Memorandum

To: Department of Education Negotiators
From: Margaret Reiter on behalf of the consumer, student and veteran negotiators
Cc: Non-Department of Education Negotiators
Re: Major Issues with the Department's Borrower Defense Proposal, Issues 1-3

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Introduction

The Department of Education (Department) identified three primary goals for a revised borrower defense regulation:

1. To Provide a Robust Borrower Defense Similar to What Is Provided under the FTC Holder Rule and Current Borrower Rights under State Laws.
2. **To Provide a Simple, Streamlined Process Easy for Borrowers to Use and the Department to Administer**
3. To Protect the Federal Fisc

We believe the Department proposal falls very, very far short of each of those goals. In this memo, we lay out some of the ways in which the proposal fails to meet the intent and we explain how the proposal could be changed to better meet the stated goals. We do so with minimal legal references, in non-legalese as much as possible.

As the Department works on its revised draft of the borrower defense regulation and associated regulations, we hope this memo will inform you of our legal and policy perspectives. We will also attempt to provide you in the following days with additional more detailed analyses or language for particular aspects of the proposal.

A. The Department's Proposal Fails to Meet Goal Number 1:

To Provide a Robust Borrower Defense Similar to What Is Provided under the FTC Holder Rule and Current Borrower Rights under State Laws.

If a seller refers a consumer to a lender, or if a seller is affiliated with a lender by common control, contract or business arrangement, it is an unfair or deceptive practice not to include the Federal Trade Commission's Holder Notice in the credit contract to finance the consumer purchase. The Federal Trade Commission (FTC) determined the practice unfair or deceptive more than 40 years ago, in 1976. The Holder Notice tells any lender or subsequent holder of the contract that the consumer can defend against collection based on any claims or defenses the consumer had against the original seller.[1] 36 FR 1211.

A primary purpose of the rule is to prevent the buyer's duty to repay from being separated from the seller's duty to perform as promised. In 1976, the Department advised program participants that the Holder Rule applied to for-profit schools in the student loan program.[2] Then in 1994, when the Department began using a common promissory note, the Department included an FTC Holder type notice in all Direct and FFEL loan promissory notes.

During the first and second sessions of the negotiated rulemaking, representatives of the Department indicated words to the effect that the FTC Holder Rule is analogous to what this process should lead to. The Department indicated that it was the Department's stated intent (in preambles to past regulations, as well as under 20 USC 1087e(a) and perhaps otherwise) to provide rights for

[1] 16 CFR §433.2 The Holder Rule is titled "Preservation of consumers' claims and defenses, unfair or deceptive acts or practices," but is commonly referred to as the Holder Rule. The final version of the rule and the rationale for it were published in the Federal Register on December 15, 1975, 40 FR 54506.

[2] Because the FTC has authority over unfair or deceptive conduct in commerce, its rules generally only apply to for-profit companies.

borrowers under the Direct Loan Program that are the equivalent of those under the FFEL Program. In the second session of Negotiated Rulemaking, the federal negotiator described the goal, in part along these lines: It is the Department's intent to capture the vast majority of the rights students [currently] have under state law.

From time to time, the Department has changed the language of the FTC Holder type notice in the Master Promissory Note. The original Direct Loan notice stated:

> Any holder of this loan is subject to all claims and defenses that I could assert against the institution that made this loan; my recovery is limited to the amount I repaid on this loan.

Currently the Direct Loan MPN states:

> In some cases, you may assert, as a defense against collection of your loan, that the school did something wrong or failed to do something that it should have done. You can make such a defense against repayment only if the school's act or omission directly relates to your loan or to the educational services that the loan was intended to pay for, and if what the school did or did not do would give rise to a legal cause of action against the school under applicable state law.

This right is also protected under both the Direct and FFEL loan programs by regulations which use similar language, and Perkins Loans have always been subject to borrowers' defenses.

Currently, over 30 million borrowers under the Direct Loan Program have the right to raise state laws as a defense to repayment. Currently, under all three programs, DL, FFEL and Perkins, there is a total of over 40 million borrowers.[3], most of whose loans presumably were made after 1994, so that they all have the right to assert defenses to repayment based on causes of action available to them under state laws

The Department's proposal eviscerates the protection of the Department's Holder type rule for all future borrowers. The Department effectively eliminates almost all state law claims or defenses and it does not provide equivalent federal rights. Among the most important state causes of action a borrower might raise are state consumer protection laws often called Unfair and Deceptive Practice (UDAP) laws. Generally, under those laws, private parties and state officials such as state attorneys general or county district attorneys may bring actions against businesses that engage in unfair or deceptive acts or omissions or that make misleading or deceptive statements. Many states allow these kinds of actions for unlawful acts as well. Abusive acts and practices may be included under the description of "unfair," or, as under the Consumer Financial Protection Bureau, may be separately defined "abusive" acts or omissions. In the California example, at least in class actions or prosecutions, no individualized proof is required from every individual in the group against whom the conduct was targeted. See discussion post.

The Department proposal would deny new borrowers almost all of the causes of action available under state laws, not allow borrowers to raise violations of federal law, except for misrepresentations, require a heightened, individualized standard of proof not generally required under state UDAP laws, and limit the time during which borrowers could defend, even though collection efforts by law may continue until the borrower's death. In all these ways, the Department proposal turns its back on the

[3] Federal Student Aid Portfolio Summary at https://studentaid.ed.gov/sa/about/data-center/student/portfolio on February 28, 2016.

FTC's determination that to deny the ability to defend against collection by cutting off claims or defenses the borrower had against the seller (the school) is an unfair and deceptive practice.

1. The Department Proposal Limits Future Borrowers' Defenses to Three Narrow Types of Claims: Proposed § 685.222(b) – (d)

a. Get a Judgment – An Illusory Defense: Proposed § 685.222(b)

The Department's proposal allows borrowers to raise a defense based on a judgment against a school. It is well known that most cases do not end in judgment. See, e.g. Eisenberg, Theodore and Lanvers, Charlotte, "What is the Settlement Rate and Why Should We Care?" (2009). *Cornell Law Faculty Publications.* Paper 203; http://scholarship.law.cornell.edu/facpub/203. This is especially true for cases involving for-profit schools.

Nearly all for-profit schools' contracts require arbitration, so while students may have causes of action under state law, such as the UDAP laws, students themselves will virtually never be able to get a judgment against a school.[4] Because of the limitations of arbitration and disadvantages for individuals in arbitration, expanding this provision to include arbitration decisions would not provide any real benefit to borrowers, either. See Conner, Eileen, "Proposal in Response to Question 1 of Issue Paper 5, provided at February 2016 session of negotiated rulemaking.

Prosecutors almost never obtain judgments against schools. Prosecutors, who generally have limited resources, generally find that a quicker settlement that puts money back into the hands of victims is more in the public interest than the delay and cost of getting a judgment, which they may never be able to collect as the school spirals into bankruptcy. When push comes to shove, schools would almost always rather reach some sort of settlement than risk an adverse judgment that could jeopardize their ability to continue to be approved by regulatory authorities or accreditors and could result in others being able to rely on the judgment to seek additional recovery.

So, the idea that this type of defense – getting a judgment – would protect borrowers' existing rights to raise state causes of actions as a defense is an illusion.

b. Breach of Contract – The One by One by One by . . . Defense: Proposed § 685.222(c)

The Department proposal allows a defense based on breach of contract. Proving breach of contract is fairly complicated. As Department representatives pointed out, proving the failure to provide quality education, which one might suppose a school contract should identify as what it is the school is supposed to do, is extremely difficult. Also, because schools write the contracts, they usually contain many disclaimers and require very little in the way of performance by the school. A school can easily promise in its contract to provide x hours of class room instruction and y hours of lab – even if the teacher is often absent or a student is teaching the class, or the lab equipment is broken or there is not enough equipment, or the teacher doesn't know the field. Technically, if the number of hours were provided, it would be difficult or impossible to prove a breach of contract.

[4] Students may still be able to bring small claims court actions, but those limits are much smaller than what most students wind up owing.

Breach of contract also generally requires a specific, individualized analysis of each element of the claim. The borrower alleging breach of contract would have to prove she complied with the contract (or was excused from doing so) and that she individually suffered damages.

So, in most circumstances, breach of contract, difficult to prove at all, likely could only be proved by the inefficient, time consuming task of examining each individual's conduct and damages – one by one by one by one by . . .

c. Only One Kind of Misconduct – Actual Misrepresentation May Be Raised – A Roadmap to Continuing Abuse § 685.222(d)

(1) Unfair, Unlawful, Deceptive or Abusive Conduct that Is Not a Misrepresentation Couldn't Be Raised as a Defense

The Department proposal allows a defense based on substantial misrepresentation. Misrepresentation is generally one of the bases included in states' UDAP laws, as well as under various federal laws of that sort. Allowing only misrepresentation to be raised as a defense, however, but not other bases for relief under state UDAP laws will instruct bad actor schools how to change their tactics to still defraud and abuse students, but by skirting actionable misrepresentations.

UDAP laws include several other bases for action. In the alternative proposal provided in February, we include these other bases: unfair, deceptive, unlawful, or abusive acts or omissions. In our alternative proposal, we provide definitions, for the most part based on decades of interpretations of such laws.[5] The Department's definition of a "substantial misrepresentation" can be revised slightly to apply to each of these types of misconduct, as we

[5] "***Abusive***" refers to any act or omission that: (1) interferes or reasonably could be expected to interfere with the ability of a person to understand a term or condition of an educational product or service or a loan intended to pay for that product or service; or (2) takes advantage of or reasonably could be expected to take advantage of a person's lack of understanding of the risks, costs, or conditions of the product or service; a person's inability to protect his or her interests in selecting or using an educational product or service or a loan intended to pay for that product or service; or a person's reliance on a school to act in his or her interests.

. "***Deceptive***" refers to any act or omission that deceives, or is reasonably likely to deceive.

"***Unfair***" refers to an act or omission that violates established public policy, is oppressive, or is reasonably likely to be injurious to a reasonable person, and no provision of law specifically makes the conduct lawful. An act or omission may be unfair to a borrower regardless of whether the benefit of the act or omission in the aggregate outweighs the cost or harm caused to the public in the aggregate.

"***Unlawful***" refers to an act or omission that is forbidden by law be it civil or criminal, federal, state or local, statutory, regulatory or court-made.

did in the alternative proposal.[6] And we proposed to add a definition of "reasonably," which also tracks general UDAP case law interpretations.[7]

If the bases for a defense exclude these other standard bases under UDAP laws, bad actors, who are usually a few steps ahead of regulators, will adapt by relying even more heavily on skillful puffery instead of more specific claims that amount to misrepresentations.

For example, a school may tell prospective students the school is great, the student is making a great decision to turn his life around, this is his pathway to success, if he really wants to succeed, he should not make excuses not to enroll, think how proud his wife, children, etc. will be when he graduates, the field he is interested in is a great field with lots of possibilities, doesn't he want to become a professional, etc., etc., arguably, never making a single actionable misrepresentation.

Nevertheless, such schools will easily be able to continue to defraud and cheat borrowers using other unlawful, deceptive, abusive, or unfair acts or omissions. For example, by using fake diplomas to enroll students, by forcing teachers to change students' grades so they appear to be making satisfactory progress, by failing to provide up-to-date equipment, by failing to hire teachers with the expertise needed, or by failing to provide substitute teachers as needed. Schools could easily figure out plenty of ways to avoid crossing the misrepresentation line, but still engage in unlawful, unfair, deceptive, or abusive acts or omissions.

Allowing only misrepresentations to be raised as defenses, not allowing borrowers to assert any other of the unlawful, unfair, deceptive, or abusive acts or omissions they can currently assert is like drawing a roadmap for deceitful schools to figure out how to continue cheating students and the system. And, of course, it is not comparable to the FTC Holder rule.

(2) The Department Should Address Widespread Fraud and Abuse Instead of Requiring Actual Reliance – Yet Another Retreat from States' UDAP Laws § 685.222(d) (and elsewhere)

The Department's proposed regulation breaks with longstanding federal and state law by requiring students to prove that they actually relied on the misrepresentation.

Substantial misrepresentation is already defined in current section 668.71(c) as a representation on which a person could reasonably be expected to rely or has reasonably relied, to that person's detriment. That is the standard that applies when the Department seeks to fine, suspend, or terminate a school from financial aid programs because of misrepresentations. That definition comes out of longstanding state UDAP laws. A prosecutor or a class action representative generally doesn't have to present testimony from every single victim to prevail.

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[6] "***Substantial*** " as applied to any misrepresentation or other unlawful, unfair, deceptive or abusive act or omission means one on which a person could reasonably be expected to rely, or has reasonably relied, to the person's detriment.

[7] "**Reasonably**" means how an ordinary person would act under the circumstances. What constitutes acting reasonably under the circumstances is determined from the vantage point of the targeted group, not others to whom the statement or act or omission is not primarily directed. A statement, act or omission directed to an unsophisticated or vulnerable group must be viewed as that group would be likely to view it.

Instead, they can prove an objective standard, that a reasonable person would have relied and been negatively affected by the misrepresentation. For example, in California, actual reliance by one individual is required to bring a UDAP case only in an individual's case or by one class representative in a class action. It is not required at all in cases brought by prosecutors, like the Attorney General.[8]

The determination under both the Department's own definition of substantial misrepresentation and many state UDAP laws is whether a person could reasonably be expected to rely, or has reasonably relied, to that person's detriment. If the conduct meets that definition, then no further proof of whether any particular individual did so rely, or whether any individual person relied to their detriment is needed. If the person could have so relied, then the claim is decided and, generally, a refund of tuition and cancellation of the loan should occur.

In proposed section 685.222(d), however, the Department requires the borrower to show she did, in fact, rely on the misconduct. The Department proposes that students seeking to defend against collection because they have been misled would have to meet this higher burden than is usual under state UDAP laws and higher than the Department itself must meet to fine, suspend or terminate a school from financial aid programs.

The impact of this harsh standard is obvious as applied in widespread cases of misleading conduct, as in the Heald matter. The Department had identified cohorts of students who were enrolled while the school was using system-wide misrepresentations to induce students to enroll. Nevertheless, it is requiring each individual borrower in those cohorts to fill out a form attesting that they personally saw written Heald brochures or other written statements about job placement; they personally believed that the job placement rates related to their program of study and indicated the level of quality a Heald education offered to students; and they personally chose to enroll at Heald based, in substantial part, on the information received about job placement rates related to their program of study and the quality of education they believed those placement rates represented.[9]

The effect of requiring attestation of individual reliance is to exclude the vast majority of victims of the misconduct. Many will not respond to what look like junk mailers notifying them of what they have to do to be included. Others may have moved and still others will not understand what is required of them. In the Heald example, about 96% of those enrolled while the school made the misrepresentations the Department had already determined were misleading have not responded, so would not qualify for relief.

The Department should follow existing federal and state law and rely on the existing reasonable person standard in its definition of substantial misrepresentation. Indeed, it is extraordinary that a regulation ostensibly proposed to ensure borrowers maintain the vast majority of their rights under state law would impose such an obstacle. There is no reason, legal or practical, to impose this increased burden on borrowers.

2. The Department's Imposition of a Statute of Limitations on Defenses Is Contrary to Most States' Laws and Would Deny Relief to the Vast Majority of Borrowers – 685.222(c) and (d).

[8] We have previously provided case law to the Department demonstrating that this kind of individualized evidence is generally not required under state law. The Department has not identified case law to the contrary. Others may be providing additional legal explanation of this concept to the Department.

[9] Heald Attestation form, https://studentaid.ed.gov/sa/sites/default/files/heald-attestation-text-only.html.

There is no time limit to collect a student loan. The Department may collect until the borrower dies. Likewise, neither the FTC Holder Rule nor the Department's current MPN or regulations impose any statute of limitations on the 40 million plus borrowers' rights to raise state causes of action as defenses to repayment.

Various laws and legal principles govern time periods related to law suits. Generally, statutes of limitations can be raised if someone who sues affirmatively for relief, e.g., for damages and punitive damages and other affirmative relief waits too long to sue. However, long-standing legal principles, often called recoupment (or set off), allow a borrower to defend against a collection effort, even if it is too late for the borrower to bring an independent suit for damages.[10] It's only fair. Can you imagine the fairness of being able to prosecute for murder, but not being able to assert self-defense? Same here. Most, if not all, states' laws allow a person to defend against a collection effort as long as the collection can continue.

We believe the FTC Holder Rule makes clear that it does not govern time limits or other aspects of state law. [11]

Adding a statute of limitations to raise a defense when there is no statute of limitations on collection is both grossly unfair to future borrowers.

B. The Department Proposal for Issues 1-3 Fails to Meet Goal Number 2:

To Provide a Simple, Streamlined Process Easy for Borrowers to Use and the Department to Administer

The Department expressed two process concerns about having to apply in the future the existing regulations applicable to the 40 million plus current borrowers: the difficulty of applying state laws and the possibility of having contradictory results in separate procedures involving borrowers and schools separately.

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[10] As far back as 1935, the Supreme Court explained that a defense to a tax collection action by the government "is never barred by the statute of limitations so long as the main [collection] action itself is timely." Bull v. United States, 295 U.S. 247, 261-62 (1935). For standard treatment of the issue, see also 51 Am. Jur. 2d Limitation of Actions § 98:

> Statutes of limitation are not intended to affect matters asserted strictly in the defense of an action. The object of a statute of limitations in keeping stale litigation out of the courts would be distorted if the statute were applied to bar an otherwise legitimate defense to a timely lawsuit, for limitation statutes are aimed at lawsuits and not at the consideration of particular issues in lawsuits. Statutes of limitation should be used only as a shield and not as a sword, and courts ordinarily allow defendants to raise defenses which, if raised as claims, would be time-barred. Thus, as a general rule, statutes of limitation are not applicable to, or do not run against, defenses.
>
> A statute of limitations does not bar a pure defense, or a defense involving no claim for affirmative relief, or a defense which, if given effect, which would negate the plaintiff's right to recover. Defenses such as fraud and misrepresentation therefore are not barred by statutes of limitation.

(Citations omitted.)

[11] We have found no basis in the FTC Holder Rule or statements from the FTC about the rule to apply a federal statute of limitations and have provided the Department a 2012 letter from the FTC that makes clear the FTC Holder Rule does not affect state laws, whether statutes of limitations or for recoupment or setoff. We ask the Department to provide its legal and policy reasoning to support denying future borrowers' rights that existing borrowers have.

1. The 50-State Fallacy – Defacto Preemption of State Law - 685.222(b)

a. Regardless of any New Regulation, the Department Will Have to Apply State Laws Well into the Future

A primary way the Department's proposal purports to simplify its task of administering future borrowers' defense to repayment is to eliminate for future borrowers the right all 40 million plus current borrowers have to defend based on claims or defenses they have under state law.[12] In effect, the Department proposes defacto preemption of almost all state laws.

The fallacy of this means to simplify the process is that the Department will have to know the laws of any states from which students raise defenses until no further collection efforts are available on the more than 40 million borrowers' loans currently outstanding, as well as on those loans made before a new regulation could be implemented in mid-2017. The proposed regulation cannot change borrowers' rights to defend based on state law on loans made before a new regulation becomes effective. Because there is no statute of limitations on collection on these loans, borrowers may still be in collection 50 or more years from now. Because, as discussed above, state laws generally allow borrowers to defend against collection as long as collection is possible, if any of these borrowers defends against collection, the Department must treat that defense based on that borrower's state law rights. So, regardless of what a new regulation provides, the Department will have to handle defenses that arise from state law from the more than 40 million borrowers who will not be subject to the new regulation.

By setting up a different set of borrower defense rules and restrictions, the Department is adding to the variety of rules it must master.

There is a way, however, to simplify the Department's task and protect those borrower rights.

b. Adopt Typical Federal Consumer Protection Law Limited Preemption

It would be anomalous for a federal regulation intended to provide broad relief for student borrowers victimized by outlaw schools to reduce those borrowers' rights to raise causes of action they have based on state law under the Department's version of the FTC Holder Rule. Generally, when a federal law or regulation intends to provide broad consumer protections, it does not preempt all state laws. It only preempts those that are less protective of consumers than the new federal standard. An example of a typical formulation for this type of limited preemption can be found in the Fair Debt Collection Practices Act, the federal law that protects consumers from abusive collection practices. It states,

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

[12] All state laws are preempted, unless they obtain a state court judgment, which as discussed above, is an illusory defense, or assert breach of contract, which as discussed above, could be avoided by bad actor schools' unlawful, deceptive, unfair or abusive conduct.

15 USC 1692n (highlighting added). The Department could include a similar provision:

> This part (sections X-XX) does not annul, alter, or affect a borrower's right to defend based on applicable state laws, except to the extent that those laws are inconsistent with any provision of this part, and then only to the extent of the inconsistency. For purposes of this section, a state law is not inconsistent with this part if the protection that law affords any borrower is greater than the protection provided by this part.

If the federal standard the Department were to choose more closely mirrored the rights borrowers already have under state law, as to future loans, the Department would only have to be knowledgeable about those few (if any) state laws that were more protective of consumers than the Department's new standard. With this solution, the Department would have a simplified task as to future loans, without sacrificing the rights of future borrowers. Future borrowers would be able to assert rights which are available across the nation to borrowers in all other consumer transactions (under the FTC Holder Rule applicable to consumer credit transactions) and to all 40 million plus current student loan borrowers. It would also provide stronger protections for students in states with weak consumer protection, so all students would have similar rights, and it could simplify the Department's burden.

2. Could It Be Any More Complicated? – The Need for True Group Processes 685.222(d) (actual reliance); (e) (certification and representation required); (f)(3) (required consent to group process);(g)(5) (decision final); and Appendix A

As discussed above, and as noted in the references in the heading for this section, the Department's proposals necessitating individualized applications and determinations will prevent victimized borrowers from obtaining the relief they need and deserve. The proposal, of course, also would greatly complicate what should be a simple process.

The Heald Attestation process provides an example of how much more complicated the proposed process would be for everyone than is necessary. The Department chose to use a process that requires each of the thousands of students in those cohorts subjected to the substantial misrepresentations to go to a website and scroll through pages of programs and dates listed to determine if they fall within the programs and time frames covered. https://studentaid.ed.gov/sa/about/announcements/corinthian#heald. Then each individual borrower must fill out a form attesting that they are applying for a discharge under 34 C.F.R. § 685.206 (c); and they must provide the individual attestations of exposure to the misrepresentations, reliance, and harm described above. Additionally, borrowers have to attach documents, for each program in which they enrolled and for each time frame during which they were enrolled (excluding dates for time they took time off and including dates when they returned) showing they were in fact enrolled within the dates the student identified on the form as the dates they were enrolled, which the Department should be able to ascertain from its and the schools' records. Suggested documentation includes transcripts and registration documents showing the particular program and dates of enrollment. https://studentaid.ed.gov/sa/sites/default/files/heald-attestation-text-only.html. The shockingly low rate of response (about 4%) demonstrates that this process, similar to what the Department's proposed regulations would necessitate, has been anything but "streamlined," and has been woefully inadequate to address the widespread fraud at Heald campuses.

This elaborate requirement for borrower involvement when there is a cohort of students targeted with misconduct is contrary to the type of notice generally required in class actions or in civil actions brought by prosecutors. In class actions, often those targeted with the misconduct need do nothing.

Only if they wish to opt out are they required to return a form opting out. In actions brought under UDAP laws, prosecutors often require targeted groups of individuals to do nothing to receive what has been determined as the cancellation or refund appropriate to the wrongdoer's conduct.

The Department can and should use a simpler method to insure targeted borrowers are not left out.

a. Use of Presumptions

We proposed to simplify the process by the use of presumptions for conduct that clearly constitutes substantial wrongful conduct or that is presumed to be substantial wrongful conduct, unless countered by the Department. For conclusive presumptions (determinations) that the conduct was substantial, entitling the borrower to complete relief, we proposed the following (at p. 3 of our February proposal):

(1) The representation of a job placement/employment rate of its graduates as (a) above a threshold established by applicable state law or the applicable accrediting agency of the school or program, if the accurate job placement/employment rate is below that threshold; **or** (b) ten percent higher than the actual placement rate;

(2) The representation of completion/graduation rates as (a) above a threshold established by applicable state law or the applicable accrediting agency of the school or program, if the accurate completion/graduation rate is below that threshold; **or** (b) ten percent higher than the actual completion/graduation rate;

(3) Other circumstances the Secretary may from time to time identify.

We proposed ten percent to begin the discussion, but are open to other suggestions. We included the option for the Department to add other conclusive presumptions because over time, as the Department implements these procedures, it may determine that others also merit conclusive determinations.

Additionally, we proposed that when there is a determination by another governmental entity, the Department must accept that determination. So for example, if a state regulatory agency, a prosecutor or a federal agency obtains a final administrative ruling or a court judgment that a school engaged in substantial misrepresentations (or the equivalent under that agency's authority), identifies the cohort of students targeted by the misrepresentation, and determines whether borrowers should be entitled to restitution, then the Department must grant relief at least as great as specified in that determination.[13] To the extent, if any, the Department has additional relevant information to show that greater relief should be granted, it should not be precluded from granting that additional relief.

We also proposed rebuttable presumptions that would apply, unless overcome by evidence that fully counters the presumption. We proposed that students could submit substantial evidence to overcome the counter evidence. In our proposal we included only the identifying section numbers of those violations which should be considered presumptive evidence of substantial wrongful conduct. We attach the actual language as Attachment 1 at the end of this memorandum for easier

[13] Note that the Department's proposal to allow judgments as a basis to assert a defense discussed above, does not explicitly accept them as conclusive, but only as one criterion that would allow a borrower to raise a defense.

review. We propose these for discussion as to which should be included as rebuttable presumptions.

b. What an Alternative Might Look Like

As explained above, use of an objective standard based on a reasonable person would eliminate the need for the painstaking collection of individual attestations. So, a representative would file an application, identifying by name or cohort those who were similarly targeted and identifying the substantial misrepresentations or other substantial misconduct at issue. The Department would ascertain from its records and/or records of the school, the time frames, programs, and any misconduct that could be shown by written materials. The Department would gather any other relevant information needed to determine if the conduct was substantial (i.e., either that a person could reasonably rely on it to the person's detriment, or that persons did reasonably rely on it to their detriment. The Department would examine the alleged conduct and determine whether it was conclusively or presumptively substantial misconduct, or whether it otherwise met the criteria for substantial misconduct.

If the Department determined that it did, it would consider whether it had evidence that countered the finding or whether, unusual circumstances should result in less than complete relief. If it determined that evidence could not counter the presumption or that such circumstances did not exist, the Department would send notice to all affected borrowers stating that they were in the identified group, that the Department had determined that all borrowers in that group were entitled to have their loans cancelled and any money paid refunded. The Department would identify the loan being cancelled and confirm that it was cancelled. For those whose notices were not returned as undeliverable, the Department would then send a check for the refund to which the individual was entitled. The Department would then make every effort to find current addresses for those individuals whose notices were returned as undeliverable, and send those located their refund checks. If an individual had other loans that were not being canceled and the Department could not find a current address for the individual, the Department could apply the refund to reduce the amount of the borrower's other loans. To the extent the Department wished to have an acknowledgement from the borrower, the Department could include necessary language on the notice and the check so that cashing the check would indicate the person's attestation that the student was among the targeted group.

If the Department determined that the student was entitled to no or less than full cancellation and refund, the Department would notify the borrower accordingly and provide the partial refund and/or cancellation. The Department would also notify the borrower of the right to apply again if the borrower thought the decision was not correct (See below.).

3. A Simplified Process Requires a Better Framework for Who Can Represent a Borrower and the Effect of that Representation – § 685.222(e)(2)

Those who work with borrowers on a daily basis recognize the need for allowing non-attorneys to represent borrowers, for example, when a family member helps a borrower who does not have the ability to explain the situation, or a borrowers' group assists its members. We support this concept. Having a single application for a cohort of students can, as discussed above, eliminate the need for the painstaking obstacle of individual applications or attestations. Having relief provided on a group basis can also simplify the Department's task. However there are two issues that must be addressed.

a. Borrowers Fooled Twice – Shame on Us: Debt Relief Scammers

We are all aware of the proliferation of so-called debt relief companies springing up to prey on already victimized borrowers with bogus promises of debt relief for a high fee. This problem has plagued other agencies that allow non-attorney representatives such as the IRS and Bankruptcy Courts. In the next few days, we will provide language drawn from work by NCLC and regulations put in place by other agencies which have faced that problem. In addition, as discussed in the next paragraph, we need to deal with protecting borrowers from a bad result due to a scam artist.

b. Not Reinventing the Wheel – How to Facilitate Other Agencies' Role in the Process

The Department's proposal requires government agencies who apply for relief for borrowers to act on behalf of borrowers and binds the borrowers to the outcome. Most agencies cannot or do not want to be the equivalent of a class representative for a cohort of students. Even if legally allowed by the agency's governing laws (which is generally not the case), the potential conflict between representing individuals and representing the state, county, or other constituency the agency is charged with representing will likely discourage most agencies from applying for borrower relief under the current Department proposal.

Failing to fix this issue would deprive the Department and borrowers of valuable resources. In the course of their investigations and actions, government agencies, such as state attorneys general, county district attorneys, state regulatory agencies, the FTC or the CFPB often accumulate extensive credible evidence of patterns of wrongdoing by for-profit schools against students and prospective students. Having such agencies apply for borrower relief has many advantages – it does the hard work of investigation which otherwise the Department would have to do; it lends credibility to the application; it may provide the Department with useful legal analyses on state or other federal laws; it carries out the analysis to show that an entire cohort has a defense that would require loan cancellation and refund, without the need for resource-intensive individualized analyses; and it may facilitate contacting witnesses, if needed for future proceedings against a school.

The new regulation must allow government agencies to file applications and obtain redress for a cohort of borrowers, without technically representing or binding those borrowers. The Department can easily fix this problem so government agencies can file applications and borrowers can obtain redress, without the agencies technically representing borrowers. Doing so would also address the problem of students being harmed by representation by bogus debt relief scammers.

Here's how: Borrowers whose claims are not granted full recovery should be afforded the ability to apply again and have their claims treated with a fresh start (de novo). This way, neither an agency nor a debt relief scammer technically represents the individual to the detriment of that individual. Ordinarily, few borrowers would apply again. For those that do, the Department would already have and could rely on any accumulated evidence in addition to any additional evidence or argument the borrower might offer. The easiest way to address this would simply be to have the decisions final as to the Department, final as to the borrower in the sense that loan is then handled as appropriate to the decision, but not final in that a borrower can raise the claim again.

An example of this type of consumer remedy exists in the lemon laws of many states. For example, in California, consumers may use a voluntary dispute resolution process which is binding on the automobile manufacturer, but not on the consumer. Cal. Civ. Code § 1723.22(c) and (d)(2). The evidence and findings from the process may be admitted in a subsequent court case a consumer brings, but the consumer may bring in whatever additional evidence or legal argument he wishes. Department could, if it thought it necessary, include a provision to prevent vexatious repeat applications, just as there are safeguards against vexatious litigants.

Allowing agencies to compile evidence and submit applications for cohorts, as well as for non-attorneys to apply for borrowers provides advantages for borrowers and for the Department's administration of the process that far outweigh the potential disadvantages of allowing borrowers to apply again.

4. David versus Goliath – The Merged Hearing Process 685.222(f)(3)(i)

We understand that the Department's stated reasons for collapsing the current two proceedings into one include the following:
The Department believes it is necessary for borrowers' due process rights.
The Department believes it may lose in both proceedings if they are separate because borrowers whose loans have been cancelled may not show up to testify; and schools who are not at risk in the first proceeding may not bother to submit evidence to counter the borrower's claims. We believe these concerns can be addressed without a collapsed process. And there are ample reasons not to have a collapsed process.

a. What is this Process?

The Department's proposed process is barely fleshed out. In comparison, the procedures for fining an institution or suspending or terminating its participation are spelled out in great detail, under statutory authority. 20 USC 1094; 34 CFR 668.81-668.98. The hearing is conducted by a hearing officer with a Department official (presumably, including legal counsel) presenting the case against the school. Apparently the hearing must be in person unless the parties agree to a hearing by phone, a stipulation as to facts and legal authorities, or a determination based on "the written record." Regular rules of evidence don't apply and discovery is not allowed, although apparently, the Department could subpoena persons and documents during its investigation for later use at the hearing. 20 USC 1097a. There is a transcribed record of the proceedings. Among other possible violations, the Department may fine, suspend, or terminate a school for making substantial misrepresentations. Presumably, the Department might want a student to provide testimony in its fine, suspension or termination hearings, but there is no requirement that students become parties to those proceedings.

b. Students' Due Process Rights Can Be Protected without a Merged Process

The Department has suggested that it needs the school and the borrower in the same process to protect the due process rights of the student, e.g., so that the student can confront witnesses against him. A witness need not be a party to a proceeding in which a borrower defends against repayment in order for the borrower to challenge the testimony of that witness. Similarly, the borrower can challenge any written evidence the Department accepts from other witnesses. It is unclear what process the Department thinks would be denied students if they first had a process in which their defense to repayment were decided, before the Department decides whether it wishes to seek recovery from the school.

c. Practical Considerations for the Department

We believe the Department's concerns about witnesses failing to participate are speculative and not based on experience of consumer prosecutors who routinely rely on non-party witnesses. First, given that a school knows the Department could decide to seek recovery from the school, how frequently would an operating school fail to provide the Department any necessary evidence to demonstrate that the borrower is not entitled to loan cancellation? That possibility seems remote. As for borrowers not being willing to provide evidence in a subsequent proceeding against the school that cheated them, that concern also seems overblown. Consumer prosecutors routinely rely on witnesses, both from in and out of state, who have no assurance that they will ever recover any money from the prosecution, or that whether or not they testify will have any effect on whether or not they recover any money.

Indeed, if a witness is testifying because that is the only way he will be able to have a loan canceled, his testimony is less credible, so less valuable than that of a witness who has already had his loan canceled and has no personal benefit to gain from testifying against the school.

Further, assuming that the rules of evidence do not apply, as is the case in the proceedings the Department uses to fine schools, hearsay testimony in the form of declarations presumably could be used in either proceeding, rather than requiring live testimony. Practically speaking, most schools do not want to risk decisions that could cause them to have to stop operating and many would likely agree to refund the Department what it paid to the borrower in a prior proceeding so as not to have a negative adjudication. And, of course, pursuing every single school, regardless of the facts, would cost the Department significant resources that could be saved if the Department made a separate evaluation whether to seek recovery from the school after determining the fact and extent of a borrower's right to a cancellation and refund.

If the Department wished to pursue recovery from the school, is there anything stopping the Department from including that in a proceeding to fine, suspend or terminate the school? If the Department is attempting to collect from a borrower, would handling the defense to repayment in that ongoing proceeding be less efficient than starting a whole new proceeding involving the borrower and the school?

d. Practical Considerations for Good Schools

For good schools, most claims can be handled summarily in a pending Department collection proceeding which already involves the student. In most cases involving a good school, the Department would likely determine the borrower is not entitled to relief and would not, if it were a separate proceeding, have any need to involve the school in a proceeding to determine the school's liability. Subjecting these schools to potential liability unless they participate as a party to a proceeding to determine the borrower's relief, however, would likely force the schools to spend resources, even though the chances that the Department would grant relief may be slim.

We ask the Department to explain what concerns it has that this memo has not adequately addressed.

e. David and Goliath

As discussed during negotiated rulemaking, pitting borrowers against the resources of major institutions in which the institutions must prevail to save their operation stacks the proceeding against the borrower, who, unlike the school, will typically not be represented by counsel. Providing a Department representative for the borrower does not cure the problem, because of the very real conflict given that the Department will have to pay out money if the borrower is successful, money, which it may or may not be able to recover from the school, even if it obtains a determination against the school.

5. Appendix A – The Impossible Task

Appendix A sets out four kinds of analyses that the Department could use if it is determined that the borrower is not entitled to complete cancellation of the Direct Loan. As has been noted, full relief from a loan does not make a person whole. Borrowers victimized by schools have invested their time and energy over a period of months or years in going to school, not in earning money on a job. Loan cancellation will not get that back for them. Many also spent their own funds to pay part of the cost of education or borrowed using additional high cost private loans. Loan cancellation under these regulations will not get that back for them either. Additionally, they may have used up their eligibility for grants and be unable to get a good education, even if the loan is entirely refunded, without the availability of those grant funds. So we must start with the recognition that complete cancellation of the loan is generally not full recovery.

In addition, each of the proposed methods in the Department's Appendix A of determining recovery less than full cancellation is fundamentally flawed.

A. Determination A requires a comparison of the tuition charged with the average of a "comparable pool" of programs. As we know, for-profit schools charge much higher tuition than public schools. Will the Department determine a pool based on both those and non-profit schools? Will the Department first determine whether schools in its pool are also misleading students and eliminate those schools from the pool? Surely, they should not be part of the standard. Will the Department use only community colleges to compare to occupational programs? Will the Department have to come up with different pools for different areas, based on what is available in the area? If the program is available elsewhere for less, why should detriment only be the difference from the average, rather than from the least expensive bona-fide program available? Will the Department include in the pool other schools whose valid placement rates are as low as the valid ones from the misrepresented school? How many resources will be devoted to this determination? And what documentation will the Department provide to the borrower so that the borrower may ascertain whether the pool or its determined average is a fair measure? How will a student have the resources to compile his own evidence of what that should be? If this is to be fair, it needs to be much more carefully considered and clearly defined.

B. Provision B purports to compare what a student could reasonably have believed the school was charging with what the school actually charged. Given that many in the population of students who are victimized are not familiar with colleges, how they operate, or what they charge, how would the Department determine what they could reasonably believe they were to be charged? If the result of the school's conduct was that the student got a lousy education, how would the Department determine what the charges for providing a lousy education could reasonably be expected to be? In what circumstances would this provision be applied?

C. Provision C does not take into account whether the student's earnings were due to initiative of that student having nothing to do with what education the school provided. Should a person who,

despite being defrauded, perseveres, and manages to succeed despite the school's conduct be penalized? Of course, this also requires the resources to carry out an individualized analysis and seems to preclude recovery if a student does not individually respond.

D. The restriction in this provision seems to have been copied in large part from language in the California Student Tuition Recovery Fund (STRF) regulation, 5 Cal Code Reg. 76000(c). Use of that language is inappropriate here. STRF covers all tuition and costs for materials and equipment for the education, as well as the costs (interest, penalties) associated with any loans used for that. So, it covers both private and public loans, as well as whatever students paid out of their own funds, but only to the extent used for the education, not for living expenses. Also, by statute, it is limited to payment of economic loss. Consequently, STRF does not cover the costs of transportation, room, board, or non economic loss such as emotional distress or punitive damages.

Direct Loans, in contrast, include all the costs of attendance, which includes board and room, and transportation, as well as direct costs for the program in which a student is enrolled. Unlike STRF, however, under the FTC holder Rule, and its analogous Department regulations and MPN, a student's recovery is limited to the amount of the Direct or FFEL student loan. It does not provide recovery for students' out-of-pocket or private loan expenses. Under current Department regulations, the student may raise any claim or defense, related to the educational program or loan.

In its proposed regulation, on the one hand, the Department says that the student may recover for economic loss up to the cost of attendance. On the other hand, copying the inapposite STRF regulation, the Department says the student may not recover for certain types of costs of attendance, such as transportation or application fees. And the Department adds additional barriers to recovery by glomming on to the limits in STRF that preclude non-economic loss. This is contrary to the FTC Holder Rule and current Department regulations and the MPN, which allow for recovery of whatever type, but limited by the amount of the loan.

In effect, the Department has layered limitations on borrower recovery, well beyond the standard limit applicable in consumer transactions generally under the FTC Holder Rule, and applicable to the 40 million plus borrowers under the Direct and FFEL loan programs. The Department does not explain why new borrowers should be treated so differently from current borrowers.

Provision D also limits recovery based on transferrable credits or employment. As noted above, it does not take into account whether the student's earnings were due to the student's initiative having nothing to do with what education the school provided. Transferability of credits should only be a factor if they are transferrable to a public institution and if they are transferable toward the certificate or degree toward which the student was studying. Credits "accepted," but not accepted for the comparable program, do not signify economic benefit to the student.

To the extent a borrower is not entitled to full recovery, bases for deciding an appropriate amount of recovery should not be decided on comparisons to other for-profit schools, which may also be engaged in similar misconduct, not yet discovered, which charge much higher fees than public institutions, and which may even be under investigation.

Moreover, none of these provisions in the Department's Appendix A address the issues in a case with mass wrongdoing to cohorts of students.

C. The Department's Proposal for Issues 1-3 Fails to Meet Goal Number 3:

To Protect the Federal Fisc

1. A Primary Purpose of Borrower Defenses Is to Prevent Fraud by Schools

The other primary purpose of the FTC Holder Rule (and its analog in the MPN) is to prevent lenders from facilitating seller misconduct. Lenders can do that by eliminating loan availability to miscreant sellers. As the FTC explained when it promulgated the FTC Holder Rule and reiterated in a 2012 letter:

> Between an innocent consumer, whose dealings with an unreliable seller are, at most, episodic, and a finance institution . . . ,' the financer is in a better position both to protect itself and to assume the risk of a seller's reliability. . . . We believe that a rule which compels creditors to either absorb seller misconduct costs or return them to sellers, . . . will discourage many of the predatory practices and schemes. . . . The market will be policed in this fashion and all parties will benefit accordingly.

Letter from Donald S. Clark, Secretary, by direction of the Federal Trade Commission (May 3, 2012) (citations omitted).

Similarly, the borrowers' right to defend serves to motivate the lender here, DE, to better police schools on the front end. As early as 1972, the predecessor to the Department recognized that some schools were abusing the guaranteed loan program and stated in a letter to program participants:

> I am sure that it comes as no surprise to anyone that the subject of defaults is of great concern, not only to the Office of Education, but to the Administration and the Congress alike. The problem of defaults is compounded by program abuses, many of which can be attributed to recruiting practices of school sales representatives and misinformation or lack of information provided to potential borrowers before the loan is made.[14]

Problems with recruiting practices and misinformation and consequent defaults have not diminished over the decades, but instead have increased exponentially. Now that borrowers are actually asserting defenses to repayment when they have been cheated, maintaining and strengthening borrowers' rights to defend should help motivate the Department to be more vigilant in policing that fraud and abuse earlier, before more borrowers are victimized. That is one of the major purposes of the rule ensuring borrowers' rights to defend and it is the smart way to protect the federal fisc.

2. Closing the Barn Door Afterwards – No Way to Run a Farm or a Multi-Billion Dollar Enterprise

[14] Dear Colleague Type Letter, perhaps before DE called them that, "To Federally Insured Student Loan Officers, All Participating Lenders & Educational Institutions," December 20, 1972, from the Office of Education, Dept. of Health, Education , and Welfare, Regional Office, 50 Fulton Street, San Francisco, California 94102, announcing workshops to be held and the attached "Prospectus for the Guaranteed Student Loan Program," prepared by the Division of Insured Loans, U.S. Office of Education, Washington, D.C. (HEW), p. 9.

Unfortunately, many of the provisions of Department proposed do not ensure a vigorous administration of borrowers' rights. Instead, in the ways outlined above, as well as in other ways, at every turn, the proposed rules make it more difficult for borrowers to obtain redress. While in the short term this crabbed reaction may prevent federal dollars from being paid out, in the long term, this response will not fulfill the twin goal of the FTC Holder Rule and what should be its Department analog.

As problem schools recognize that only a tiny percentage of borrowers will be able to navigate successfully the Department's proposed multiple barriers to recovery, such schools will feel confident that the cost of their transgressions will not be outweighed by the tiny portion which the Department might seek to recover from the school. Just as surely, the Department's proposal reduces the intended incentive – to encourage the Department itself to become more vigilant in protecting the federal fisc against continued fraud and abuse.

D. Note: A Technical Issue to Resolve: Confusion about which procedures apply to loans disbursed before July 1, 2017

> Proposed section 685.206(c)(1) addresses loans disbursed before July 1, 2017. Proposed section 685.206(c)(2)(i) states that a direct loan borrower must use the "procedures" in 685.222.
>
> But proposed section 685.222(a) states that for loans disbursed before July 1, 2017, the Secretary discharges direct loans disbursed before July 1, 2017 in accordance with the "provisions" of section 685.206(c).
>
> It would be clearer if 685.206(c)(i) specified which subsections of 685.222 it refers to when it says procedures under that section apply. It appears that it may refer to subsections (e) through (j). But clarifying that would be very helpful.

Conclusion

This memo lays out only in summary fashion the legal and policy bases that support the recommended changes. If the Department believes there is an insufficient legal or policy basis to support the changes we propose, please advise us as soon as possible so that we may provide more in-depth analyses.

Attachment 1: Proposed violations constituting rebuttable presumption of substantial wrongdoing:

1. The following provisions of 20 U.S.C. § 1092: Subsections (A), (E), (F)(i), (G), (I), (J), (K), (L), (M), (R), (S) or (U) concerning required disclosures:

The information required by this section shall be produced and be made readily available upon request, through appropriate publications, mailings, and electronic media, to an enrolled student and to any prospective student. Each eligible institution shall, on an annual basis, provide to all enrolled students a list of the information that is required to be provided by institutions to students by this section and section 1232g of this title, together with a statement of the procedures required to obtain such information. The information required by this section shall accurately describe--

(A) the student financial assistance programs available to students who enroll at such institution;

(E) the cost of attending the institution, including (i) tuition and fees, (ii) books and supplies, (iii) estimates of typical student room and board costs or typical commuting costs, and (iv) any additional cost of the program in which the student is enrolled or expresses a specific interest;

(F) a statement of--

(i) the requirements of any refund policy with which the institution is required to comply;

(G) the academic program of the institution, including (i) the current degree programs and other educational and training programs, (ii) the instructional, laboratory, and other physical plant facilities which relate to the academic program, (iii) the faculty and other instructional personnel, and (iv) any plans by the institution for improving the academic program of the institution;

(I) special facilities and services available to students with disabilities [if the student requires those services];

(J) the names of associations, agencies, or governmental bodies which accredit, approve, or license the institution and its programs, and the procedures under which any current or prospective student may obtain or review upon request a copy of the documents describing the institution's accreditation, approval, or licensing;

(K) the standards which the student must maintain in order to be considered to be making satisfactory progress, pursuant to section 1091(a)(2) of this title;

(L) the completion or graduation rate of certificate- or degree-seeking, full-time, undergraduate students entering such institutions;

(M) the terms and conditions of the loans that students receive under parts B, C, and D of this subchapter;

(R) the placement in employment of, and types of employment obtained by, graduates of the institution's degree or certificate programs, gathered from such sources as alumni surveys, student satisfaction surveys, the National Survey of Student Engagement, the Community College Survey of Student Engagement, State data systems, or other relevant sources;

(S) the types of graduate and professional education in which graduates of the institution's four-year degree programs enrolled, gathered from such sources as alumni surveys, student satisfaction surveys, the National Survey of Student Engagement, State data systems, or other relevant sources;

(U) the retention rate of certificate- or degree-seeking, first-time, full-time, undergraduate students entering such institution.

2. The following provisions of 34 CFR § 668.72: Subsections (a), (b)(1), (b)(2), (c)(1), (c)(2), (g), (h), (i), (k), or (n) of 34 C.F.R. § 668.72 concerning misrepresentations about the nature of educational programs:

(a) The particular type(s), specific source(s), nature and extent of its institutional, programmatic, or specialized accreditation;
(b)(1) Whether a student may transfer course credits earned at the institution to any other institution;
(2) Conditions under which the institution will accept transfer credits earned at another institution;
(c) Whether successful completion of a course of instruction qualifies a student—
(1) For acceptance to a labor union or similar organization; or
(2) To receive, to apply to take or to take the examination required to receive, a local, State, or Federal license, or a nongovernmental certification required as a precondition for employment, or to perform certain functions in the States in which the educational program is offered, or to meet additional conditions that the institution knows or reasonably should know are generally needed to secure employment in a recognized occupation for which the program is represented to prepare students;
(g) The availability, frequency, and appropriateness of its courses and programs to the employment objectives that it states its programs are designed to meet;
(h) The nature, age, and availability of its training devices or equipment and their appropriateness to the employment objectives that it states its programs and courses are designed to meet;
(i) The number, availability, and qualifications, including the training and experience, of its faculty and other personnel;
(k) The nature and availability of any tutorial or specialized instruction, guidance and counseling, or other supplementary assistance it will provide its students before, during or after the completion of a course;
(n) Whether the academic, professional, or occupational degree that the institution will confer upon completion of the course of study has been authorized by the appropriate State educational agency.

3. The following provisions of 34 CFR § 668.73 concerning misrepresentations about the nature of financial charges:

(a) Offers of scholarships to pay all or part of a course charge;
(c) The cost of the program and the institution's refund policy if the student does not complete the program;
(d) The availability or nature of any financial assistance offered to students, including a student's responsibility to repay any loans, regardless of whether the student is successful in completing the program and obtaining employment; or
(e) The student's right to reject any particular type of financial aid or other assistance, or whether the student must apply for a particular type of financial aid, such as financing offered by the institution.

4. The following provisions of 34 CFR § 668.74 concerning misrepresentations about the nature of employability of graduates: Subsections (a), (b), (c), (d), (e), or (f):

(a) The institution's relationship with any organization, employment agency, or other agency providing authorized training leading directly to employment;

(b) The institution's plans to maintain a placement service for graduates or otherwise assist its graduates to obtain employment;
(c) The institution's knowledge about the current or likely future conditions, compensation, or employment opportunities in the industry or occupation for which the students are being prepared;
(d) Whether employment is being offered by the institution or that a talent hunt or contest is being conducted, including, but not limited to, through the use of phrases such as "Men/women wanted to train for * * *," "Help Wanted," "Employment," or "Business Opportunities";
(e) Government job market statistics in relation to the potential placement of its graduates; or
(f) Other requirements that are generally needed to be employed in the fields for which the training is provided, such as requirements related to commercial driving licenses or permits to carry firearms, and failing to disclose factors that would prevent an applicant from qualifying for such requirements, such as prior criminal records or preexisting medical conditions.

5. For those programs subject to 34 CFR § 668.6, the following provisions related to reporting and disclosure requirements for programs that prepare students for gainful employment in a recognized occupation: Subsections (b)(1)(i)-(v):

(b) Disclosures.
(1) For each program offered by an institution under this section, the institution must provide prospective students with—
(i) The occupations (by names and SOC codes) that the program prepares students to enter, along with links to occupational profiles on O*NET or its successor site. If the number of occupations related to the program, as identified by entering the program's full six digit CIP code on the O*NET crosswalk at http://online.onetcenter.org/crosswalk/ is more than ten, the institution may provide Web links to a representative sample of the identified occupations (by name and SOC code) for which its graduates typically find employment within a few years after completing the program;
(ii) The on-time graduation rate for students completing the program, as provided under paragraph (c) of this section;
(iii) The tuition and fees it charges a student for completing the program within normal time as defined in § 668.41(a), the typical costs for books and supplies (unless those costs are included as part of tuition and fees), and the cost of room and board, if applicable. The institution may include information on other costs, such as transportation and living expenses, but it must provide a Web link, or access, to the program cost information the institutions makes available under § 668.43(a);
(iv) The placement rate for students completing the program, as determined under a methodology developed by the National Center for Education Statistics (NCES) when that rate is available. In the meantime, beginning on July 1, 2011, if the institution is required by its accrediting agency or State to calculate a placement rate on a program basis, it must disclose the rate under this section and identify the accrediting agency or State agency under whose requirements the rate was calculated. If the accrediting agency or State requires an institution to calculate a placement rate at the institutional level or other than a program basis, the institution must use the accrediting agency or State methodology to calculate a placement rate for the program and disclose that rate; and
(v) The median loan debt incurred by students who completed the program as provided by the Secretary, as well as any other information the Secretary provided to the institution about

that program. The institution must identify separately the median loan debt from title IV, HEA program loans, and the median loan debt from private educational loans and institutional financing plans.

6. Subsection (a)(20) of 20 U.S.C. § 1094 and corresponding subsection (22) of 34 C.F.R. § 668.14(22) concerning misrepresentations in general.

7. Subsection (c) of 20 U.S.C. § 1091 concerning a student's satisfactory academic progress:

*A student must maintain satisfactory progress in the course of study in order to remain eligible for assistance. 20 U.S.C. § 1091(a)(2); 34 C.F.R. §§ 668.16(e), 668.32(f), and 668.34. [While this should be addressed through false cert. discharge, so far the Dep't has not extended false cert. this far.]

8. Agreement in Program Participation Agreement to comply with incentive compensation ban. 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(22).

9. Subsection 20 U.S.C. § 1094(a)(22) and the corresponding 34 C.F.R. § 668.14(24) for failure to comply with refund requirements.

10. A provision of applicable state law that specifies acts or omissions that constitute *per se* violations of state law.

11. Any other provisions the Secretary may from time to time identify, including any substantial abusive acts or omissions.