December 20, 2021

Department of Financial Protection and Innovation, Legal Division
Attn: Charles Carriere, Senior Counsel
2101 Arena Boulevard
Sacramento, CA 95834
regulations@dfpi.ca.gov

VIA EMAIL SUBMISSION

Re: Invitation for Comments on Proposed Rulemaking Under the California Consumer Financial Protection Law (PRO 01-21)

Dear Mr. Carriere:

The undersigned organizations welcome the opportunity to comment on the Department of Financial Protection and Innovation's (DFPI) proposed rules for firms providing education financing products and services in California.[1] As drafted, these rules already mark a substantial step forward toward greater protection for all student loan borrowers in California—regardless of what form of education financing those borrowers rely on. These draft rules serve as a testament to the Golden State's long-standing leadership in student borrower protection.[2]

We offer the following feedback regarding how the DFPI can continue building on and refining its proposed regulations for California firms in the education financing market:

- **The DFPI should increase the scope and granularity of loan-related annual data reporting.** As drafted, the DFPI's proposed regulations require covered firms involved in education financing to submit a report each year providing data on their lending activities over the preceding twelve months.[3] In particular, any registrant that "offers or provides education financing under its registration" must offer detail on the "number of education financing contracts executed with California residents during the calendar year, and, of those contracts, the number of contracts with income-based repayment provisions."[4] Registrants must also report on several other fields, such as the total amount advanced for loans with and without income-based repayment features. But while consideration of the flow of a firm's loans to borrowers over a given year is important, the DFPI's existing approach ignores the stock of loans already on those firms' balance sheets from past years and the information those loans may hold regarding potential borrower harm. Instead of

[1] https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-Invitation-for-Comments-for-Publication.pdf
[2] See, e.g., https://protectborrowers.org/milestones-in-the-fight-to-protect-california-borrowers/
[3] https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-TEXT-CCFPL-Registration-Regulation-For-Publication.pdf#page=29
[4] https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-TEXT-CCFPL-Registration-Regulation-For-Publication.pdf#page=29

looking only at new originations over a given year, the DFPI should also seek exhaustive information on the nature and performance of the loans that firms were already holding in their portfolios over the past year, including requesting detail annually on at least the following:

- The total number of education financing contracts that the firm holds and/or services, broken out by number and dollar volume, by the institution and program at which they were used to finance student attendance, and whether the loans involve income-based repayment provisions;

- For education financing products with income-based repayment provisions, the total amount all borrowers whose credit products the firm owns and/or services would pay if those borrowers paid up to any relevant cap on total repayment;

- The repayment status of the contracts in each firm's portfolio, including the total number and dollar volume of financing contracts that the firm holds and/or services for which the borrower:
  - Is in school;
  - Is in a post-graduate grace period;
  - Is in repayment (with and without income above any relevant income threshold, for education financing products with income-based repayment provisions);
  - Is in default (including whether the default is due to failure to pay or, in the case of education financing products with income-based repayment provisions, whether it is a "technical" default), or;
  - Has already extinguished their repayment obligations (including, in the case of education financing products with income-based repayment provisions, the number and dollar volume of loans that were extinguished due to the borrower making a maximum number of payments, the borrower being in repayment for a maximum amount of time, or the borrower making a maximum dollar amount of payments).

  To the extent possible, this data should also be broken out by each school and program that borrowers attended;

- For contracts for which the repayment obligations have been extinguished, broken out by school and major or program, the applicant should disclose:
  - The number of students and percent that paid less than the total amount in advance and the number and percent whose payments exceeded the amount advanced; and
  - The range of the amount advance and repaid for each group (repaid in full, and not repaid in full), with the median and average amount advanced and repaid for each.

- The distribution by deciles, mean, and median of the dollar value of monthly payments that borrowers owe on education financing products that the firm provides and/or services, broken out separately for products with and without income-based repayment provisions; and

    - The number and dollar value of education financing products the firm has sold or has sold an interest in to third parties such as investors or special purpose vehicles, and the names of any firms that have bought more than five percent (5%) of the firm's inventory of education financing products at a given time or over a given period, such as but not limited to one year.

- **The DFPI should include in its annual data reporting requirement information about registrants' business practices, in addition to their portfolios.** As drafted, Section 22 of the DFPI's regulations requires firms seeking registration with the Department to submit the following at the time of their application for initial registration:

    "(3) All investor prospectuses or other marketing materials distributed by the applicant during the twelve months preceding the date the application is submitted to prospective purchasers of (A) education financing originated by the applicant and (B) any interest in the income streams arising from education financing originated by the applicant. (4) Copies of representative contracts and disclosures used by the applicant to provide education financing to California residents."[5]

  Particularly in light of the history of education financing companies telling the public one thing and investors another,[6] these materials offer the Department, consumers, and the public at large key information on education financing firms' operations and serve as a critical pathway toward consumer protection. As drafted, however, the proposed regulations do not require the annual submission of this information, which would be critical for the Department to maintain an ongoing understanding of registrants' market conduct. The DFPI should therefore revise its proposed regulations to mandate the annual submission of these investor prospectuses, marketing materials, and the remainder of the materials requested in the draft regulations' proposal for Section 22(f), including all contracts in effect between the applicant and third parties, including servicers of education debt of California residents. This can be accomplished by adding these materials to the annual reports required by Section 51.

- **The DFPI should require the submission of additional types of marketing materials.** There is extensive evidence that firms in several markets are using online advertising tools—including social media platforms—in ways that are likely to generate disparate outcomes for protected classes.[7] Examples of this conduct include firms paying to target ads based on prospective customers' use of search terms or interaction with keywords that are

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[5] https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-TEXT-CCFPL-Registration-Regulation-For-Publication.pdf#page=17
[6] https://www.businessinsider.com/lambda-school-promised-lucrative-tech-coding-career-low-job-placement-2021-10
[7] https://harvardcrcl.org/wp-content/uploads/sites/10/2021/04/gilman.pdf

likely to be highly correlated with race.[8] Researchers,[9] consumer advocates,[10] and even the federal government[11] have noted that online advertising practices and the methods of their facilitation by social media companies and other online advertising firms can implicate fair lending law. Accordingly, in addition to the investor-facing marketing materials already proposed under Section 22, and which we suggest also be included in Section 51, the DFPI should revise the supplemental application requirements discussed in its draft of Section 22 of the proposed regulation and the annual reporting requirements in its draft of Section 51 to include a request for detailed information on the nature of each education financing company's online marketing strategy. This annual request should include the disclosure of a comprehensive list of any keywords, search terms, or other user characteristics based on which registrants have paid to have online ads be targeted.

- **The DFPI should provide additional clarity around the definition of "postsecondary education."** As drafted, the DFPI's proposed regulations centrally envision and define "education financing" as being credit used for "the purpose of funding postsecondary education . . . at a postsecondary institution. . . ."[12] However, neither the draft regulations nor the California Consumer Financial Protection Law (CCFPL) that they implement provide a definition of postsecondary education or a postsecondary institution. Instead, we are left with definitions available elsewhere in California law, which can exclude many of the most harmful institutions in the for-profit educational ecosystem, such as many coding bootcamps. For example, in the context of private postsecondary education the California Education Code defines "postsecondary education" as "a formal institutional educational program whose curriculum is designed primarily for students who have completed or terminated their secondary education or are beyond the compulsory age of secondary education, including programs whose purpose is academic, vocational, or continuing professional education."[13] However, coding bootcamps—short term, credential-based software engineering programs that generally build their business model on ISAs and which have been caught deploying predatory practices[14] and being outright, harmful frauds[15]—may not require students to have completed secondary education. For example, the coding bootcamp Sabio does not appear to require high school completion as a prerequisite for enrollment,[16] instead touting in marketing materials a story about a program graduate who

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[8] Id (see discussion of Southern Technical College at note 13).
[9] Id.
[10] https://www.aclu.org/blog/womens-rights/womens-rights-workplace/facebook-settles-civil-rights-cases-making-sweeping
[11] https://www.washingtonpost.com/business/2019/03/28/hud-charges-facebook-with-housing-discrimination/
[12] https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-TEXT-CCFPL-Registration-Regulation-For-Publication.pdf#page=3
[13] https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=EDC§ionNum=94857
[14] https://protectborrowers.org/coding-bootcamps-offering-isas-may-be-unlawfully-depriving-students-of-the-ability-to-protect-themselves-from-fraud/
[15] https://protectborrowers.org/make-school-vemo-lawsuit/
[16] https://sabio.la/faq [https://perma.cc/8SNJ-UWB8]

initially "had no college degree, no high school diploma and no idea about how he would find his next job"[17] before enrolling.

To avoid any uncertainty as to the applicability of these proposed regulations and the obligation to register with respect to these programs, the DPFI should revise its draft regulations to more clearly define or specify a referenced definition of postsecondary education and postsecondary institutions. Within this revision, the DFPI should specify either that all forms of vocational and other training that come at a cost to students (including but not limited to training offered at bootcamps) count as postsecondary education for the purposes of the regulation, or that "education financing" includes credit used to finance attendance at courses of study that are not postsecondary education. In either case, the definition of "education financing" should be as expansive as possible with regard to the underlying vision of what constitutes education.

- **The DFPI should broaden its definition of education financing.** As drafted, the DFPI's proposed regulations define "education financing" as "credit . . . extended for the purpose of funding postsecondary education and costs of attendance at a postsecondary institution, including, but not limited to, tuition, fees, books and supplies, room and board, transportation, and miscellaneous personal expenses."[18] This definition importantly addresses how borrowers are using private credit and debt used to finance postsecondary learning that does not fall neatly into the existing definition of a "private education loan,"[19] and as such are losing critical protections granted for users of educational loans. Some examples of these forms are credit are, revolving credit balances, personal loans, and institutional debts owed directly to schools to pay for education.[20] The DFPI's more holistic approach ensures that borrowers receive protection as recipients of educational credit—in the Department's words—"regardless of whether the provider labels the credit a loan, retail installment contract, or income share agreement, and regardless of whether the credit recipient's payment obligation is absolute, contingent, or fixed."[21] Although the DFPI has emphasized that credit may involve an obligation that may be absolute, contingent, or fixed, we urge it to include this explicitly in the proposed regulations themselves.

  Further, we note that the DFPI's approach leaves out key forms of private debt and credit used to finance education. For example, the DFPI's approach leaves out credit taken on in the course of vocational training that happens not in a classroom, but in the workplace. An example is Training Repayment Agreements (TRAs). TRAs are terms tucked into employment contracts or that exist as standalone agreements as a precondition to

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[17] https://sabio.la/stories/success/from-washing-dishes-to-a-job-at-amazon-an-inspiring-story-for-pandemic-job-seekers-in-2021 [https://perma.cc/7VZF-QM83]
[18] https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-TEXT-CCFPL-Registration-Regulation-For-Publication.pdf at 3.
[19] https://protectborrowers.org/wp-content/uploads/2020/12/Shadow-Student-Debt.pdf
[20] https://protectborrowers.org/wp-content/uploads/2020/12/Shadow-Student-Debt.pdf (see discussion of the definition of a "private education loan" at note 1).
[21] https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-Invitation-for-Comments-for-Publication.pdf

employment stipulating that workers who receive on-the-job training—often of dubious quality or necessity—must pay back the "cost" of this training to their employer if they leave their job before a preset period of time.[22] This cost often involves massive interest, inflated fees, and little or no disclosure of its existence at the time the "training" in question is delivered, creating a contingent credit obligation that holds back worker power.[23] To the extent that these debts reference worker training (regardless of that training's value), they constitute a form of credit used for education. But because the training in question happens at the workplace and not at an institution of postsecondary education, TRAs land outside of the DFPI's current definition of "education financing."

This loophole cannot and does not have to be allowed. The DFPI could bring TRAs into the fold of education financing by revising its definition of the term to read (with changes in bold): "Education financing" means credit (as defined by Financial Code section 90005, subdivision (g)) extended for the purpose of funding postsecondary education**, training required by an employer,** and/**or** costs of attendance at a postsecondary institution, including, but not limited to, tuition, fees, books and supplies, room and board, transportation, and miscellaneous personal expenses." Moreover, in light of the discussion above of the ambiguity that surrounds the draft regulations' definition of "postsecondary education," any definition that DFPI ultimately adopts should define the term expansively enough to capture postsecondary education that happens to take place on the job.

- **The DFPI should expand its rules to capture ISAs that may exist wholly outside of the realm of education financing.** As stated above, the DFPI's draft regulations mark an important step forward in the regulation of income share agreements (ISAs) in the context of education financing.[24] However, ISAs also exist to a lesser extent in a much larger array of financial contexts that nevertheless merit the DFPI's attention.[25] For example, consumers can currently access ISAs that are the equivalent of personal loans,[26] that act as student loan refinancing products,[27] and that even offer advances to minor league baseball players in anticipation of major-league salaries.[28] Many, if not all, of the ISA products that do not relate to education finance may nevertheless constitute a "consumer financial product or service" as defined under the CCFPL.[29] Indeed, DFPI entered into a consent agreement with one such non-educational ISA provider.[30] Accordingly, and especially given ISAs' use

[22] https://protectborrowers.org/wp-content/uploads/2021/12/2021.12.1-OMI_SBPC_CFPB_TRA.pdf
[23] https://protectborrowers.org/student-debt-in-disguise-how-employers-are-using-predatory-debt-to-hurt-workers-and-hold-back-competition/
[24] https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-Invitation-for-Comments-for-Publication.pdf
[25] https://protectborrowers.org/the-isa-market-is-getting-bigger-and-weirder-putting-borrowers-at-increasing-risk/
[26] https://www.helloalign.com/products/income-share-agreement
[27] https://defynance.com/
[28] https://bigleagueadvance.com/minor-league-player-investment/
[29] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1864
[30] https://dfpi.ca.gov/2021/08/05/california-dfpi-enters-groundbreaking-consent-order-with-ny-based-income-share-agreements-servicer/

as an education *re*-financing product, the DFPI should consider revising its draft rule to add a new section intended to apply as a baseline to ISAs at large, regardless of whether they exist in the context of education financing. Then, the DFPI should consider revising its proposed regulations for education financing so that (aside from applying to forms of education financing that are *not* ISAs) they constitute an additional set of requirements for ISAs that also meet the definition of education financing. That way, all ISAs would be covered by at least some rules, and those that amount to education financing would still be regulated as such. However, as in the discussion above of the need for more clarity around the definition of "postsecondary education," the DFPI should be extremely careful to institute a broad vision of what qualifies as an ISA used for education financing so as to not open the door to efforts at regulatory arbitrage.

- **The DFPI should expand penalties related to the failure to comply with the law and its implementing regulations.** As drafted, the DFPI's proposed regulations state that "[n]o person shall engage in the business of offering or providing a subject product to California residents without first registering with the commissioner pursuant to this subchapter."[31] However, the draft regulations do not specify a penalty for failing to comply with this provision through registration. Nevertheless, the CCFPL states that the DFPI "may take any action authorized by this law against a covered person or service provider" that "may include, but is not limited to . . . [r]escission or reformation of contracts."[32]

  In light of the expansive history of consumer financial services firms harmfully and repeatedly violating the law,[33] the DFPI should use its power to hold firms accountable to the greatest extent possible for failing to register as the law requires. In particular, DFPI should revise its draft regulations to indicate that any instance of lending by a firm that has failed to meet registration requirements will be considered an instance of unregistered lending, and that any loans an unregistered firm creates will be considered void pursuant to the authorities cited above.

  Further, the DFPI should heighten penalties associated with the failure of registered firms to comply with annual reporting requirements. As drafted, the DFPI's proposed regulations state that "[t]he commissioner may by order summarily revoke the registration of any registrant if that person fails to file the report required by this Section within 10 days after notice by the commissioner that the report is due and not filed. If, after an order is issued, a request for hearing is filed in writing within 30 days and the hearing is not held within 60 days thereafter, the order is deemed rescinded as of its effective date."[34] This penalty is notable, but even it may not be enough to deter bad actors from failing to comply with the

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[31] https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-TEXT-CCFPL-Registration-Regulation-For-Publication.pdf#page=7

[32] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1864

[33] See, e.g., https://protectborrowers.org/wp-content/uploads/2019/09/Testimony-of-Seth-Frotman-before-HFSC_September-2019.pdf#page=5

[34] https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-TEXT-CCFPL-Registration-Regulation-For-Publication.pdf#page=25

law. Accordingly, the DFPI should revise its draft rules to impose substantial monetary penalties for each day that registered firms fail to comply with annual reporting obligations. The CCFPL clearly authorizes the DFPI to impose these penalties.[35]

- **The DFPI should clarify the process for calculating the total amount advanced by licensees for education financing contracts with income-based repayment features.** As drafted, the DFPI's regulations state that the set of things that registrants that offer products with income-based repayment features must annually disclose includes "[t]he total amount advanced by the applicant under those contracts."[36] Regarding how that total amount may be calculated, the draft regulations state, "[f]or the purposes of calculating the amount advanced where the financing provider is also the provider of the education program(s) to the student," the registrant must reference "the cash value of the education program(s) for which financing is provided," and that "[f]or the purposes of calculating the cash value of an education program provided remotely, the applicant shall use the lowest available cash price for the program offered in any United States jurisdiction, regardless of whether that cash price is available to California residents."[37]

  This definition involves several shortcomings and areas of ambiguity. First, the use of the phrase "lowest available cash price for **the program offered in any United States jurisdiction**" leaves open the question of whether the program referenced for calculation of the total amount advanced under the relevant loan contract must be offered by the same education services provider as is operating in California, or if the same course of study offered by any provider anywhere in the country can be used as a baseline. Indeed, the definition could lead to evasions where the provider offers the program in a small United States territory at a low price in order to be able to use that price in California reporting. The DFPI should revise the proposed regulation to clarify that it strictly envisions the present language applying to instances in which the same company operating in California is also operating in other states and offers the same educational services in other states, and that the cash price for services offered in different states may be used for the purposes of the annual report requirements.

  Further, the draft regulation references "the lowest available cash price" for a program of study. This is problematic, as—especially in instances where one firm is offering an educational product, designing an income-based loan such as an ISA, and setting the reference "price" for their educational services—it incentivizes firms to set an artificially low "price" for their courses of study. Doing so would not lead these firms to lose any money, as students would still be paying based on their income up to a maximum cap that could always simply be inflated as a multiple of the underlying reference "price," but it would lead to misleading consumer-facing disclosures. The DFPI should revise this draft language to

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[35] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1864 (see 90012(b)(5) and 90012(b)(8))

[36] https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-TEXT-CCFPL-Registration-Regulation-For-Publication.pdf#page=29

[37] Id.

clarify that the price used for the calculation of a total amount advanced under an education financing contract is at least the true price for the institution to offer the program on a per-student basis.

In addition, we offer the following responses to various specific requests for comment that the DFPI posed in the announcement accompanying its request for comments.[38]

- **Question 3: comments on "Proposals that will clarify what information collected in connection with registration is and is not subject to public disclosure."** We firmly believe that all information collected from registrants should be made public, and that there should be a strong presumption of a need for public disclosure in instances where the DFPI may otherwise consider withholding data collected from registrants. Public disclosure of information related to registrants' activities is a key tool that consumer advocates and the public at large use to identify risks and ongoing harms in the market. The DFPI has an opportunity through the regulations being considered here to create a situation of unparalleled consumer empowerment through public disclosure, catalyzing the pro-consumer competition necessary to generate meaningfully helpful consumer financial products. This outcome will be possible only if DFPI takes a strong stance in favor of transparency and public access to the data disclosed under these regulations.

- **Question 5: comments on "Proposals to clarify whether and when the registration requirements apply to Department licensees and licensees and registrants of other state agencies. For example, if a DFPI licensee originates bona fide retail installment contracts (RIC) that meet the definition of education financing, should the licensee be required to register in connection with its RIC origination practices?"** Registration requirements should be implemented broadly to apply to all firms that offer and/or provide products and/or services that meet the definition of education financing. There is a long, unfortunate history of firms rebranding or trivially modifying consumer financial products to bring their offerings out of the ambit of consumer protection laws.[39] For example, while this maneuver was ultimately unsuccessful, the ISA industry has long argued that its product does not constitute a form of credit, loan, or private student loan so that ISA companies could try to avoid a need for compliance with a wide variety of relevant state and federal laws and regulations.[40] If the DFPI does not apply registration requirements broadly, it will invite firms to seek out opportunities to avoid the badly needed regulations proposed here for education financing, all while still harming consumers. Observers have noted that the DFPI's broad authorizing statute was intended to prevent particularly this outcome, and that instead (drawing on lessons from the creation of the Consumer Financial Protection Bureau) the California legislature intended for the agency to have broad authority so that regulatory

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[38] https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/11/PRO-01-21-11-17-21-Invitation-for-Comments-for-Publication.pdf

[39] https://digitalcommons.mainelaw.maine.edu/cgi/viewcontent.cgi?article=1733&context=mlr#page=26

[40] https://protectborrowers.org/statement-on-cfpb-enforcement-action-against-income-share-agreement-provider-better-future-forward-inc/, https://protectborrowers.org/sbpc-statement-on-california-dfpi-consent-order-with-income-share-agreements-servicer-meratas/.

arbitrage would be effectively impossible.[41] The regulations being discussed here should be tailored to make the outcome the DFPI's framers envisioned a reality. Should the DFPI choose not to require existing licensees to affirmatively register, pursuant to the Department's authority over that licensee through the relevant licensure, the DFPI should still require submission of the information in proposed Sections 22 and 51 so that it can create a dataset that accurately reflects the industry and market.

- **Questions 1-10 related to economic impact.** The DFPI's draft regulations would impose minimal costs on industry and minimal disruption in the business or jobs landscape while creating a positive tailwind for both competition and business success in California by boosting investment, and incentivizing innovation. These regulations principally require that firms take certain minimal steps to secure and renew registration under the law, including by disclosing at the time of application for registration and annually thereafter a number of key data fields related to their business. These data fields are ones that it would be concerning for firms to not already have readily at their disposal, such as information on the amount and repayment status of loans on their balance sheet. Yet by simply requiring firms to take the minimal step of disclosing this information to the public, the DFPI will have boosted the transparency that markets and innovation thrive on. With these regulations in place, California will become the most competitive market for education financing in the country, catalyzing waves of invention, investment, and job creation.

In closing, we note that registration and data collection under the CCFPL cannot substitute for substantive regulation and the enforcement of existing laws that already apply to education financing companies in California. As other commenters on this proposed rulemaking have noted,[42] the changes outlined in this proposed rulemaking are badly needed, but they should serve as only the first in many steps aimed at keeping consumers safe in the Golden State.

Again, we appreciate the opportunity to comment on the Department's proposed regulations. If you have any questions, please contact Ben Kaufman (ben@protectborrowers.org), Head of Investigations and Senior Policy Advisor at the Student Borrower Protection Center.

Sincerely,

[41] See, e.g., https://www.gtlaw.com/en/insights/2020/11/californias-adoption-mini-cfpb-will-transform-consumer-financial-services-regulation
[42] See comment from the National Consumer Law Center and the Center for Responsible Lending on wage-based advances.