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RE: Docket ID ED-2018-OPE-0027, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program

The New York City Department of Consumer Affairs ("DCA") appreciates the opportunity to comment on the rules that the U.S. Department of Education ("the Department") has recently proposed to amend regulations governing the Direct Loan Program and rescind amendments to these regulations that have already been published but have not yet gone into effect. DCA believes these proposed changes would erode needed protections for student borrowers and could remove a strong deterrent to predatory practices in the higher education marketplace.

DCA's mission is to protect and enhance the daily economic lives of New Yorkers to create thriving communities. DCA licenses more than 81,000 businesses in more than 50 industries and enforces key consumer protection, licensing, and workplace laws. By supporting businesses through equitable enforcement and access to resources, and by helping to resolve complaints, DCA protects consumers from predatory practices and strives to create a culture of compliance.

In the last several years, DCA has worked to deepen our understanding of the student loan debt crisis in New York City. In December 2017, DCA and the Federal Reserve Bank of New York published a first-of-its-kind neighborhood-level examination of student loan repayment outcomes, *Student Loan Borrowing Across NYC Neighborhoods*. This report used credit panel data to map student loan debt, as well as delinquency and default on student loan debt. We found that at the end of 2016, approximately 15 percent of New York City adults had a student loan, with a median balance of $16,957, or 32% of median income. Of the nearly one million New York City borrowers, about 16 percent of student loan holders have defaulted (defined as being 270 or more days overdue on student loan repayments). The share of residents struggling with student debt rises even further when one narrows the focus to low-income zip codes, as nearly a quarter of residents with a student loan in the lowest-income areas of the city have defaulted.

To complement the knowledge we gained from our report, DCA has engaged in a series of on-the-ground fact-finding initiatives to hear from New Yorkers about their experiences with student debt. Our agency

launched special student loan debt counseling sessions in neighborhoods with high rates of delinquency and default. We traveled around the boroughs on a listening tour, asking New Yorkers to share their student loan stories. And we hosted a public hearing on student loan debt, at which we heard from panels of experts as well as members of the public.

At these outreach events, we heard stories from New Yorkers who felt misled by schools and pressured into educational options that provided low returns on students' investment. We heard many stories from borrowers who didn't know where to turn for reliable information about school quality and student loan repayment options. One young woman who gave testimony at the public hearing fought tears as she described having $30,000 in student loan debt, with no transcript to show for her time in school. Her college was withholding her transcript because of the money she owed, leaving her unable to continue her education and get a job that would pay enough to allow her to repay what she had borrowed.

Our research and outreach initiatives have reinforced our belief that too many New Yorkers are experiencing a student debt crisis, and that more leadership is needed at the federal level to reduce the burden of student loans on individuals and households. The burden of student debt threatens households' financial health, and DCA believes more can be done to protect students from taking on unsustainable student loans, particularly for schools that employ predatory practices and fail to deliver adequate educational outcomes. With this in mind, we provide the following comments on the Department's proposed rules regarding the Direct Loan Program:

1 – Limiting claims to borrowers in collections is unnecessarily punitive.

We urge the Department to accept borrower defense claims from both defaulted and non-defaulted borrowers. The Department's stated concern, that allowing claims from borrowers who have not defaulted would lead to a flood of unsubstantiated claims, is misplaced and is itself unsubstantiated by evidence from existing borrower defense claims. The Department should work to prevent loan defaults, rather than imposing new rules that incentivize default and its attendant harms. Requiring borrowers to default on their loans before they can assert a borrower defense claim would have long-term negative consequences for impacted borrowers' financial health. Borrowers who default face damaged credit scores, potential wage garnishment, and harassment from debt collectors. As DCA has outlined elsewhere,[1] defaulting also makes them ineligible to borrow additional federal student loans should they want to continue their education. Consequently, defense to repayment should be available to borrowers regardless of default status.

2 – The proposed rules require that borrowers assert their claims within an unreasonably short time period.

We urge the Department to increase the amount of time for defaulted borrowers to raise a borrower defense claim. In proposing to allow only defaulted borrowers to assert borrower defense claims, the Department seeks to allow borrowers to submit such claims only within 30-65 days of the date on which a defaulted borrower receives a collections notice. If borrowers want to challenge a wage garnishment or federal benefits offset notice, they have either 15 or 30 days after the date of the notice of intent to garnish to request a hearing and if accepted for a hearing, the borrower would then have to take time to prepare for the hearing. A borrower could potentially be preparing to contest a collections notice while also gathering documents to submit

[1] https://medium.com/@NYCConsumerAffairs/three-unexpected-ways-defaulting-on-your-student-loans-impacts-your-long-term-credit-226792bdda8f

a borrower defense claim within the same constricted timeframe. DCA believes the proposed rules provide an unreasonably short window of time for borrowers to gather the evidence they need to make a successful borrower defense claim.

Furthermore, DCA believes that the statute of limitations for borrower defense claims should begin when an individual learns of a misrepresentation or could reasonably be expected to learn of that misrepresentation, not when the borrower leaves school. The 2016 borrower defense regulations, which allowed a borrower six years from the time the borrower discovered misrepresentation on the part of the school to make a claim, provided a more appropriate statute of limitations for borrower defense claims, both affirmative and defensive.

3 – The proposed rules require that students seeking defense to repayment meet an unreasonably high evidentiary standard.

We ask that the preponderance of evidence standard remain the burden of proof a borrower must meet to assert a successful borrower defense claim, regardless of whether a claim is defensive or affirmative. The proposed rules would require borrowers to meet a clear and convincing evidentiary standard, which would require borrowers to prove that the school made a misrepresentation with either knowledge of its falsity or with a reckless disregard for the truth. The application of this standard would unduly restrict the accessibility and utility of the borrower defense claim because many borrowers would not have access to the documents and information necessary to meet this high standard and would need to seek discovery to obtain relevant proof. Such an evidentiary burden would be out of sync with consumer protection laws and the evidence standard applied in most civil actions.

4 – The proposed rules further impose an unreasonable burden on borrowers by requiring them to seek their own relief in court and eliminating borrowers' ability to benefit from group adjudication of borrower defense claims.

By proposing to move to case-by-case adjudication of borrower defense claims, the Department risks creating an unsustainable backlog of borrower defense cases – a backlog that delays relief for defrauded borrowers and strains Department resources.

DCA strongly believes that group discharge, as provided for under the 2016 regulation and demonstrated by the cases of Corinthian and ITT, is vital to effective consumer protection in the higher education marketplace. We urge the Department to continue to allow defrauded borrowers to benefit from lawsuits brought by other students and by state attorneys general, rather than requiring each defrauded student to assert a separate claim.

5 – The proposed rules narrow the circumstances under which borrowers are eligible for borrower defense discharge, and in doing so gives schools more latitude to abuse borrower trust and access to public loan dollars.

Under the 2016 regulations, a judgment against a school or a breach of contract on the part of a school constituted actions that would render a borrower eligible for borrower defense discharge. The newly proposed rules would not recognize judgments and breach of contract as triggers for borrower defense relief, allowing relief only when a school has made a substantial misrepresentation. However, as described above, the misrepresentation standard is unduly strict, requiring as it does that a borrower prove that the misrepresentation was made with knowledge of its falsity or reckless disregard for the truth.

Amending Department rules to restrict access to borrower defense relief would remove an important check on schools. DCA considers this restriction to be an anti-consumer change to Department policy – a change that, in combination with changes to the Department's investigation and enforcement regime – and may lead institutions to believe that the standards for their communications with students and prospective students have been lowered, increasing the risk that federal dollars will flow to unworthy institutions and resulting in a waste of public funds, a raft of borrower defaults, and financial distress.

6 – By allowing schools to deny successful borrower defense discharge claimants access to their transcripts, the proposed rules punish students for school misconduct and limit students' access to future higher education and employment.

The proposed rules indicate that in the event that a borrower receives a 100 percent discharge of a loan, the institution in question "may refuse to verify, or to provide an official transcript that verifies the borrower's completion of credits or a credential associated with the discharged loan." This proposal would allow institutions to punish borrowers for effectively protesting against institutional misconduct. There is no rational basis for this change, which would reduce institutional accountability and serve as a disincentive for students to seek the relief to which they are entitled.

When an individual cannot access an official transcript from a school, that individual is hindered from moving on to another institution that may be more suitable in terms of affordability, quality or both. The individual may, as a result, be barred from seeking employment in careers that require educational credentials.

DCA is concerned by the plight of consumers currently unable to access their transcripts because of outstanding fees and other college costs. We urge the Department to reconsider its proposal to allow schools to deny transcripts to successful borrower defense applicants. DCA believes that this proposal, if enacted, would add to the ranks of individuals who find themselves unable to move forward with their education. Furthermore, we believe it could act as a disincentive for individuals to seek borrower defense discharges to which they are entitled. In acting as a disincentive to borrower defense claims, the proposal could remove a check on institutional misconduct, rendering the higher education marketplace less safe for consumers.

7 – By offering no appeals process for borrowers whose claims are denied, the proposed rules rob students of the opportunity to submit new evidence regarding their borrower defense claim.

While the 2016 regulations allowed borrowers to appeal for reconsideration of an unsuccessful borrower defense claim if the borrower could submit new evidence, the Department's proposed rules make no provision for reconsideration of a claim in light of new evidence. Instead, the rules indicate that the Department's decisions on borrower defense to repayment claims are final and not subject to appeal. However, the proposed rules give schools the opportunity to appeal any recovery proceeding the Department initiates. DCA believes that if institutions deemed to have engaged in misrepresentation are allowed to appeal the Department's decision, struggling borrowers should be accorded the same opportunity.

8 – The proposed rules unduly restrict the ability of borrowers who attend closed schools to attain borrower defense discharge of their loans.

Under the 2016 regulations, a student who attended a school that closed could elect to follow the school's teach-out plan or not, and in either case would be eligible for borrower defense relief. If the individual who attended the closed school did not re-enroll or transfer their credits within three years, the loans associated with the closed school would be automatically discharged.

The Department's proposed rules stipulate that individuals who do not follow the teach-out plan of a closed school will be ineligible for borrower defense relief. DCA believes that a student who attends a school that closes should not be required to follow that school's teach-out plan in order to be eligible for discharge. Faced with the disruption of a school closure and the uncertainty of a teach-out plan, not to mention the diminished value of a degree from a shuttered institution, an individual may prefer to transfer to another school of their choice. Such an individual should not, as a result of such a decision, lose access to borrower defense relief.

The proposed rules further break with the 2016 regulations by eliminating the automatic discharge for individuals who, three years after school closure, have not re-enrolled or transferred their credits. DCA urges the Department to re-instate automatic discharge in these cases. If a school, through its own mismanagement, is forced to close, students should not be unduly penalized.

Taken together, the proposals in this NPRM weaken accountability for higher education institutions, while increasing the burden on defrauded young people and limiting access to loan relief. DCA supports robust accreditation of schools, in combination with rigorous investigation and enforcement against deceptive practices and other abuses of student trust. Unfortunately, such an accreditation and enforcement regime is not currently in place, as demonstrated by the reinstatement of the Accrediting Council for Independent Colleges and Schools (ACICS) and the closure of the unit responsible for investigating school misconduct.[2] This lack of rigorous accreditation, investigation, and enforcement means that borrowers will continue to find themselves in need of relief after being defrauded, or after enrolling in a school that later closes. The Department should not deny borrowers redress for a harm to which the Department's own practices contribute.

The Department, in overseeing the higher education accreditation and enforcement regime, as well as the administration of Title IV funds, sends a strong signal to students about which schools the Department has deemed trustworthy. The Department bears sole responsibility for ensuring that its own systems for determining accreditation and access to Title IV funds function properly. It is therefore particularly unreasonable to expect students to avoid institutions that mislead borrowers, and, with these proposed rules, to narrow the relief available to misled students seeking borrower defense discharge of their loans. We appreciate the opportunity to comment on these proposed rules.

Respectfully submitted,

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[2] https://www.nytimes.com/2018/05/13/business/education-department-for-profit-colleges.html

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