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March 18, 2016

The Honorable John King
United States Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Mr. Joseph A. Smith
Special Master
United States Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Relief to Student Borrowers

Dear Acting Secretary King and Special Master Smith:

We, the undersigned Attorneys General of Massachusetts, California, Connecticut, Hawaii, Illinois, Kentucky, Maine, Maryland, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia, as well as the Executive Director of the Office of Consumer Protection of Hawaii, write to share our views on the U.S. Department of Education's ("Department") negotiated rulemaking on borrower defense to repayment—the process by which student borrowers preyed upon by predatory schools can assert their legal rights to debt relief. In our respective jurisdictions, we have grown far too familiar with the fraud and abuse committed by certain schools in their efforts to secure federal loan funds and the devastation caused to borrowers. We wholeheartedly agree with the Department's express aim for the rulemaking: "to make the process of forgiving loans efficient, transparent, and fair—and to ensure students receive every penny of relief they are entitled to under law."¹ We wish to convey our support for a number of the revisions adopted by the Department in its most recent proposal but also call attention to areas that may further strengthen borrower defense. We believe that we are close to achieving a process that provides rightful relief to victimized students and holds predatory schools accountable to taxpayers.

We are particularly encouraged by three of the Department's changes to the draft rule: (i) the establishment of a group discharge process so that students subjected to the same abuses can be treated equally and efficiently, although we support revisions to the procedure; (ii) procedural changes to ensure that the Department's decision to grant a discharge is not an adversarial

¹ <http://www.ed.gov/news/press-releases/education-department-appoints-special-master-inform-debt-relief-process> (June 25, 2015 public statement by Under Secretary Ted Mitchell).



process that pits individual borrowers against schools; and (iii) new rules to limit the use of binding arbitration agreements by schools and protect the legal rights of students. We hope the Department will consider the following additional revisions at the final meeting of the rulemaking committee: (i) complete removal of any statute of limitations for victimized students to raise a borrower defense; (ii) language expanding the Department's reliance on the work of state attorneys general and other state agencies; and (iii) continued recognition of violations of state law as a basis for borrower defense.

1. Establish a group discharge process

A significant benefit to students in the Department's updated proposal is the new, streamlined group debt relief process in § 685.222(f)-(h). Our investigations and enforcement actions have repeatedly unmasked schools that engaged in systemic practices that subjected all prospective and enrolled students to the same egregious abuse and deception. As the Department recognized, a group process is necessary if we seek to provide relief to all students with a rightful claim, and it is consistent with the Department's current regulations and state consumer-protection laws.

The Department's own experience with implementing borrower defense for Heald students is the strongest argument in favor of an automatic group process. On June 8, 2015, the Department announced that the seriously misrepresented job placement rates at Heald campuses between 2010 and 2014 "entitle the defrauded students enrolled in these programs to a discharge of their Federal Direct Student loans,"² provided they complete an attestation form. The Department estimated that 50,000 students were eligible for a full discharge,³ but reported last December that just 1,312 students had navigated the process for seeking relief as of September 30, 2015—less than 3.0% of those eligible.⁴ The Department has appropriately responded with an approach that removes the burden from students.

A streamlined, automatic group approach to providing student borrower relief is consistent with the Department's current discharge practices and Secretary Duncan's promise to "make this [borrower defense] process as easy as possible for them [student borrowers], including by considering claims in groups wherever possible."⁵ Under the rules for seeking a closed school discharge, "[t]he Secretary *may discharge a loan under this section without an application from the borrower* if the Secretary determines, based on information in the Secretary's possession, that the borrower qualifies for the discharge."⁶ This language, permitting automatic, group discharges, is also found in the regulations authorizing discharge for false certification⁷ and Congress empowers the Secretary to adopt this provision.⁸

² <http://blog.ed.gov/2015/06/debt-relief-for-corinthian-colleges-students/>.

³ <https://www2.ed.gov/documents/press-releases/report-special-master-borrower-defense-1.pdf> .

⁴ <https://www2.ed.gov/documents/press-releases/report-special-master-borrower-defense-2.pdf> .

⁵ http://www.nytimes.com/2015/06/09/education/us-to-forgive-federal-loans-of-corinthian-college-students.html?_r=0 .

⁶ § 685.214(c)(2) (emphasis added).

⁷ § 685.215(c)(7).

⁸ 20 U.S.C 1087e(h) ("[T]he Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as defense to repayment of a loan").

Relatedly, the Department's updated draft includes a "rebuttable presumption" that students have reasonably relied on a school's substantial misrepresentations that the Department determines to be widespread.⁹ The Department's own definition of a "substantial misrepresentation" giving rise to borrower defense is "any misrepresentation to a person on which that person *could reasonably be expected to rely . . . to that person's detriment*,"¹⁰ a definition consistent with the unfair and deceptive trade practice laws in many states, which have long-recognized the importance of objective standards in distinguishing honest statements from fraudulent ones. Establishing a rebuttable presumption allows for an efficient, streamlined group process and ensures that when schools engage in patterns of unfair and deceptive conduct, they will be held accountable for all of it.

2. Avoid a process that pits victimized students against schools

The Department's revised rule no longer pits individual students against their school in an adversarial process. We support the Department's new framework and will continue to provide assistance in developing a process that is sufficiently simple and straightforward so that a student can navigate it successfully without a lawyer. We also support the Department's efforts to hold schools liable for reimbursement of discharged loans. However, fair and effective defense to repayment procedures must ensure accountability for students and taxpayers by preventing schools from making the process burdensome and expensive for borrowers.

3. Stop predatory schools from forcing students to sign away their legal rights

We applaud the Department for joining with consumer advocates and attorneys general in taking aggressive action to end the use by schools of forced arbitration agreements and similar restrictions on students' legal rights.

In advancing this proposal, the Legal Aid Community negotiator wrote, "When predatory schools bind their students to arbitrate any and all disputes that they may have against the school, it functions on the whole to suppress meritorious student complaints."¹¹ As attorneys general, we have witnessed the effectiveness of binding arbitration in silencing the aggrieved and cutting off the private legal rights of our consumers. Not only are consumers forced to waive certain fundamental legal rights, but the confidentiality of arbitration proceedings favors institutions at consumers' expense, because repeat players benefit from past arbitrations whereas aggrieved individuals have no access to precedent. Bans on class and representative actions often make it infeasible for students to secure legal representation. Preservation of a private right of action is critical to ensure school misconduct and unlawful actions cannot be swept under the rug, and students have the ability to seek damages or other legal remedies.

At a time when the unlawful conduct of abusive educational programs has generated ruinous student debts and cheated the taxpayers, we need more legal enforcement and strong

⁹ § 685.222(f)(3).

¹⁰ § 668.71(c).

¹¹ Proposal of Eileen Connor on behalf of the Legal Aid Community, February 11, 2016 (available at <http://www.legalservicescenter.org/project-attorney-urges-department-of-education-to-prohibit-for-profit-colleges-from-using-forced-arbitration-to-hide-fraud-and-deception-of-students/>)

safeguards, not less. As the Department has recognized here, the efforts of government agencies and the attorneys general cannot effectively counter this misconduct alone and students seeking loan forgiveness need access to publicly available complaints and court documents to achieve the relief they are owed. For these reasons, we strongly support the Department's proposed language.

We continue to support a few important revisions to the Department's proposal that will further strengthen borrower defense.

1. Remove the statute of limitations

While the revised statute of limitations language is an improvement over earlier drafts, a student borrower is offered just a four-year window to raise a breach of contract or substantial misrepresentation by the school as a defense to repayment of a Direct Loan for sums the student has already repaid.¹² Victimized students in our states are often unfamiliar with their legal rights and unaware of the violations committed against them until many years after the fact, if ever. Two federal agencies and three states had to complete multi-year investigations before Corinthian's Heald, Wyotech and Everest borrowers became aware that they had been deceived regarding placement rates. Many of these students have had their wages or tax returns garnished by the Department for years and, under the proposed rule, might never be able to recover those sums. Moreover, in similar contexts, like false certification discharge, there is no statute of limitations to bar recoupment of improper collections. Indeed, the Department's proposal to limit student reimbursement to just four years is inconsistent with the position taken by the Corinthian Special Master, who has provided reimbursements beyond four years. For these reasons, we urge you to remove the statute of limitations for raising a borrower defense entirely.¹³

2. Expand reliance on the work of state attorneys general and other government agencies

The Department's draft proposed rule allows distressed student borrowers to secure debt relief on the basis of an investigation or enforcement action by a state or federal agency only if the agency obtains a "contested judgment" against the school.¹⁴ This rule is too narrow to be effective and is inconsistent with the Department's commitment to "whenever possible, . . . rely on evidence established by appropriate authorities in considering whether whole groups of students (for example, an entire academic program at a specific campus during a certain time frame) are eligible for borrower defense relief."¹⁵ State attorneys general often settle cases or resolve investigations in order to secure monetary relief that aids both students and taxpayers. Attorneys general should not be forced to forego restitution and litigate with schools in order to ensure that investigative findings can form the basis of a defense to repayment for affected borrowers. We therefore urge that the Department revise § 685.222(b) to grant borrowers a defense to repayment if the government agency has secured "any judgment or determination in a court of competent jurisdiction or an admission by the school."

We also recommend that investigations by state agencies and legal aid organizations

¹² 685.222(c) & (d).

¹³ As noted, presently the Department may collect on federal student loans in perpetuity.

¹⁴ § 685.222(b).

¹⁵ <http://www.ed.gov/news/press-releases/fact-sheet-protecting-students-abusive-career-colleges>

shared with the Department should trigger an automatic review by the Department under § 685.222(f)(1), followed by a written determination within a reasonable period of time. Litigating cases against predatory schools can take years, during which time student borrowers suffer greatly. If state agencies can share their investigations with the Department in the manner outlined here, the Department can begin making discharge determinations much more quickly. Given the role of state regulators and state attorneys general in protecting consumers and enforcing state trade practices laws,¹⁶ and our recognized role in the “triad” of higher education oversight,¹⁷ we believe that this practical change will help streamline and strengthen borrower defense implementation.

Proposed language for § 685.222(f)(1): Upon the written request of a state attorney general, state or federal enforcement agency, or a legal aid representative, the Secretary shall initiate a process to determine, within a reasonable period of time, whether a group of borrowers has a common basis for borrower defense.

3. *Keep state law as a basis for borrower defense*

The Department’s proposal preemptively limits the categories of school misconduct that would give rise to a defense to repayment by creating a federal standard that excludes applicable violations of state law. The proposal limits students’ rights to circumstances where a school either breached a contract or engaged in “substantial misrepresentations,” excluding other categories of egregious school misconduct that violate state law.

Breach of contract and substantial misrepresentation do not capture all the misconduct covered by state laws that protect students from exactly the sort of abuse that borrower defense seeks to remedy. We are concerned that the Department’s proposal to limit viable defenses to these two categories would exclude, for example, (a) violations of state law related to affirmative-disclosure obligations, debt collection, and *per se* prohibitions on certain advertising techniques, such as the use of government and military seals; (b) “unfair” business acts or practices in violation of certain state UDAP laws; (c) violations of other federal laws that are incorporated into state law (through, for example, the “unlawful” prong of California’s Unfair Competition Law¹⁸), such as recruiter incentive-compensation bans; and (d) state-law theories of liability predicated on aiding and abetting and conspiracy.

We do not oppose the creation of a national standard, so long as it serves as a federal floor applicable to all borrowers. But to ensure that maximum, long-standing consumer

¹⁶ These statutes generally make unlawful any unfair or deceptive trade practices as defined by state law. *See, e.g.*, Mass. Gen. Law c. 93A, § 2 (“... unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”); 815 Ill. Comp. Stat. 505/2 (“... unfair or deceptive acts or practices . . . in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.”). Indeed, many trade practices statutes look to the attorneys general not only as the primary enforcers of their terms, but also as the regulators who clarify the meaning of their statutory provisions. *See, e.g.*, Mass. Gen. Law c. 93A, §§ 2, 4.

¹⁷ *See* United States Government Accountability Office, “HIGHER EDUCATION: Education Should Strengthen Oversight of Schools and Accreditors; Table 1: Oversight Roles and Responsibilities of the ‘Triad,’” December 2014, (available at <http://www.gao.gov/assets/670/667690.pdf>).

¹⁸ *See* Cal. Bus. & Profs. Code § 17200 et seq.

protections remain in place for borrowers, we urge the Department to retain the further protections of state law in any new standard.¹⁹

Finally, we ask that the Department clarify in the rules and other communications that borrowers with federal consolidation loans, FFEL loans, and Parent PLUS loans are eligible for relief based on defense to repayment. Many students who attended Corinthian and other predatory schools have FFEL loans or have consolidated their loans since the initial disbursement, and these borrowers remain confused regarding their rights to borrower defense relief. We appreciate the Department taking this opportunity to make clear that all such individuals are eligible for the same relief available to other federal loan borrowers.

We appreciate the Department's close attention to our recommendations and the recommendations of members of the negotiated rulemaking committee and applaud the progress we have made together. After years of abuse and deception by predatory for-profit schools, we join in the belief that the borrower defense rule will provide a means to help restore accountability for taxpayers and fairness for students. We look forward to seeing the product of your negotiations this week.

Sincerely,



Maura Healy
Massachusetts Attorney General



Kamala D. Harris
California Attorney General



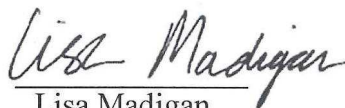
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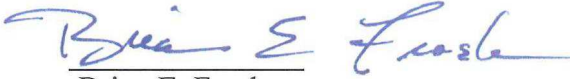
¹⁹ Moreover, any perceived burden of interpreting the laws of the various states will not be eased by excluding state law. Under the Department's existing regulations, violations of state law are the *only* basis for borrower relief. The Department's proposed standard that excludes state law will not apply retroactively. Thus, billions of dollars of outstanding federal student loans dispersed before July 2017 will remain subject to a standard for which state law remains the *only* avenue for relief.



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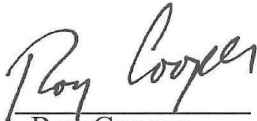
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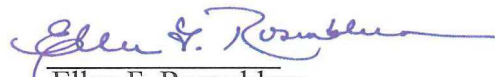
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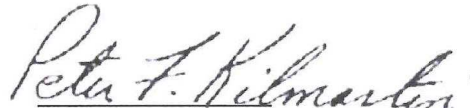
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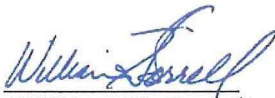
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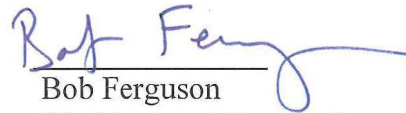
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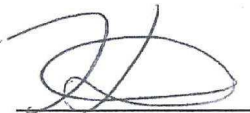
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