Center for Responsible Lending

August 30, 2018
The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

RE: Docket ID ED-2018–OPE–0027

Dear Secretary Devos:

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) and rescind and rewrite previously promulgated regulations from 2016. CRL is extremely concerned about the Department's decision to rewrite rules meant to protect students and taxpayers from unscrupulous for-profit colleges and its tacit refusal to hold these schools accountable for their predatory tactics and activities. Moreover, CRL finds the Department's current proposal woefully inadequate to meet the aims of the statute or to conform to the Department's own mission. The proposal would dramatically curtail relief for wronged borrowers by providing a very limited basis for claims, coupled with an insurmountable evidentiary standard. The proposed rule would also compound the already negative effects of a poor, costly education with even more economic risk by forcing borrowers to default in order to even pursue relief. Finally, the rule would increase costs to students and taxpayers by billions and ensure that even the worst actors continue to receive federal funds. Combined, the new standards will ultimately fail to hold bad actors accountable and allow them to continue to take advantage of the federal loan program.

Because this NPRM fails in almost every respect to ensure that borrowers can access necessary relief or that institutions who engage in misconduct risk losing access to taxpayer funds, we urge the Department to abandon this effort and implement the 2016 Borrower Defense regulations (2016 rule) immediately.

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[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.

I. Background

CRL has done extensive research on the impact of predatory for-profit schools on individuals, communities and the overall economy.[2] CRL also participated in the most recent round of negotiated rulemaking on this issue. Based on this activity, CRL firmly recommends that the Department implement and improve the 2016 rule, not dismantle it. Should the department seek to improve upon, rather than discard, the 2016 rule, CRL suggests a rule that would ensure that students and taxpayers do not bear an undue share of the risk of fraud and would provide an efficient path for the Department to provide relief to eligible borrowers.

An improved version of the 2016 rule would have the following basic characteristics:

- Be based on a broad, general standard of federal and state consumer protection law;
- Consider a broad range of evidence to show consumer protection violations;
- Give heavy weight to actions by state attorneys general and federal consumer protection authorities;
- Be applicable to all federal loans with no time limit to access relief;
- Provide for full relief wherever possible.

II. The proposed rule fails to meet Department's responsibility to students and taxpayers.

Throughout its proposal, the Department indicates that it is attempting to balance the "competing interests of students and taxpayers." CRL rejects the idea that these interests are at odds. Often, because students are or will be taxpayers, they are one in the same. Further, this fails to acknowledge the actual competing interests of the predatory institutions at the center of this regulation, despite the fact that many provisions are prefaced by a need to protect institutional interests. That these proposed institutional protections are almost exclusively completely detrimental to students and taxpayers goes unstated in the current proposal. Taxpayers have a vested interest in their funds going

[2] See generally Robin Howard & Robert Lang, *DEBT AND DISILLUSIONMENT: Stories of Former For-Profit College Students as Shared in Florida Focus Groups* (Center for Responsible Lending, 2018), available at https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-florida-debt-disillusionment-l-aug2018.pdf; Robin Howarth, Whitney Barkley & Robert Lang, *A BITTER PILL: Gainful Employment and Credentialism in Healthcare Support Fields* (Center for Responsible Lending, 2018), available at https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-bitter-pill-jun2018.pdf; Peter Smith & Leslie Parrish, *Do Students of Color Profit from For-Profit Colleges? Poor Outcomes & High Debt Hamper Attendees' Futures* (Center for Responsible Lending, 2014) available at https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-for-profit-univ-final.pdf; 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) available at https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_nc_student_loan_calculus_may2016.pdf.

to student education so that students can use their education to gain employment and contribute to the economy. Where schools fail to provide a quality education to the students, leaving the student without options that allow them to repay the loan, the school has taken advantage of the taxpayer investment, not the student. Allowing the student to be made whole and move on allows them to contribute to the economy without the burden of debt. An onerous burden on a student that cannot repay helps neither the student nor the taxpayer, and completely fails to highlight or address the failure of the school that took advantage of the system.

We have already seen what happens when the Department's process "serves as a last resort for borrowers, with disputes between borrowers and schools primarily resolved by those parties in the first instance."[3] The result is the Corinthian collapse and the loss of millions of dollars of taxpayer funding and hundreds of thousands of ruined lives. CRL fails to see how this method did anything but shift financial burden to the taxpayer and ensure that the Department had no avenue to secure institutional restitution.

III. Department's proposed standard would substantially curtail relief and even increase harm to wronged borrowers.

A. The Department's proposal to require borrowers to default in order to access relief is baseless, unlawful and harmful to borrowers.

Throughout the NPRM, the Department falsely states that its practice of accepting so-called "affirmative" claims began in 2015 as a response to the Corinthian College collapse. This assertion is not based on actual past practice, an accurate reading of the authorizing statute nor the 1994-1995 regulations as the Department states.

The Higher Education Act (HEA) requires the Secretary to promulgate regulations clarifying "which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part."[4] Before promulgation of the 2016 regulations, Department regulations provided that "[i]n any proceeding to collect on a Direct Loan, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law."[5]

The regulation does not require that 'proceeding' have a rigid meaning or that it be a formal proceeding conducted by the Department. It does provide a non-exhaustive, enumerated list of *some* such proceedings, including Department-conducted wage offset, social security offset or other proceedings. This provision was never intended nor interpreted to mean that these were the only circumstances under which a defense could be made, until the Department proposed this current rule.

[3] NPRM at 37,253 – 37,254.
[4] 20 U.S.C.A. § 1087e
[5] 34 C.F.R. § 685.206(c)

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In fact, throughout the corresponding regulatory sections, the Department explicitly distinguishes non-defaulted loans from defaulted loans several times. Thus, if it were intending this provision to refer to only defaulted loans, it could and should have done so explicitly.

Further, the statutory authority for the Secretary of Education to collect debts distinguishes between non-delinquent debts and delinquent debts and refers to governmental actions in general to collect on funds owed, not just overdue or defaulted claims.[6] The statute does not define claims as only those that are delinquent or past due[7] and even explicitly provides for the "collection of payments" to include even regular, on-time payment activity, not special collection activity for overdue claims.[8] Therefore, the department must provide some evidence other than anecdotal evidence that the Department has a history of only reviewing "defensive" claims or that such a reading is consistent with statutory authority or the Congressional intent of the HEA to justify its argument. It has failed to do so to date.

Additionally, though the Department repeatedly states a need to deter "frivolous" claims as an alternate reason for treating affirmative claims differently, it has failed to document or demonstrate a basis for the assertion that this is an actual risk. Therefore, the Department should provide sufficient data and information regarding submissions of frivolous claims since the promulgation of the 1994-1995 regulations. It has not. Notably, what has borne out and what the Department has documented and acknowledged several time is that claims have been filed overwhelmingly against schools whose widespread abuses are well-documented and/or have already collapsed.[9]

Beyond lacking a legal or factual basis, requiring default would cause additional undue harm to borrowers as well as have far-reaching effects for taxpayers and the economy. Regarding whether this will lead to strategic defaults, if the Department requires default in order to submit a claim against an institution that has wronged the borrower and risked taxpayer money, it is possible that defaults will increase. However, the "decision" to default would be anything but strategic. Rather, if it can be called a decision at all, it would be a catastrophic last resort with far-reaching consequences for every borrower, whether their claim is successful or not.

The consequences of default are numerous and last for years. Defaulting increases the overall cost of the loan and prevents borrowers from accessing additional federal education funding, should they not be so disillusioned with higher education and seek to better their life once more. Defaulting also substantially impacts a borrower's credit score and rating, decreasing their ability to access other

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[6] 31 U.S.C. § 3711

[7] 31 U.S.C. § 3701

[8] 31 U.S.C. § 3720

[9] See: https://www.durbin.senate.gov/newsroom/press-releases/durbin-releases-shocking-new-data-on-department-of-educations-borrower-defense-application-backlog.

credit products or even basic utilities. When individuals are unable to be active participants in society, the ramifications are felt by the entire economy.

Because a distinction between affirmative and defensive claims has no legal basis and does not serve a compelling purpose, the Department should refrain from setting differing standards for relief for these two types of claims. Further, the Department should not set arbitrary statutes of limitations for claims. So long as the Department can collect payment for a loan, a borrower should be able to assert a defense to repayment under this provision. Moreover, recent history and the effects of denying or withholding relief for affirmative claims demonstrate that the proposed approach will be extremely costly and burdensome for borrowers, taxpayers and the Department.

B. **Requiring claimants establish that misrepresentations were knowingly or recklessly made imposes an unnecessary standard that will deprive relief to borrowers with legitimate claims.**

The proposal would require that a borrower establish not only a misrepresentation of a material fact by the institution, but also that the misrepresentation was made knowingly or with reckless disregard for the truth. This standard would differ from the existing standard under 12 CFR 685.206, which permits a borrower to assert a defense based upon a cause of action available under applicable state law. The [2016 Rule] would also have replaced the existing standard that relies upon state law claims with a federal standard, but would have allowed "a borrower to assert a borrower defense on the basis of a substantial misrepresentation, a breach of contract, or a favorable, non-default contested judgment against the school, for its act or omission relating to the making of the borrower's Direct Loan or the provision of educational services for which the loan was provided."[10] Thus, what the Department now proposes is a federal standard that would not only deprive borrowers who have valid state law claims of a defense to repayment, but would allow only claims where the institutions' intent could be proven. Both of these changes are misguided.

First, elimination of state law as a basis leaves out many claims that arise under the states' exercise of their traditional role in consumer protection. Institutions are already subject to the applicable state laws wherever they operate, so affording borrower defense claims when an institution does not comply imposes no additional burden on the institutions.

The heightened burden the Department seeks to impose—that borrowers prove the institution's intent-- would also deprive a substantial number of consumers who have been harmed by deceptive practices and misrepresentation, but lack the capacity and resources to establish that an institution engaged in such practices knowingly or recklessly. Unscrupulous institutions rely on subterfuge and confusion, in their marketing and their contracts, but rarely make overtly fraudulent statements that on their own establish intent. In the absence of such a statement from the institution, the proposed standard would require access to documentary evidence, that, even when represented by counsel,

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[10] See: 2016 Rule, pg. 6.

borrowers will find difficult to obtain. This is especially unnecessary when the Department is likely to have more evidence of wrongdoing than the borrower can access.

Finally, a scienter requirement is inconsistent with other federal precedent regarding claims for deception. The deception standard used by the FTC does not require a showing of intent by the party against whom a deception claim is brought.[11] The CFPB, though not bound by the FTC, uses a similar standard for establishing deception. Under both agencies' authority, a practice is deceptive if it is likely to mislead a consumer.

This deception standard has been formally in place for decades, is well understood, and promotes transparency and honesty in other financial markets. There is no legal or policy justification for imposing a higher standard under the Borrower Defense rule, one that many borrowers will be unable to satisfy. Shifting this burden shifts costs to borrowers who may have legitimate claims and ensures that taxpayers continue to bear the brunt of this burden.

In fact, the Department is already responsible for monitoring schools that take advantage of student loan funds and that should include ensuring that deception and misrepresentation are not present. It is better positioned to do this monitoring, and to offload this responsibility to borrowers in individual claims is to fail to adequately maintain standards for its lending program.

C. **There is no justification for imposing a higher, "clear-and-convincing" evidentiary standard for affirmative claims.**

The Department also seeks comment on whether to require that affirmative claims meet a "clear and convincing" evidentiary standard, rather than a "preponderance of the evidence" standard. While this is consistent with the Department's intent to drastically reduce the types of claims which are sufficient to support borrower relief, if it is the only avenue by which a defrauded student could seek relief, it would likely force some consumers to default on their claims. Moreover, as previously discussed, the Department lacks any basis for its speculation that such a standard would deter frivolous claims, because the department cannot point to frivolous claims being made under the current standard.

The Department itself uses a preponderance of the evidence standard in other processes regarding other borrower debt issues.[12] Despite the Department's assertions, while courts may impose a "clear-and-convincing" evidentiary standard, in certain fraud cases, that standard is not typical in the consumer protection context, at either the federal or the state level. A preponderance of the evidence standard strikes a balance between ensuring that borrowers that have been harmed are not subject to

[11] Federal Trade Commission, Policy Statement on Deception (Oct. 14, 1983), *at* https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception.
[12] See 34 CFR 34.14(b), (c) (administrative wage garnishment); 34 CFR 31.7(e) (Federal salary offset).

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an overly burdensome evidentiary standard and protecting the Federal government, taxpayers, and institutions from unsubstantiated claims.

The Department offers little rationale for a heightened standard, other than its belief that this standard will discourage frivolous claims. First, the NPRM does not provide any basis for the Department's repeated assertions that frivolous claims are a significant burden. The one example of a "frivolous" claim—a borrower submitting a claim because of dissatisfaction with the quality but not alleging any misrepresentation[13]—would hardly be expected to survive a preponderance of the evidence standard. So it is unclear how a higher evidentiary standard would deter such a claim. Even assuming that a higher evidentiary standard might deter some frivolous claims, it would do so at the costs of many claims that are not frivolous.

Ultimately, the standard provided by this rule would make it harder for those who are already in financial distress from seeking and receiving relief. If borrowers want to challenge their school's conduct, they first need to expose themselves to massive risk by defaulting on their student loans (or under the "alternative" approach, open themselves up to massive invasions of privacy). When they do, the standard they will have to meet will be so high that they are almost certain to lose. This is not how a government should treat its most vulnerable citizens. Thus, all claims should be subjected to the baseline preponderance of evidence standard used in civil cases and state law.

D. Borrowers should not have to show economic harm beyond taking out a loan.

We reject the Department's assertion that the mere existence of a loan or loans taken out by the student for the college program in question is not sufficient evidence of financial harm just because fraud or misrepresentation on the part of the school has been established.[14] Students take on the responsibility of debt *only* because they have been led to expect that, at a minimum, the degree they are pursuing will make them marketable for employment in their field of study at a steady wage sufficient to repay that debt while covering a reasonable level of living expenses. When these expectations are not met because of the school's misconduct, the loan is financially harmful, *merely because it exists and by its very nature*. This harm is manifested in a number of ways both actual and potential:[15]

[13] NPRM at 37,244.
[14] NPRM at 37,259.
[15] Note that other agencies, such as the FDIC, have a much more expansive definition of consumer harm that includes harm that is monetary and non-monetary harm, quantifiable and unquantifiable, actual and potential, and harm mediated through a third party. See: https://www.fdic.gov/regulations/compliance/manual/2/ii-2.1.pdf.

Actual:

1) The loan principal represents a claim against borrower assets and therefore reduces the borrower's net-worth (financial cushion). Financial cushions can be used to protect against family emergencies, to invest in long-term assets such as a home, or for long-term needs such as college savings for children and retirement.
2) Debt service (principal and interest) reduces cash-flow and therefore borrower liquidity to meet both usual and unusual expenses and reduces ability to save for future needs.

Potential:

1) A loan represents financial risk: even a borrower current on payments is at risk for future delinquency and default should circumstances change. Default results in a cascade of financial harms such as impaired credit scores, wage garnishment and tax offsets. Mortgage lenders underwrite to the financial risk represented by student loans, with many student loan borrowers unable to qualify for a home loan as their student loan balances are too high relative to their incomes. Student loan payments are also included when calculating debt-to-income ratios for satisfaction of ability-to-repay requirements, often severely limiting buying options for borrowers, especially as the cost of homes continues to rise. Thus, student loans have the potential to crowd out wealth building opportunities such as buying a home based on the financial risk they represent.

Because the loan itself is evidence of financial harm, the Department should utilize the standards and definitions as articulated in the 2016 rule. Thus, in establishing financial harm, the applicant's role should be to provide evidence of misconduct on the part of the school based not on the new proposed standards of proof, but on the 2016 Borrower Defense standards. Generally, the misconduct per the 2016 standards must concern false, misleading or deceptive practices around: 1) program costs and financing, 2) the provision of educational elements required to complete the program in a timely manner with the promised skills and knowledge, or 3) employability in the chosen field following completion.[16] The 2016 standards also require that the applicant show only that they relied on the practices underlying the misconduct *to their detriment.* There is no requirement to show that the misrepresentations explicitly led to enrollment as in the new standards in the NPRM.[17]

This approach coincides with the fact that the Department's own College Scorecard "How to"[18] for choosing a college as well as virtually *all* college marketing and enrollment materials[19] *focus on the three factors of cost/financing, timely skill and knowledge attainment, and employability in a chosen field*, demonstrates that they are *elemental* to the enrollment decision.[20] Therefore, the student should

[16] See: https://www2.ed.gov/policy/highered/reg/hearulemaking/2016/bd-factsheet-nprm-061316.pdf
[17] Id.
[18] See: https://collegescorecard.ed.gov/assets/College-Scorecard-Guide.pdf
[19] See: https://www.higher-education-marketing.com/blog/roi-website-content
[20] CRL's own focus group research of students that borrowed to attend for-profit colleges shows that again and again, participants considered these three factors, but particularly the employability factor, in

not be required to establish that misrepresentations of these sorts played a major role in the student's decision to enroll. Similarly, whether or not a student was also attracted by a school's convenience, friendly atmosphere, attractive landscaping, or other features is irrelevant. Even if there appears to be no reasonable alternative college or program to the one chosen by the student, the student could have chosen not to enroll at all and therefore would have relied on at least one of these types of misrepresentations. [21]

Additionally, a student should not be further required, as proposed by the new standards, to show that the representations underlying the misconduct were *relied upon by the applicant when taking out a loan*. Given that the representations of these sorts are embedded in the enrollment decision, the loans follow, based not on borrower discretion, but on the intersection between program costs and borrower means. The borrower's navigation of this intersection is governed by the FAFSA process. For any shortfall in student resources (and parental resources for dependents) that is not covered by grant aid, borrowing is necessary and federal loans are the obvious choice.

This financial harm should not be considered by the Department to be mitigated when a borrower may have scrambled to shore up their finances despite the harm inflicted by the loan or loans, whether it be by finding other employment, reducing living expenses to make loan payments, or returning to school for better job prospects. Borrower resourcefulness in the face of the adversity created by the misconduct should not be punished. One can imagine a circumstance where a student borrower's earnings post-separation are so far below what was expected, that the borrower is unable to afford daycare expenses for young children. Under this circumstance, the borrower may decide to leave or cut back on their work to stay home with children. Applicants' rational economic choices in the face of the adversity created by the Misconduct should not be punished. Thus the "blame the victim" requirement in the current NPRM that borrowers must show that harm was not caused by workplace performance, voluntary decisions to change jobs or work less than full-time, or other factors, should be thrown out.[22]

The amount of the financial harm incurred by the applicant by virtue of taking out the loan or loans is no less than the sum of all principal, interest and fees paid by the borrower to-date and all remaining principal outstanding and accrued interest and fees. There is no justification for partial relief of this amount as suggested by the current NPRM.[23] As shown in the prior paragraphs, the

their enrollment decision. See: https://www.responsiblelending.org/research-publication/bitter-pill-gainful-employment-and-credentialism-healthcare-support-fields and https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-florida-debt-disillusionment-l-aug2018.pdf. The quotes contained in this section are from these two pieces of research.

[21] In fact, recent research has shown that, on average, for-profit certificate seeking students earn less after leaving school than they would had they not attended at all. See: https://www.brookings.edu/blog/brown-center-chalkboard/2018/02/09/gainfully-employed-new-evidence-on-the-earnings-employment-and-debt-of-for-profit-certificate-students/

[22] NPRM at 37,327.

[23] NPRM at 37,263.

loan is by its nature financially harmful in the face of misconduct and borrower resourcefulness and rational economic decision-making should not be punished by making either the basis for offsets to full relief.

The relationships between misconduct and harm are illustrated below through direct quotes from focus groups recently conducted by CRL.
Relationship 1: Misconduct -> Enrollment (Misconduct is assumed to result in Enrollment)
Yeah, you've taken out $57,000 in loans but you make $20,000 more per year, you can pay the loan off in 3 years. You tell them things like that. It's like, "oh yeah, I go from making $30,000 to $50,000. I could just keep living off the $30,000 and the $20k extra that I'm getting, I'll just pay off my loans". (Jade, former for-profit student borrower and admissions representative, talking about her "pitch" as the latter).[24]
They do have situations like that in for-profit schools, where they are just like -- they don't care, come on in. You could get a loan, you could get financial aid? You are welcome. They don't care if you learn. (Rita)[25]
Relationship 2: Enrollment -> Borrowing and therefore Misconduct -> Borrowing (Misconduct is assumed to result in Borrowing)
When I did the FAFSA -- it told me my total and it let me know when I signed up for another loan, ok, this will be added on to this -- and this is what you already have. And when I talked to the enrollment counselor, she was like -- I was questioning, I was like "I don't think I can enroll because I'm already at such and such thousand" and she was like "oh no, you can go up to such and such thousand. She was like don't worry about it." And I was like ok! And then she said you can get a SUPER PLUS loan and all this other stuff, and that's for when you exceed $100,000... You can get this type of loan. (Candace)[26]
...I didn't think that the money thing was going to be an issue. ***How come?*** *Because they didn't explain that that I was going to be paying the amount that I actually owe.* ***What do you owe?*** *They said I was going to owe maybe $9,000, $10,000. And at the end I end up owing like $16,000, $17,000. (Terrence)*[27]
Relationship 3: Misconduct -> Borrowing, Borrowing -> Financial Harm, therefore Misconduct –> Financial Harm. (Misconduct is assumed to cause financial harm.)
The one thing about my school, is that I think they misrepresented or maybe overinflated what they said… (they said) they had a 90% placement rate and from what I saw, there was very few people in my class actually got jobs as medical estheticians unless you wanted to go to a chain and not get paid very much money. So, they overinflated how much we would be paid once we got out of school and how easy it was to get a job. I was not placed. I had gotten a job through a friend. It's basically who you know in this business, a lot of it. So, I did work for a plastic (surgeon) for a while, but I thought I was going to get paid way more by having that degree, and I did not. So, I actually work for myself. (Angel)

[24] https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-florida-debt-disillusionment-l-aug2018.pdf.
[25] Id.
[26] Id.
[27] Id.

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E. The Department's proposed standard fails to provide due process protections to borrowers.

Throughout the NPRM, the Department states an intention to provide institutions with a "reasonable opportunity to see and respond to borrower claims."[28] Nowhere does the Department state a similar intention for borrowers. In fact, the proposal fails to provide even minimal due process protections to borrowers. There are no specifications given as to how a borrower will be given an opportunity to review and respond to evidence submitted by the institution or Department and borrowers do not have the ability to appeal. The proposal only states that due process will be given through the processes associated with the hearings for defensive claims (nothing at all for affirmative claims). However, each of the proceedings explicitly enumerated involve incredible burdensome, paperwork intensive processes that require significant know-how to navigate even for the savviest borrower or anyone not represented by counsel. In these processes, borrowers must submit requests for everything from a hearing to evidence review.

Although the Department may consider requirements like returning a form attesting to eligibility to be "simple," in reality, these steps may pose high barriers for the low-income people who are likely to need the relief most acutely. For example, the unemployed and those living below the poverty line are more likely to change addresses in a year.[29] Almost one in four people with incomes below the poverty line may move in a year.[30] They may not receive the mail that the Department sends notifying them of their rights to discharge. The persistent racial and economic "digital divide" means that email and web-based forms are similarly likely to miss many low-income borrowers who deserve relief.

Even if low-income borrowers do receive notice from the Department, they may lack the necessary resources and motivation to fill out and return the form. What appears "simple" to a government official with expertise may be a much more complex task for a struggling borrower dealing with the stress and material limitations of poverty.

As *Goldberg v. Kelly* -- the seminal Supreme Court case on due process rights for the poor in government programs – recognized, requiring written submissions in government proceedings can be an undue burden for those lacking the advantages of education and wealth, and unable to afford a lawyer.[31] In addition, the lack of available relief in the past may lead low-income borrowers to believe that there is no point in paying attention to the Department's notices. It has been noted by sociologists that "[o]ne of the most common barriers to participation [in formal civil proceedings to

[28] NPRM at 37,261.
[29] *See, e.g.,* https://www.census.gov/newsroom/releases/archives/mobility_of_the_population/cb10-67.html.
[30] *Id.*
[31] *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).

recover benefits] is the belief that success is unlikely."[32] Low-income borrowers thus may make a rational (albeit incorrect) cost-benefit analysis and ignore the Department's form.

The Department also includes several measures that can only be seen as attempts to intimidate students and encourage them not to submit claims. Specifically, the Department proposes to:

1) Require borrowers to sign a waiver stating that the institution can provide any information "relevant to the claim"
2) Require the borrower to submit "proof of financial harm"
3) Explicitly remind borrowers that the institution has the right to withhold a student's transcript if discharge is granted
4) For "defensive" claims, require the defense to be asserted at the outset of the proceeding or not at all
5) Require that the borrower show that their economic situation is not the result of their own actions or inaction

This says nothing of the Department's proposal to require default for claim submission and the Department's unfounded decision to reverse course from the 2016 rule and allow forced arbitration clauses in school enrollment agreements. Forced arbitration clauses are the almost exclusive province of for-profit colleges. They require students to sign away their rights to their day in court in advance, and give a systematic advantage to the college in arbitration. Forced arbitration also commonly takes away students' rights to proceed as a class, greatly limiting their ability to get relief.[33]

Most importantly, in the case of borrower defense to repayment, the prevalence of forced arbitration greatly limits the evidence available to the Department to assess DTR claims. Consumers often forgo seeking relief entirely if they cannot go to court because of an arbitration agreement. Even if they do initiate arbitration, the proceedings are generally confidential, so the Department will have limited ability to learn of the findings.[34] Forced arbitration has no place in the relationship between a student and a college. The Department can and should stop colleges from using arbitration agreements to suppress students' legal rights and limit essential information that the Department should be receiving.

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[32] Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, Social Service Review 15 (Mar. 1984).
[33] http://www.consumerfinance.gov/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/.
[34] Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* 7 (2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf.

F. Failure to include a process for group claims ensures a long and costly resolution process and that fewer borrowers will receive relief.

Any borrower defense rule should require cohort-based relief whenever possible. Cohort-based relief will ensure that all students who deserve relief get it, and will minimize the administrative burden on the Department. The appropriateness and effectiveness of cohort-based relief has long been recognized in the class action procedures provided in federal and state courts, and has roots in notions of equity and fairness.[35] Without the efficiency offered by cohort-based relief, the Department's administrative costs will skyrocket, and borrowers would face high barriers and delays.

As with the 2016 rule, once a cohort has been established by the Department, there should be no requirement for borrowers to make affirmations or return forms about their individual cases. Requiring borrowers to "opt-in" to the cohort – i.e., take an affirmative step like mailing in a letter or filling out an online form – will result in many eligible class members never receiving the relief they deserve. Moreover, they need not attest to the fact that they saw or relied on the misrepresentations made by the school. This reliance can be presumed. It is well-established in consumer protection law that consumer protection agencies need not show that each consumer individually relied on the misrepresentations. As the court in *Federal Trade Commission v. BlueHippo* held, "To require proof of each individual consumer's reliance on a defendant's misrepresentations would be an onerous task with the potential to frustrate the purpose of the FTC's statutory mandate."[36]

V. The Department's proposal would increase costs for taxpayers and the economy and the NPRM fails to properly calculate and account for all of the costs.

The NPRM Regulatory Impact Analysis as further detailed in the Net Budget Impacts, claims that taxpayers under the new Borrower Defense Rule will save on a present value basis, $693.9 million a year ($10.5 Billion over 10 years before discounting) in *loan dollars not forgiven* under the new rule *compared to the 2016 Baseline* (not including the effects of changes to Closed School Discharge, False Certification, and administrative savings.) This $693.9 million number is derived from a fairly straightforward formula that multiplies projected federal student loan volumes by school sector (for-profit, nonprofit, public) by four factors with sector specific values including: 1) a ratio reflecting school misconduct 2) a ratio of Defensive Claims (based on default rates) brought by borrowers as a result of this misconduct, 3) a ratio of approved claims based on the number of Defensive Claims submitted, and 4) one minus a recovery ratio of reimbursements from institutions given the amount of Defensive Claims approved.[37] These ratio values can and do vary over the time period covered (2019-2028) based on a number of Department assumptions and result in a total taxpayer cost that is

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[35] *See* Federal Rule of Civil Procedure 23; Wright and Miller, *Federal Practice and Procedure* § 1751.
[36] *Federal Trade Commission v. BlueHippo Funding, LLC*, 762 F.3d 238, 244 (2d Cir. 2014).
[37] *Id.* at 297-298.

then compared to applying the same process (but with different values for the ratios) under the 2016 Baseline to arrive at "taxpayer savings".

The assumptions underlying the taxpayer cost savings are, in a number of cases, incorrect or unsubstantiated. Further, follow-on taxpayer costs of the new rule *have been completely ignored.* These follow-on effects include the taxpayer costs of student defaults for those borrowers not receiving relief under the new rule, either because of the elimination of affirmative claims or for those submitting defensive claims, because of the very low approval rate of these claims under the new rule. The analysis also ignores the follow-on effects of continuing taxpayer support of unsound institutions that would have folded under the higher reimbursement burden of the 2016 rule, in the form of Pell grants and student loan subsidies. As a result, the taxpayer "savings" as presented have been substantially overstated.

Problems with the various ratio assumptions include:

1) Misconduct ratios are assumed to be 95% of the old ratio values, with the old ratio values shrinking over time under the assumption that misconduct goes down as institutions experience the costs of their misconduct (reimbursement). Call this the "disincentive effect" of the old rule. First, the misconduct ratio value of the new rule should not be 95% of the old value, but some factor substantially exceeding 100%. Secondly, the misconduct of institutions under the new rule should not be assumed to reduce over time, as it did under the 2016 rule. In both cases, the disincentive effect of the new rule is substantially reduced if not eliminated entirely. The NPRM estimates that reimbursements from institutions for successful borrower defense claims will go down by $223 million annually on present value terms compared to the old rule![38] This can hardly be called a disincentive and is in fact, putting substantial dollars back into the hands of undeserving institutions that should have been going to offset relief to defrauded students who will now be left in the lurch by the new rule.
2) The ratio of Defensive Claims included in the analysis of the new NPRM is not included in the 2016 baseline, because that baseline includes Defensive *and* Affirmative Claims. Therefore, claims brought in the 2016 baseline are assumed to be 100% of the misconduct rate and are not reduced by the exclusion of Affirmative claims as they are in the new NPRM. The inclusion of the Defensive Claims ratio in the new NPRM analysis results in estimated taxpayer savings of $959 million in total before discounting over the 10-year period (2019-2028). Interestingly, despite the repeated assertion by the Department of the potential for widespread "frivolous" affirmative claims in the NPRM, without presenting any evidence of their existence to-date, the taxpayer savings to be realized by excluding all affirmative claims only represent 9% of the total estimated taxpayer savings of the new rule, on an undiscounted, total outlay basis.

[38] *Id*. at 275.

3) The biggest contributor to the purported taxpayer savings of the new rule is the difference in values of the approved claim ratio between the old and new rule. Generally, the new values are 10% to 12% of the old values. As an example, the approval rate for claims related to for-profit institutions in 2019 is 47.3% under the 2016 Baseline, but only 6% under the new rule analysis.[39] This is a shocking reduction in approval rates, especially given that the elimination of affirmative claims is already accounted for. The justification for this reduction is very murky, with only a few contributors cited that may affect the new ratio values such as relief to be determined only on an individual, not group basis, and new timing requirements for borrower notification of intent to raise a defense to repayment. No relative weighting is given to any factor, and no detailed analysis provided whatsoever of how this dramatic reduction in approval rates was derived. Without this analysis, a large share of the "taxpayer savings" of the new rule are completely unsubstantiated.
4) Finally, the recovery ratios from private and for-profit institutions that are the subjects of claims are assumed to be lower under the new rule compared to the 2016 baseline because of "removal or modification of some financial responsibility triggers."[40] This once again shows that taxpayer savings are being realized on the backs of deserving students whose claims are denied or prohibited from being filed in the case of Affirmative Claims, but institutions accused of misconduct are not expected to offset the losses of those few claims that are approved. For example, the 2019 recovery rate from for-profit institutions drops from 25% under the 2016 Baseline, to 16% under the new rule.

Finally, the analysis does not include offsetting *follow-on* taxpayer costs of the new NPRM that are twofold:

1) Borrowers that would have received relief under the 2016 Baseline, don't. For those that were Defensive Claim borrowers, the Department will only recoup on average 70% of the amount due.[41] Therefore the taxpayer cost is 30% of the difference in Defensive Claims approved between the 2016 baseline and the new NPRM. Further, some substantial portion of the former Affirmative Claim borrowers that would have filed under the 2016 baseline but can't under the new NPRM, will eventually go into default, and a projected 30% of these defaulted amounts will be lost to taxpayers.
2) The second follow-on cost that needs to be considered stems from the fact that poor-performing institutions continue to operate under the new NPRM regime, when they would have experienced greater financial repercussions due to misconduct and potentially closed under the 2016 baseline assumptions. These institutions will continue to receive taxpayer support in the form of Pell grants and federal loan subsidies, which is ironically, the basis for Ed's calculation of a net taxpayer *cost* to the NPRM for Gainful Employment.[42]

[39] Id at 299.
[40] Id at 300-301.
[41] See: https://www2.ed.gov/about/overview/budget/budget18/justifications/q-sloverview.pdf.
[42] See: https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/gainfulemployment.html.

In summary, the NPRM Regulatory Impact analysis and supporting Net Budget Impacts, even with the Department's own unjustified assumptions, lay bare the give-away that is occurring to for-profit institutions that have constituted 98% of the Defense to Repayment Claims to date. This give-away is completely inappropriate given that relief to borrowers will be more than halved by the exclusion of Affirmative Claims, and then further reduced to a trickle by an almost 90% reduction in approvals based on the requirements for "more effort on the part of individual borrowers to submit a borrower defense application" among other completely unspecified factors.[43]

VI. The Department should discard this proposal and make improvements to the 2016 rule

As stated previously, CRL urges the Department to implement the 2016 regulations without delay. CRL also suggests the following improvements to the 2016 rule.

A. Relief should be based on an independent Department of Education standard of based on substantive federal and state consumer protection law

The Department should create a new, independent standard for relief based on the general consumer protection principles embodied in both federal and state consumer protection law. Tying student loan relief solely to state-law claims, as does the 1995 rule, or a narrower federal standard that provides less relief than some state laws, is a needlessly restrictive and difficult-to-implement standard.

Federal and state consumer protection laws share many common elements from which the Department can derive its own standard. All fifty states have a version of an Unfair and Deceptive Trade Practices Act (UDAP).[44] Many of the state UDAP statutes are modeled on the Federal Trade Commission Act (FTC Act). The Consumer Financial Protection Bureau's statutory authority also largely tracks the FTC Act.[45] Although state and federal consumer protection laws evolve to address new practices and incorporate new legal theories,[46] they share a common, stable structure and

[43] See: https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/borrowerdefense.html, pg. 306.
[44] National Consumer Law Center, *Unfair and Deceptive Acts and Practices* 1 (8th ed. 2012).
[45] Consumer Financial Protection Bureau, Bulletin 2013-7 n.1 (Jul. 10, 2013), *at* http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.
[46] Most notably, the CFPB has a new power over "abusive" conduct, in addition to unfair and deceptive conduct. The "abusive" power is intended to address conduct that takes advantage of predictably irrational consumer conduct or exploit inherent power imbalances between consumers and businesses. In these cases, deception and unfairness theories may be unable to reach the conduct because they rely too much on a presumption of a rational consumer with free choice to make alternative decisions in the market place. The new "abusive" authority is grounded in the insights of behavioral law and economics, as opposed to classical economics. *See* Patrick Corrigan, *"Abusive" Acts and Practices: Dodd-Frank's Behaviorally Informed Authority over Consumer Credit Markets and its Application to Teaser Rates*, 18 N.Y.U J. Legis. & Pub. Pol'y 125, 140 (2014).

pedigree that can be readily adopted by the Department of Education for a borrower defense standard.

UDAP laws address two main categories of misconduct: deception and unfairness. These two legal concepts provide ample basis to address for-profit college misconduct. Deception is defined as "a material misrepresentation likely to mislead a consumer."[47] Much of the misconduct that the borrower defense standard could be expected to address would fall easily into this category. For example, the central complaint against Corinthian was misrepresentation of its job placement rates – a fact pattern which could easily fit the concept of deception.

An unfairness claim involves conduct that interferes with a consumer's free choice and causes injury, as opposed to the sort of outright lie that could give rise to a deception claim.[48] In many cases, consumer protection violations come not from outright lies, but from conduct that takes advantage of a consumer's relative lack of power and information in the transaction. For example, one classic FTC unfairness case involves high-pressure sales tactics used to pressure vulnerable, lonely adults into signing expensive dance-class contracts on the promise that dance lessons would give them companionship and social standing.[49]

The aggressive high-pressure sales tactics used by for-profit colleges constitute classic unfairness claims: just like the dance studio salesmen, they pressure consumers into harmful transactions by making repeated calls and emails, exploiting psychological vulnerabilities, and then rush borrowers through the complex financial aid process to close the deal without the consumer understanding the financial obligation incurred. When these high-pressure and aggressive tactics are combined with financial incentives to enroll students or sign them up for financial aid, the unfairness is further compounded.[50] Indeed, the CFPB's unfairness claim against ITT focuses on just such conduct.[51]

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[47] Federal Trade Commission, Policy Statement on Deception (Oct. 14, 1983), *at* https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception.

[48] Federal Trade Commission, Policy Statement on Unfairness (Dec. 17, 1980), *at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

[49] *Arthur Murray Studio, Inc. v.* EW, 458 F.2d 622 (5th Cir. 1972) (cited at n. 22 in the FTC Unfairness Statement).

[50] Current regulations ban such incentive compensation. Any violations of these regulations should be strongly weighed evidence in a DTR proceeding because they carry such a strong implication of unfairness.

[51] Complaint, *Consumer Financial Protection Bureau v. ITT Educational Services, Inc*., No. 14-292 (S.D. Ill. Feb. 26, 2014). The ITT complaint focuses on the origination of private student loans, but the theory and facts could apply equally to federal loans.

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B. Give heavy weight to actions by state attorneys general and federal consumer protection authorities, but do not require actual judicial findings

An improved version of the 2016 rule should be expansive enough to weigh evidence of misconduct from multiple sources, including the Department's own investigations, GAO reports, Congressional findings, investigative journalism and advocacy organization reports, student complaints, and actions by licensing, consumer protection, and law enforcement agencies from any jurisdiction.

Actions by state attorneys general and federal consumer protection authorities should be given special weight. However, the rule should clarify that a final determination of facts from an adjudicative body is not required in order to give rise to relief. Instead, the Department will make its own determination based on the facts before it gathered from these various sources.

At the same time, a final determination of facts against a college from a court, arbitrator, or other entity charged with fact determinations (e.g., a state licensing body or accreditor) should be given extremely strong deference. A borrower who actually wins a trial or arbitration proceeding against a school should be given automatic relief by the Department.

IV. Conclusion

The sum result of the concerns listed above is that the current proposal provides ample guidance for schools on how to avoid accountability and ensures that few claims will be submitted and even fewer will be successful. However, despite the Department's framing of this as an improvement over the 2016 or even 1995 regulations, the continued funneling of billions of dollars to institutions who deceive and trick students and then provide worthless degrees is tantamount to the Department endorsing and guaranteeing a predatory lending scheme of mammoth size. This action would have far reaching effects on individuals, communities and our economy. We need look no further than the housing crisis and the Great Recession to see what happens when predatory actors are allowed to run unchecked at the expense of low-income people and people of color.

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. This proposal would bolster unscrupulous institutions, increases costs and risk for students and taxpayers, and further erode our system. We urge you to abandon this proposal.

We thank you for the opportunity to provide our comments.

Sincerely,

Center for Responsible Lending