, 817-18 (Ala. 1987); *Credit Ins. Gen. Agents. Assn. v. Payne,* 148 Cal. Rptr. 141, 143-44 (Cal. App. 1978); *State ex rel. Com'r of Ins. V. Integon Life Ins. Co.*, 220 S.E.2d. 409, 411 (N.C. App. 1975); *Credit Ins. Gen. Agents. Assn. v. Payne,* 124 Cal. Rptr. 249, 250-51 (Cal. App. 1975); *Cope v. Aetna Finance Co. of Maine*, 412 F. 2d 635, 641 (1st Cir. 1969); *In re Richards*, 291 F.

statutory or regulatory definitions of reverse competition in their insurance codes.[61] In recent years, reverse competition in forced-place homeowner's insurance has drawn considerable state and federal regulatory attention.[62] Just as regulators have had the responsibility to correct reverse competition in these markets, the Department of Education has the responsibility to ensure that its Title IV programs are not used as a mechanism to create this market dysfunction.

Supp.537, 541 (1st Cir. 1968). Forced-place insurance: *Ellsworth v. U.S. Bank*, 2014 WL 1218833, 7 (N.D. Cal. 2014).

Mortgages: *See, e.g.,* Diane M. Standaert, Sara K. Weed, *Secure Transactions: Restoring our Communities with Responsible Lending,* 19 J. Affordable Housing & Community Dev. L. 71, 79 (2009); Elizabeth Renuart, *Toward One Competitive and Fair Mortgage Market*, 82 Tex. L. Rev. 421, 429-30 (2003). The Federal Reserve and CFPB's rules limiting mortgage broker compensation on the basis of "yield spread premiums" operates to correct reverse competition.

Indirect auto lending: *See, e.g.,* Center for Responsible Lending et al., Comments to the Federal Trade Commission Motor Vehicle Roundtable 6 (Feb. 1, 2012) (comment joined by six additional consumer groups)*, at* http://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/FTC-Comment-February-2-2012.pdf.

[61] For example, Nevada defines "reverse competition" as "insurers competing for the favor of a person who controls or may control the placement of insurance with insurers that tends to increase insurance premiums … in order to give greater compensation to the person who controls or may control the placement of insurance with insurers." NRS 691C.220. New Mexico likewise defines "reverse competition" as "a marketplace situation where the placement of … insurance with insurers is determined primarily by parties other than the policyholders." N.M.S.A. sec 59A-17-4. The New Hampshire insurance code allows the insurance commissioner to consider "the presence of conditions indicating reverse competition" when assessing the state of the property insurance market. N.H. Rev. Stat. sec. 412:14. Commentary to the Washington state insurance code notes that the code's restraints on compensation of insurance brokers is intended to combat reverse competition. The commentary states that "there are instances where the compensation paid to intermediaries should be subjected to control. This problem has long plagued regulators … the insurance business is particularly vulnerable to an erosion of price competition on the consumer level in favor of a 'reverse competition' in commission rates paid to agents or brokers." W.S.A. Ch. 628, Comments, L.1975, C.371, sec. 46 (commenting on sections 625.01(2)(e) and 625.11(2)(b)).

[62] The National Association of Insurance Commissioners ("NAIC") discusses reverse competition in forced-place insurance as "a key regulatory concern," defining it as:

"where the lender chooses the coverage provider and amounts, yet the consumer is obligated to pay the cost of the coverage. Reverse competition is a market condition that tends to drive up prices to consumers, as the lender is not motivate to select the lowest price for coverage since the cost is born by the borrower. Normally competitive forces tend to drive down costs for consumers. However, in this case, the lender is motivated to select coverage from an insurer looking out for the lender's interest rather than the borrower." http://www.naic.org/cipr_topics/topic_lender_placed_insurance.htm; http://www.naic.org/documents/government_relations_2013_flyin_ib_lender_placed_insurance.pdf. *See also* http://www.responsiblelending.org/mortgage-lending/policy-legislation/regulators/2013-joint-consumer-group-comments-to-fhfa-force-placed-insurance-may-28.pdf; the 2012 NAIC testimony of Robert Hunter, Consumer Federation of America, for a helpful macroeconomic description of reverse competition in forced-placed insurance.
http://www.naic.org/documents/committees_c_120809_public_hearing_lender_placed_insurance_testimony_cfa.pdf at 2. In addition, NAIC's model act on credit insurance includes a definition of reverse competition. *See* http://www.naic.org/store/free/MDL-365.pdf at 3(X).

B. Colleges Should Use Their Power for the Benefit of Students

Instead of creating a market failure by aligning themselves with banks, colleges should harness their market power by educating students about their options and helping them shop for fair accounts. Using tools like the Scorecard being developed by the CFPB,[63] colleges could identify a range of safe accounts for their students that have low fees, features students want, and no harmful fees like overdraft or debit card PIN point-of-sale fees. As long as the college has no financial interest in any of these accounts, and analyzes them correctly, they can be presented accurately to students and in a way that helps students understand how to manage their Title IV money and avoid fees.

IV. Section-by-section Analysis of the Proposed Rule

A. Overview

The proposed Cash Management amendments would be a strong step towards protecting students' Title IV money from predatory bank fees and marketing practices. Its strengths should be preserved, and its weaknesses shored up. We offer the following main suggestions:

- Ban revenue sharing and receipt of any goods, services, or discounts in marketing or servicing agreements. These financial benefits received by colleges are a key driver in creating reverse competition and steering students to accounts.
- Tier 1 and Tier 2 cards should have identical fee protections, especially from overdraft fees. Although the marketing settings may be different for Tier 1 and Tier 2, they both directly impact Title IV funds.
- Preserve the requirement that contracts be filed in a central database and fees disclosed annually. This transparency is crucial to helping students chose accounts freely and identifying accounts that skim off Title IV dollars.
- State clearly that colleges have a fiduciary duty towards students as well as towards the Department in the management of the Title IV program. The "best financial interests" standard should reflect this fiduciary duty, rather than simply referencing prevailing market practices – especially when, like overdraft fees, they have been the subject of continuing regulatory concern.

B. Current Cash Management Rule

The proposed amendments would update a longstanding rule, 34 C.F.R. § 668.164(c)("Direct Payments"), which governs how colleges disburse federal financial aid dollars to students. The current rule imposes requirements on how schools must disburse the funds to students. Schools have a choice between issuing a check, providing cash, or initiating an electronic funds transfer (EFT). Schools may require students to provide account information

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[63] 80 Fed. Reg. 4255 (Jan. 27, 2015). The Center for Responsible Lending's comment on the Scorecard Initiative is at http://www.responsiblelending.org/student-loans/research-policy/request-for-information-crl.html?referrer=https://www.google.com/.

for an EFT, but if the student does not provide it, they must still disburse the money by cash or check.

The current Direct Payments provision allows schools to open an account "on behalf of" students, or "assist" students in opening an account in which to deposit the financial aid funds.[64] If the school does so, then the regulations provide additional restrictions. These include: obtaining consent to open the account, disclosing the terms before opening the account, ensuring that there is no cost to open the account or receive a debit or prepaid card, ensuring convenient access to a fee-free ATM, and prohibiting the account from being marketed as or converted into a "credit card or credit instrument."[65]

C. Tier 1 and Tier 2 Accounts

The proposed Cash Management rule's new Direct Payments provision, § 668.164(d)-(f) imposes new, much more extensive requirements on how schools may be involved in marketing agreements with banks.

The rule divides marketing agreements into two different categories, Tier 1 and Tier 2. Tier 1 accounts, § 668.164(e), are those offered by a third-party servicer, such as Higher One, with whom the institution has retained to perform part of its Title IV disbursement duties. Tier 1 also encompasses accounts offered by a partner or affiliate of the servicer. Tier 2 accounts, § 668.164(f), are other accounts where a financial institution and a school have a contract "under which financial accounts are offered and marketed directly to students or their parents."

The rule imposes substantive marketing and fee requirements on both types of accounts, but Tier 1 accounts have greater protections than Tier 2 accounts. In addition, the rule imposes restrictions on how accounts (Tier 1, 2, or any other account) may be presented or marketed to students during financial aid disbursement as options for receiving the funds.

Comment: Tier 1 and Tier 2 may be a useful way to describe to different marketing settings. However, as described in more detail below, Tier 2 cards deserve the same range of fee protections at Tier 1 cards. Although the initial marketing may take place at a different moment in time, both types of marketing agreements motivate the school to push students to deposit Title IV funds into the accounts using unfair marketing practices.

Notably, the proposed rule's definitions of Tier 1 and Tier 2 arrangements continues to allow colleges to receive a financial benefit from banks or servicers in return for providing them access to students and participating in the marketing. It also continues to allow servicers to use Title IV disbursement as a marketing platform for their own associated bank accounts. This allows the essential conflict of interest to persist: colleges would still have a financial stake in steering students to a particular account, rather than acting neutrally or in the students' best interests. Such a conflict of interest is inappropriate, especially since colleges have a fiduciary duty in the management of Title IV funds.

[64] § 668.164(c)(3).
[65] § 668.164(c)(3)(i)-(vii).

The rule should get to the heart of the matter and ban all revenue sharing or receipt of any other financial benefit, including discounted services. It should also ban servicers from offering affiliated bank accounts during servicing Title IV disbursements. There is no reason why servicers should be permitted to use Title IV servicing as a marketing device for financial services unrelated to the Title IV program.

D. Tier 1 Accounts Requirements

For Tier 1 accounts, the rule would impose the following requirements:

1. Pre-account Opening Restrictions

The rule would impose a number of limitations before the account could be opened:

- The school must obtain a students' consent to open an account before the school provides the bank or servicer with the student's personal data. However, schools may still provide the students' name, address, and email address without consent.
- The school must also obtain consent to open the account before any account access device is sent (e.g. a debit card) or a student ID card is linked to the account.
- The school must inform the student of the account terms before the account is opened.

Comment: These provisions are effective interventions intended to address unfair marketing practices that allow servicers and their bank partners' preferential access to students by opening accounts without their consent; sending them unsolicited debit cards; and failing to disclose account terms. This gives students the impression that they have to choose that account to receive their Title IV money, and keeps them from understanding the terms and conditions of the account. It also serves to block competing banks and payment services from effectively advertising to new students.

Although these proposals will help restore fairness, they do not go far enough. They still allow servicers and financial institutions to receive key personal information about students before they have consented to open an account, including their name, address, and email address. This data will no doubt be used to market financial accounts, and imply endorsement of those accounts, even under the proposed amendments. Colleges would still be inappropriately monetizing their students' data and selling it to banks it as part of the Title IV disbursement process.

The Department must take stronger steps to ensure that Title IV does not remain a bank marketing device. While it may be true that servicers need basic student information to perform their legitimate functions even if they do not consent to open an affiliate account, the use of this data should be strictly limited to actual Title IV disbursement operations. It should not be used for any other purposes whatsoever. A strict firewall should be imposed between legitimate usage and marketing.

Suggested language: Add to the end of § 668.164(e)(1)(A): "The name, address, and email address provided must be used solely for the purpose of fulfilling Title IV duties, and not for marketing any financial account or any other product or service. A Title IV servicer may not

disclose this information to any affiliate or entity except for the purposes of fulfilling its Title IV duties."

2. Tier 1 Fee Protections

The proposed rule imposes significant, new fee protections on Tier 1 cards. These include:

- Ensuring that students have "convenient access" to a fee-free ATM so that funds are "reasonable available," including when Title IV payments are made. § 668.164(e)(2)(iii)(A).

Comment: This measure is essential to ensuring that students receive and use their Title IV funds without incurring expensive ATM fees. As documented by U.S. PIRG and others, the current rule has not been sufficient to ensure that students can withdraw their loan money without ATM fees. For example, in some cases there was only one fee-free ATM for students, which would run out of cash quickly on the day students received their payments, forcing students to pay a fee at a different ATM.[66]

- No account opening fee. § 668.164(e)(2)(iii)(B)(*1)*
- No fees at all in the first 30 days after financial aid money is deposited in the account. §668.164(e)(2)(iii)(B)(*4*).

Comment: These two provisions are necessary to ensure that students are not charged a fee in order to receive their Title IV money, either by their college directly, or by an account the college helps sell them. We agree with the Department that monthly and other fees might be appropriate on a financial account that a student keeps for purposes other than receiving title IV disbursements. But if a financial institution that has a contract with a school uses that contract to encourage students to receive their Title IV funds in an account,, students must not be charged a direct fee, like an account opening fee, for receiving their Title IV money. Students must have the ability to receive their Title IV money to the penny and then to close the account if they do not wish to keep it.

Colleges, clearly, do not have the authority to charge students directly to receive their Title IV money. Since the proposed rule does not ban colleges from receiving a payment or other financial benefit from banks and servicers, colleges may still have a direct financial interest in steering students to the accounts. Thus, a fee charged by the bank to open the account is the same as a fee charged by the college.

The proposed rule correctly bans not only an account opening fee, but also fees in the first 30 days. The 30-day ban is necessary to protect Title IV funds when they most likely to be in the account. It also helps ensure that banks do not evade the rule by charging the fee a few days after the account is opened and calling it something other than an "account opening fee."

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[66] PIRG, Debit Card Trap, *supra* n.3, at 15-17.

- No fees for point-of-sale transactions (e.g., using your debit card with PIN to make purchases) § 668.164(e)(2)(iii)(B)(*2*).

Comment: As documented by the GAO, point-of-sale or PIN-debit fees sometimes charged on campus bank accounts are unusual, expensive fees not typically found on checking accounts.[67] The fees are charged when the consumer presses "debit" and enters a PIN rather than pushing "credit" and doing a signature transaction. PIN and signature transactions draw funds from the same account, but usually by using different electronic payment networks to process the transaction. The Federal Reserve's consent order with Higher One's bank partner, Cole Taylor, notes that PIN debit fees are "unusual."[68]

Because the PIN fee is so unusual, and often is not clearly disclosed, consumers do not know about it (or even think to look for it in the fine print) before they decided to open an account. Although PIN transactions may be safer than signature transaction, consumers may not understand that they may incur a fee if they use their PIN.

If a school is going to partner with a bank to offer a particular account for receipt of Title IV funds, it must ensure that the account does not have unusual fees that charge students for basic transactions that are free with nearly every other bank account. It is entirely appropriate that the Department act to ensure that students are not charged an unnecessary fee.

However, the Department should broaden this language to ensure that campus accounts do not penalize students in other ways as payment systems and technologies continue to evolve and proliferate. As the complex interchange fee system morphs, banks may start to have different financial incentive to push students into other payment types. Imposing fees on students to manipulate their choice of transactions is inappropriate. The rule should be more broadly worded to encompass all types of transaction-type steering.

Suggested language: add to the end of § 668.164(e)(2)(iii)(B)(*2*) "does not incur any discriminatory cost … for the use of any particular electronic payment network or electronic payment type."

- No fees for any transaction on a surcharge-free ATM. § 668.164(e)(2)(iii)(b)(*3*)

Comment: This provision is necessary to protect students from surprise, expensive fees for checking balances on an ATM and other transactions. Students should be able to check balances at no cost in order to better manage their money.

- Ban on all overdraft fees. § 668.164(e)(2)(iv)(B).

Comment: We strongly support the ban on overdraft fees on ATM, point-of-sale, and debit card transactions. As we detailed extensively above in part III, these overdraft fees are harmful, and inappropriate. Title IV servicers have a record of abusive overdraft practices, as

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[67] GAO Report, *supra* n.2, at 20.
[68] *In the matter of Cole Taylor Bank*, *supra* n.4, at ¶E.

indicated by the FDIC settlement and class actions against Higher One.[69] Thus, the proposed ban on overdraft fees is a necessary response to this documented bad conduct by Title IV servicers.

Many accounts without overdraft fees are now coming available. If a school chooses to enter into a contract with a Title IV servicer, it must offer a safe account without overdraft fees.

- Ensure that the accounts are in the "best financial interests" of the students, defined as "not excessive in light of prevailing market rates." § 668.164(e)(2)(vii).

Comment: While the "best financial interests" standard is a welcome addition to the Cash Management rule, the reference to "prevailing market rates" weakens it substantially. Colleges act as fiduciaries with respect to the Department and students. They are obligated to employ a higher standard, corresponding to a fiduciary duty, than "prevailing market rates" when assessing whether to enter into a contract to market a particular account to students.

Suggested language: in § 668.164(e)(2)(vii)(A), delete the reference to "not excessive in light of prevailing market rates" and require that the school "periodically conducts due diligence reviews to ascertain whether the fees imposed … are, considered as a whole, in the best financial interests of the student."

- Ensure that the contract can be cancelled due to student complaints or if the school determines the fees are excessive in its "best financial interests" review. § 668.164(e)(2)(vii)(B).

Comments: This provision would require that the school be empowered to cancel contracts in light of student complaints or unreasonable fees. This is an important measure to protect students, but it should be strengthened to actively require schools to create a mechanism to collect complaints, and act on complaints during its due diligence review.

Suggestion: Add to the end of § 668.164(a)(2)(vii)(B): "Institutions must create a complaints portal online and an ombudsman's office to receive student and parent complaints in writing or in person. The method for making a complaint must be clearly and conspicuously included in any website or print advertisement for the account. Any on-campus event or location where accounts are market in person by institution or bank personnel must also include a representative of the ombudsman's office to collect complaints. Any complaints collected must be included in the periodic due diligence review required to establish that the account is in the students' best financial interests. Complaints must be cross-filed with the Consumer Financial Protection Bureau."

3. Tier 1 Public Disclosure Requirements

The proposed rule would require schools to publish marketing contracts on their websites, submit them to the Department, and disclose data about the money received by all

[69] *See In re Higher One*, *supra* n.4.

parties to the contract in the previous year, the number of accounts opened, and the average fees charged to students for the accounts in the previous year.[70]

Comment: Public disclosure of marketing contracts and fees charged is essential to overcoming the information asymmetry created by school-bank marketing partnerships. If the Department does not ban revenue sharing, it is doubly important that it provide parents and students with transparency and full information to be able to better understand their choices and the conflict of interest that may be present. Disclosure of the contracts will allow students and parents to better understand the account and decide whether to open it. Public disclosure of contracts forms an essential component of the CARD Act's protections against high-pressure, revenue-sharing marketing agreements between colleges and card issuers. A similar step is appropriate and necessary for bank account marketing.

E. Tier 2 Accounts

1. Requirements Overlapping with Tier 1

Tier 2 accounts are defined as accounts "directly marketed" to students pursuant to a contract between a school and a financial institution.[71] "Directly marketed" is defined to include any account that the school markets itself to students; any account linked to a student ID card; and any other account cobranded with the school name, logo, or mascot[72]

Tier 2 accounts receive some of the same protections as Tier 1 accounts, including the pre-account opening protections, public disclosure requirements, access to surcharge-free ATMs, and ban on an account-opening fee.[73] Tier 2 also has the same "best financial interests" requirement as Tier 1.[74]

Comment: Our comments on Tier 2 pre-account opening, surcharge-free ATMs, account opening fees, public disclosure, and best financial interests standard are identical to our comments on Tier 1 accounts above.

2. Weaker Overall Fee Protections for Tier 2

The proposed Tier 2 fee protections are much weaker than the Tier 1 protections. Tier 2 does not include a ban on overdraft fees, point-of-sale fees, ATM transaction fees, or 30-day moratorium on fees after aid disbursement.

Comment: Harmful fees – at a minimum, overdraft fees --should be banned on Tier 2 cards for the same reason they are banned on Tier 1 cards: both cards are equally motivated by the Title IV program and both skim fees in the same manner. Although Tier 1 and Tier 2 cards may be marketed at different times and places, they still incentivize—and in some cases, require—colleges to use their best efforts to push students to deposit their Title IV funds. As

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[70] §668.164(e)(2)(v).
[71] § 668.164(f)(1), (f)(4)(i)-(iii).
[72] § 668.164(f)(3).
[73] § 668.164(f)(4)(v),(vi), (ix).
[74] § 668.164(f)(4)(vii).

detailed above, some existing Tier 2 contracts require schools to advertise and push the account during the financial aid disbursement process.[75] In addition, current Tier 2 contracts financially reward schools when students keep the accounts active and use them more often, which is an additional incentive for schools to push them to designate the Tier 2 account to receive their disbursement.

At a minimum, if a Tier 2 card is offered during the course of financial aid disbursement, even without the involvement of a third-party servicer, it should become a Tier 1 card. There is no functional difference between a Tier 1 and Tier 2 card if it is offered as an EFT option directly during disbursement, whether that offer is made by the college or by the college's servicer. The proposed rule already recognizes that a Tier 2 card offered during disbursement should be treated like a Tier 1 card with respect to the student choice provisions. It should extend this treatment to the fee protections as well.

F. Neutral Marketing Requirements – "Student Choice"

In addition to the specific fee restrictions and other requirements for Tier 1 and 2 accounts, the proposed rule imposes "Student Choice" requirements about how an account (Tier 1 or Tier 2) can be presented as an option to receive student aid funds during the course of financial aid disbursement.[76] The inclusion of both Tier 1 (offered by servicers) and Tier 2 (offered by non-servicers) in the Student Choice provision recognizes that some schools market a specific financial account for disbursement, even if they do not utilize a servicer for disbursement, or if the servicer does not itself offer the account.

Under the Student Choice provision, a school that has a Tier 1 <u>or</u> Tier 2 contract must ensure that those options are presented neutrally as options for disbursement. The school must:

- Inform students that they are not required to open any specific account to get their student aid money (e.g., the Tier 1 or Tier 2 account).[77]
- Present all the options for disbursement clearly and neutrally.[78]
    - The student's own pre-existing account must be the "first and default" option presented.[79]
    - Must disclose the terms and features of the Tier 1 and Tier 2 accounts.[80]
- Ensure that the process to receive funds to the students' preferred account is "as timely and no more onerous" as to the Tier 1 or Tier 2 account.[81]

Comment: As has been extensively documented by the Department's Inspector General, the GAO, the CFPB, the Federal Reserve, and independent research, schools and banks engage in a variety of practices intended to steer students into these accounts. Students have been forced

[75] *See supra*, part I.D.
[76] § 668.164(d)(4).
[77] § 668.164(d)(4)(i)(A)(*1*).
[78] § 668.164(d)(4)(i)(A)(*2*).
[79] § 668.164(d)(4)(i)(B)(*1*).
[80] § 668.164(d)(4)(i)(B)(*3*).
[81] § 668.164(d)(4)(i)(A)(*3*).

into accounts by deceptive marketing practices that make it seem as if the sponsored account is the only feasible choice. The proposed rule would correctly restore choice to the extent possible without a complete ban on revenue sharing or third-party servicing account offers.

In addition, we urge the Department to require schools to communicate with students about their disbursement choices early, before funds are ready to be disbursed. Students who do not have bank accounts should have the opportunity to open the account that works best for them. Students who have accounts (or open new ones) should be able to provide the bank account and routing numbers in advance so that funds can be directly deposited as soon as funds are available.

G. Standard of Conduct - Fiduciary Duty

The current Cash Management rule imposes a fiduciary duty on institutes of higher education "with regard to *maintaining and investing* title IV, HEA program funds."[82] The proposed rule would broaden this definition to "with regard to *managing* title IV, HEA program funds."[83] The amendment would also move the fiduciary duty provision from the subpart on "Managing and Investing Funds" to the subpart on "Scope and Institutional Responsibility."

Comment: We support the broader language and changed location of the section on a governing institution's standard of conduct for its role in the Title IV process. The proposed changes highlight the institutions' fiduciary duty towards the Department – and towards students.

A fiduciary duty arises where one person "is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation."[84] Colleges receive Title IV funds on behalf of students, hold the money in trust for students, and are obliged by federal law to transmit the funds to students in a safe and timely manner. This describes a fiduciary relationship. As a fiduciary of students' Title IV money, colleges must ensure that any conduct that touches the Title IV money, including financial account marketing, is conducted with the students' financial best interests as the first consideration. Merely conforming to "prevailing market rates" when offering accounts is incompatible with this standard of conduct.

H. Government Disbursement

The new rule expressly reserves the right of the Secretary to disburse funds directly to students, without the college as the intermediary.[85]

Comment: This section appears to be intended to leave open the possibility of the federal government issuing credit balances directly to students. We agree that the Department should continue to explore such an option, and support this clarification of the Department's authority.

V. Conclusion

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[82] Current § 668.163(e) (emphasis added).
[83] Proposed § 668.161(c) (emphasis added).
[84] Rest. (2d) Torts § 874, comment a.
[85] § 668.164(d)(3).

Thank you for the opportunity to comment on the proposed amendments to the Cash Management Rule. The proposal would bring significant and rapid relief to students, but it must be strengthened in order to reach its full potential.

Yours very truly,

Center for Responsible Lending

National Consumer Law Center (on behalf of its low income clients)