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August 1, 2016

The Honorable John B. King, Jr.
Secretary of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue SW
Washington, DC 20202

Re: Notice of Proposed Rulemaking, 81 Fed. Reg. 39,330 (June 16, 2016)
RIN 1840-AD19; Docket ID ED-2015-OPE-0103

Dear Secretary King:

Public Citizen submits these comments on the Department of Education's proposed rule to amend Title IV regulations governing institutions that receive federal financial assistance. We commend the Department for proposed amendments to 34 C.F.R. § 685.300, which attempt to rein in schools that use forced arbitration provisions, class-action bans, and mandatory internal dispute resolution processes with their students. These practices impede students' access to the civil justice system and hide wrongdoing from regulators and the public. The Department is right to address them.

We are concerned, however, that a significant shortcoming in the rule—a provision that allows schools to continue to use pre-dispute arbitration agreements that are not a condition of enrollment—could undermine all of the Department's efforts to combat forced arbitration. Indeed, because of this shortcoming, some students might be worse off under the Department's proposed rule than if the Department had not acted at all. Accordingly, the Department should bar Direct-Loan-participating schools from entering into or relying on *any* pre-dispute arbitration agreements (including agreements with "opt-out" provisions) with students.

In addition, to ensure that the rule adequately protects students and taxpayers, we urge the Department, in its final rule, to expand the scope of claims and students covered by the amendments to § 685.300. We also recommend that the Department prohibit schools' use or enforcement of "delegation clauses" in arbitration agreements to ensure that any questions about the enforceability or scope of arbitration agreements are resolved by a court instead of an arbitrator.

In the comments that follow, we discuss these concerns and recommendations in greater detail and provide other suggestions to improve the Department's proposed amendments to § 685.300. We also discuss the portions of the rule that we strongly support and direct the Department to relevant evidence and case law supporting these portions of the rule.

I. The Rule Should Prohibit Schools from Entering into or Relying on *Any* Pre-Dispute Arbitration Agreements with Students.

The Department's proposed rule does not bar Direct-Loan-participating schools from entering into or relying on pre-dispute arbitration agreements. Instead, the proposal would forbid covered schools from "compel[ling]" a student to enter into a pre-dispute arbitration agreement and from "rely[ing] in any way" on what the Department terms a "*mandatory* pre-dispute arbitration agreement."[1] The Department defines a "pre-dispute arbitration agreement" as one "between a school and a student providing for arbitration of any future dispute between the parties," and a "mandatory pre-dispute arbitration agreement" as a "pre-dispute arbitration agreement included in an enrollment agreement or other document that must be executed by the student as a condition for enrollment at the school."[2] Although the Department does not define what constitutes a "compel[led]" arbitration agreement, that term would presumably be interpreted consistently with the regulation's proposed definition of "mandatory pre-dispute arbitration agreement."

Under the Department's proposal, schools could provide students at the time of enrollment with a pre-dispute arbitration agreement that states, buried in the type of "fine print" that the Department acknowledges is often used by proprietary schools,[3] that the agreement is not required to enroll. Schools could thus side-step the rule simply by not mentioning a pre-dispute arbitration agreement but handing it to a student as part of the packet of enrollment materials. They could also condition benefits other than enrollment on a student's willingness to sign a pre-dispute arbitration agreement. And schools might even be permitted to include pre-dispute arbitration agreements in mandatory enrollment contracts, so long as the specific clause constituting the pre-dispute arbitration agreement allows the consumers to check "yes" or "no" as to acceptance of that clause, since the clause in that circumstance need not—as the proposed regulation states—"be executed by . . . students as a condition for enrollment at the school."[4]

Accordingly, under the Department's proposal, students who did not know that an arbitration agreement was part of a contract presented to them, did not understand what it meant, or did not know they did not have to sign it would continue to sign pre-dispute arbitration agreements and regulators and the public could be kept in the dark, just as they always have been. As a result, the proposed exception permitting pre-dispute arbitration agreements so long

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[1] U.S. Department of Education, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 39,330, 39,421 (proposed June 16, 2016) (to be codified at 34 C.F.R. § 685.300(f)(1)) (emphasis added).

[2] *Id.* at 39,422 (to be codified at 34 C.F.R. § 685.300(i)(4), (5)).

[3] U.S. Department of Education, *Press Release, U.S. Department of Education Takes Further Steps to Protect Students from Predatory Higher Education Institutions*, Mar. 11, 2016, http://www.ed.gov/news/press-releases/us-department-education-takes-further-steps-protect-students-predatory-higher-education-institutions.

[4] 81 Fed. Reg. at 39,422 (to be codified at 34 C.F.R. § 685.300(i)(5)). For one example of such a contract, see *Spring Lake NC, LLC v. Beloff*, 110 So. 3d 52, 55 (Fla. Dist. Ct. App. 2013), which describes a residency agreement for a nursing home that allowed the consumer "on one line to accept the arbitration agreement" or "on the next line to decline" it. The consumer could not recall whether the company representative had explained the provision to her, but she checked "yes" based on her "feeling that her husband," who would reside in the home, "would not get any attention" otherwise. *Id.*

as they are not a condition of enrollment would render the arbitration provisions in this rule of little to no utility for students who need them most. Indeed, some students might be worse off under the Department's proposed rule than if the Department had not acted at all: Students wishing to challenge arbitration agreements as unconscionable under state law will have to contend with industry arguments that the agreements are expressly permitted by federal law.

We urge you to adopt a final rule that forbids the use of or reliance on *any* pre-dispute arbitration agreements with students (including agreements with an "opt-out" provision) because all such agreements, once signed, force students to arbitrate any claims that may later arise.

A. The Department's proposal does not account for evidence demonstrating that many students or other consumers do not read or understand forced arbitration agreements, and that those who do feel powerless to challenge them.

The Department's proposal assumes that if a pre-dispute arbitration agreement is not a condition of enrollment, students will be aware of that fact and, if they sign such an agreement, will do so knowingly and without coercion. Substantial evidence from cases filed against for-profit schools and from broad-based studies and other research demonstrates that the assumption is misplaced.

First, nothing in the proposed rule would require schools to tell students—verbally or in writing—that pre-dispute arbitration agreements are not a condition of enrollment; schools could instead remain silent about the mandatory or voluntary nature of the agreements. Under those circumstances, students would likely assume that signing is mandatory given the mandatory nature of other documents that students sign at the same time.

Second, even if the agreements state that they are not a condition of enrollment, students are unlikely to have knowledge of that fact. Consumers often report perceiving that form contracts are "nonnegotiable" and thus "a waste of time to read," let alone to consider in depth.[5] Consumers are also less likely to read contracts when the contracts are provided by an institution they trust and believe to be subject to stringent regulation. For example, in one recent study, over ninety-five percent of a sample of college students at DePaul University signed a three-page contract prior to being part of a psychological experiment at the school, even though the contract contained "outrageous terms" within the first two paragraphs and included a clause indicating that the contract was entirely unrequired for participation in the experiment.[6] The participants who signed stated their trust in a researcher's assertions about the contract and their trust in the university and federal standards applicable to it as the most influential factors in leading them to sign the contract without reading it.[7]

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[5] Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 Wake Forest L. Rev. 863, 881 (2010).

[6] Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & Bus. 617, 627, 678-79 (2009).

[7] *Id.* at 684.

Third, even if students read pre-dispute arbitration agreements, they are unlikely to understand their importance. Court records indicate that many prospective students at for-profit institutions (like most lay people) do not know what arbitration is,[8] and that reading dense contractual language does not assist their understanding.[9] Indeed, in one case against a for-profit college that used a forced arbitration clause, a recruiter who interviewed hundreds of prospective students each year "testified that she did not understand the arbitration provision herself."[10]

Student experiences recounted in court records are confirmed by research in the consumer context. The Consumer Financial Protection Bureau (CFPB) recently conducted a national survey of consumers about their perceptions of contracts they have with issuers of credit cards and compared those perceptions to the actual terms of the consumers' contracts. Among those consumers whose credit card agreements contained a pre-dispute arbitration clause, more than one-third wrongly believed that they could sue in court, and another half were unsure.[11] In addition, among those credit card holders who indicated that they had heard of arbitration as a method for resolving disputes, only about one-fifth correctly answered that an arbitrator actually decides the dispute, as opposed to facilitating resolution by the parties.[12]

Similarly, a recent study in which the researchers asked respondents to read a sample credit card contract with a mandatory arbitration clause found that more than half did not realize the contract provided for arbitration or did not know whether it did.[13] Even among those respondents who recognized that the contract provided for arbitration, 61 percent believed that consumers would have a right to have a court decide their dispute with the company.[14] And

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[8] *See, e.g.*, *Rude v. NUCO Educ. Corp.*, No. 25549, 2011 WL 6931516, at *2 (Ohio Ct. App. Dec. 30, 2011) ("None of [plaintiffs] knew what arbitration was or asked any questions about the arbitration provision. [The recruiter] testified that, although she interviews hundreds of applicants each year, she has never been asked a question about the arbitration provision and she has not mentioned it when meeting with prospective students."); Aff. of Brittney Tyus ¶¶ 2, 4, *Tyus v. Va. Coll.*, No. 15-cv-00211, 2015 WL 4645513 (M.D. Ala. Aug. 4, 2015) (stating that plaintiff did not know what arbitration was and did not recall seeing an arbitration agreement at the time of enrollment); Aff. of Curtis Wardwell ¶¶ 12-13, *Dean v. Draughons Jr. Coll., Inc.*, 917 F. Supp. 2d 751 (M.D. Tenn. 2013) (No. 12-cv-00157) (same); Decl. of Shamekia Goodwin ¶¶ 9, 11-12, *Deck v. Miami Jacobs Bus. Coll. Co.*, No. 12-cv-00063, 2013 WL 394875 (S.D. Ohio Jan. 31, 2013) (same); Decl. of Jacquel Kimble ¶ 6, *Kimble v. Rhodes Coll., Inc.*, No. 10-cv-05786, 2011 WL 2175249 (N.D. Cal. June 2, 2011) (same); Decl. of Krystle Bernal ¶ 10, *Bernal v. Burnett*, 793 F. Supp. 2d 1280, 1282 (D. Colo. 2011) (No. 10-cv-01917) ("I have [sic] never heard of arbitration when I enrolled in Westwood College and did not even know what the term 'arbitration' meant."). For ease of reference, Public Citizen includes the above declarations and affidavits, and all others cited in these comments, in Appendix A.

[9] *See, e.g.*, Decl. of Chelsi Miller ¶ 7, *Miller v. Corinthian Colls., Inc.*, 769 F. Supp. 2d 1336 (D. Utah 2011) (No. 10-cv-00999) ("I quickly read through some of the provisions but did not understand most of them."); Decl. of Christie Cotton ¶ 4, *Miller*, 769 F. Supp. 2d 1336 (No. 10-cv-00999) ("[The contract language] all seemed complicated and I did not understand most of what I read."); *see also* Aff. of Curtis Wardwell ¶ 14, *Dean*, 917 F. Supp. 2d 751 (No. 12-cv-00157) ("When I signed the agreement, I believed that I was merely agreeing that I had read and received a copy of the agreement.").

[10] *Rude*, 2011 WL 6931516, at *2.

[11] Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress Pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)* § 3.1, at 3-4 (2015).

[12] *Id.* § 3.4.3, at 21.

[13] Jeff Sovern, *et al.*, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 Md. L. Rev. 1, 45 (2015).

[14] *Id.* at 47.

fewer than one in five respondents realized that the contract required them to give up their right to a jury trial, even though the contract's arbitration provision made this waiver express.[15]

Accordingly, even assuming a school uses an arbitration clause that explicitly states it is not a condition of enrollment—language that the proposed rule does not even require—the assumption that students will understand that clause is not justified.

Fourth, even if students understand, at least in part, that a pre-dispute arbitration agreement is not a condition of enrollment, they are likely to feel constrained to sign it. As court records demonstrate, recruiters are trained to move students quickly and persuasively through the enrollment process,[16] often leaving students feeling pressured[17] and without adequate time to understand the "packet[s]" of paperwork that recruiters ask them to sign.[18] If students do have doubts about a provision in an enrollment agreement, they often ask the recruiter and then trust the veracity of assurances that the recruiter makes.[19] Some recruiters have been able to assuage

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[15] *Id.* at 49-50.

[16] *See, e.g.*, Decl. of Shayler White ¶ 3, *Miller*, 769 F. Supp. 2d 1336 (No. 10-cv-00999) ("[N]ew admissions representatives learn structured and strategic communication techniques to increase a prospective student's chances of enrolling during the recruiting process."); *see also Guzman v. Bridgepoint Educ., Inc.*, No. 11-cv-00069, 2013 WL 593431, at *2 (S.D. Cal. Feb. 13, 2013) (involving allegations that defendant's advisors "are trained to engage in the same misleading practices to recruit and enroll as many students as possible [among the veteran community], without regard for the recruits' best interests"); *Mitchell v. Career Educ. Corp.*, No. 11-cv-01581, 2011 WL 6009658, at *2 (E.D. Mo. Dec. 1, 2011) (involving allegations "that Defendants' staff was trained to manipulate potential students to enroll and endeavored to sign up such students on the first in-person visit" (internal quotation marks omitted)); *Bernal*, 793 F. Supp. 2d at 1282 ("According to Plaintiffs, Defendants provide extensive training in . . . high-pressure sales tactics.").

[17] *See, e.g.*, *Gragg v. ITT Tech. Inst.*, No. 14-cv-3315, 2016 WL 777883, at *2, *5 (C.D. Ill. Feb. 29, 2016) (involving allegations of duress in signing of enrollment agreement); *Asbell v. Educ. Affiliates, Inc.*, No. 12-cv-00579, 2013 WL 1775078, at *4 (M.D. Tenn. Apr. 25, 2013) (involving allegations of "lack of time afforded . . . to contemplate the contract"); *Bernal*, 793 F. Supp. 2d at 1282 (involving allegations of "high-pressure sales tactics"); *Miller*, 769 F. Supp. 2d at 1348 ("[T]here is evidence to show that Plaintiffs felt rushed into signing the enrollment agreements and that Defendant may have employed questionable practices in getting students to sign enrollment agreements . . . ."); *Morgan v. Sanford Brown Inst.*, No. 075074, 137 A.3d 1168, 1173 (N.J. June 14, 2016) (involving allegations of "high-pressure . . . business tactics"); *Rude*, 2011 WL 6931516, at *2 ("The students said that, during individual meetings with the nursing recruiter . . . they were pressured to sign the agreement immediately or risk losing their spot in the next class."); *Mitchell*, 2011 WL 6009658, at *3 (involving allegations of "high pressure sales tactics"); Decl. of Lishiana Damico ¶ 8, *Asbell*, 2013 WL 1775078 (No. 12-cv-00579) ("Plaintiffs were presented with the enrollment agreements, and quickly told to sign the enrollment agreement in order to move the admissions and financial aid process forward."); Decl. of Shamekia Goodwin ¶¶ 4, 7, *Deck*, 2013 WL 394875 (No. 12-cv-00063) ("During the application process, I was given a large number of documents to complete or sign. . . . The entire process was rushed and I was not provided an opportunity to review the document."); Decl. of Shayler White ¶ 11, *Miller*, 769 F. Supp. 2d 1336 (No. 10-cv-00999) (describing the enrollment agreement process as "always a hurry"); Decl. of Plaintiff Chelsi Miller ¶ 6, *Miller*, 769 F. Supp. 2d 1336 (No. 10-cv-00999) ("Everything after [plaintiff talked with the admissions representative] happened really quickly."); Aff. of Curtis Wardwell ¶ 19, *Dean*, 917 F. Supp. 2d 751 (No. 12-cv-00157) ("I felt pressure from Daymar representatives to quickly sign the agreement and was not given the opportunity to later withdraw my signature.").

[18] Decl. of Plaintiff Chelsi Miller ¶ 6, *Miller*, 769 F. Supp. 2d 1336 (No. 10-cv-00999); *see also* Decl. of Krystle Bernal ¶ 9, *Bernal*, 793 F. Supp. 2d 1280 (No. 10-cv-01917) ("When I was enrolling, the Admissions Representative gave me a bunch of documents to sign.").

[19] *See, e.g.*, Decl. of Krystle Bernal ¶¶ 8, 12, *Bernal*, 793 F. Supp. 2d 1280 (No. 10-cv-01917) ("I relied completely on the Admissions Representative to explain the enrollment documents to me. . . . I didn't think I needed

students' concerns by downplaying the importance of contract terms. For example, when one student allegedly questioned her recruiter regarding a contractual provision "advising that the school [did] not guarantee employment," she was inaccurately told that "the provision was a formality" and that she was "guaranteed a job."[20]

Social science research confirms this tendency for consumers to "ask the salesperson" when they have concerns about an agreement or an aspect of an agreement, instead of performing independent research.[21] Sales people may be able to allay concerns by providing more plausible explanations or even senseless ones.[22] As the Senate HELP Committee found in its investigation of the for-profit college industry, some schools already rely on similar techniques to overcome student objections, such as by answering questions with questions, and by creating a false sense of urgency at the time of enrollment.[23] They also train staff to "identify and manipulate emotional vulnerabilities."[24] For-profit schools could easily channel these tactics toward pressuring students to sign pre-dispute arbitration agreements that are not technically a condition of enrollment.

Research also indicates that parties who view themselves as depending on the trust of others—such as prospective students targeted by for-profit colleges—may feel the urge to demonstrate trusting behavior.[25] "[P]otential victims of fraud, especially those who have to apply for a loan or otherwise be trusted in return may feel that they cannot show any hesitation in trusting the would-be defrauder."[26] There is little to counteract this tendency to display trusting behavior. People tend to be optimistic when signing contracts; they assume that disputes will not arise. As a result, they often do not fully consider terms that are only implicated if something goes wrong.[27]

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to be concerned about what was in the enrollment documents because I trusted the school and the Admissions Representative to be looking out for my best interests.").

[20] *Montgomery v. Corinthian Colls., Inc.*, No. 11 C 365, 2011 WL 1118942, at *4 (N.D. Ill. Mar. 25, 2011).

[21] Stark & Choplin, *A License to Deceive*, 5 N.Y.U. J.L. & Bus. at 662.

[22] *Id.* at 665; *cf. Foremost Ins. Co. v. Parham*, 693 So. 2d 409, 440 (Ala. 1997) (Butts, J., dissenting) ("It is no surprise that even educated consumers find it difficult to fully understand what they must sign and be bound by; this is precisely why they often rely so heavily upon representations that are made to them as to the meaning of certain terms and provisions, particularly when they are made in a friendly voice and with an assuring smile.").

[23] U.S. Senate Health, Education, Labor and Pensions Committee, For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success 63-65 (2012) (hereinafter, Senate HELP Report), *available at* http://1.usa.gov/1e1MM0U.

[24] Department of Education, Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890, 64,907 (Oct. 31, 2014) (final rule) (hereinafter, Gainful Employment Rule).

[25] J. Mark Weber, Deepak Malhotra & J. Keith Murnighan, *Normal Acts of Irrational Trust: Motivated Attributions and the Trust Development Process*, 26 Res. in Organizational Behav. 75, 95–96 ("[E]xaggerated evaluations of trustworthiness are likely to be shaped by feelings of dependence and can lead to precipitous acts of trust.").

[26] Stark & Choplin, *A License to Deceive*, 5 N.Y.U. J.L. & Bus. at 669.

[27] *Cf.* Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan. L. Rev. 211, 227 (1995) ("[C]ontracting parties are likely often to not even try to think liquidated damages provisions through, and are therefore unlikely to fully understand the implications of such provisions.").

B. The Department's proposal will leave some students worse off than if the Department had not acted and invites abuse by the most predatory schools with little possibility of enforcement.

Two other key considerations confirm that the rule should prohibit pre-dispute arbitration agreements with students. First, the Department's proposal will leave some students worse off than if the Department had not acted at all. Students arguably subject to pre-dispute arbitration agreements frequently challenge the agreements by asserting "generally applicable contract defenses, such as fraud, duress, or unconscionability."[28] Such challenges are consistent with the Federal Arbitration Act (FAA), which "provides that written arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[29] Although these challenges are difficult to mount, some students succeed.[30]

Unfortunately, the Department's proposal would open the door to a host of arguments by the for-profit education industry to support enforcement of pre-dispute arbitration agreements. Schools would undoubtedly argue that contract defenses based on duress, for example, must be evaluated in light of the Department's regulation, which permits pre-dispute arbitration agreements so long as they are not a condition of enrollment. For-profit schools may even contend that the Department's regulation impliedly preempts state contract defenses based on unconscionability and other grounds.[31] Although we believe these arguments should be rejected, even their invocation in a case would erect a new barrier—both in terms of time and litigation expenses—for students who are already at a disadvantage when seeking justice against their schools.

Second, as the Department recognizes, this rulemaking is necessary to "protect student loan borrowers from misleading, deceitful, and predatory practices" used by some Title IV-participating schools.[32] And the Department has acknowledged the "accumulation of evidence of misrepresentations to consumers by for-profit institutions regarding their outcomes."[33] Thus, although the proposed rule does not purport to permit schools to lie or mislead students about whether a pre-dispute arbitration agreement is a condition of enrollment, the Department must take into account the fact that some schools will do so, just as they have with respect to other material information at the time of enrollment.

Unfortunately, under the Department's proposal, the agency would have a difficult time taking enforcement action against schools that flout the regulations in this way. The Department would need to investigate the specific facts and circumstances leading to a student's assent to a

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[28] *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

[29] *Id.* (quoting 9 U.S.C. § 2) (emphasis omitted).

[30] *See, e.g.*, *Rosendahl v. Bridgepoint Educ., Inc.*, No. 11CV61, 2012 WL 667049, at *11 (S.D. Cal. Feb. 28, 2012) (declaring portions of an arbitration agreement unconscionable under state law and forbidding their enforcement).

[31] *Cf. Boomer v. AT&T Corp.*, 309 F.3d 404, 423 (7th Cir. 2002) (holding that "state law challenges to the validity of [an] arbitration clause [we]re impliedly preempted by the Communications Act").

[32] 81 Fed. Reg. at 39,330.

[33] Gainful Employment Rule, 79 Fed. Reg. at 64,911, 65,034-35.

pre-dispute arbitration agreement. And where an agreement states that it is not a condition of enrollment, the Department may have even more difficulty proving that a school trained its representatives to make contrary representations or mislead students by omission. In contrast, a complete bar on pre-dispute arbitration agreements offers a clear, bright-line rule for enforcement purposes: If a school enters into a pre-dispute arbitration agreement that reaches claims and students covered by the Department's regulations, the school has violated its Program Participation Agreement (PPA) with the Department and must answer for that violation.

The Department unquestionably intends to help, rather than hinder, students enrolled in the most predatory schools. To meet that aim, it must forbid the use of or reliance on all pre-dispute arbitration agreements, not just those imposed as a condition of enrollment.

C. The Department should make clear that pre-dispute arbitration agreements with "opt-out" provisions are impermissible.

In the notice of proposed rulemaking, the Department sought comment on whether it should deem "mandatory"—and thus impermissible—those "pre-dispute arbitration agreements [that] allow the consumer within a set period to affirmatively opt-out of an agreement to arbitrate."[34] It stated that its proposed definition of "mandatory pre-dispute arbitration agreement" would treat these agreements as "binding unless the student affirmatively opts out of the agreement."[35]

We strongly urge the Department to forbid the use of or reliance on *all* pre-dispute arbitration agreements, including agreements with opt-out provisions. An opt-out agreement to arbitrate still generally becomes final and binding before a dispute arises, so it deprives students of the ability to opt for arbitration (or not) at a time when they can fully understand what rights they are giving up by signing an arbitration contract.

Permitting pre-dispute arbitration agreements with an opt-out provision would create an exception that swallows the Department's forced arbitration rule. It would invite schools to portray their agreements as voluntary while providing students only a short period to opt out or by otherwise making it difficult for students to do so. For example, Cortiva Institute already uses an arbitration provision that purports to allow students to reject the agreement, but its students must do so within thirty days of signing the agreement and must send "a signed rejection notice" by mail to a specific corporate office.[36] Similarly, forced arbitration provisions used by Brown Mackie College and South University forbid consolidation of any claims, including by way of a class action, in arbitration but state that students can opt out of this "single-case provision" only "by delivering via certified mail return receipt a written statement to that effect to the Vice

[34] 81 Fed. Reg. at 39,384.

[35] *Id.*

[36] Cortiva Institute Enrollment Agreement at 11, as obtained by The Century Foundation, attached as Appendix B, *also available at* https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/ (click on source documents).

President and Senior Counsel" for the school within 30 days of executing the enrollment agreement.[37]

Unsurprisingly, court records indicate that students presented with opt-out provisions for arbitration agreements or other oppressive contract terms rarely opt out. For example, Everest College—owned by now defunct Corinthian Colleges—permitted students in some years to opt out of a contract term that forbade the consolidation of claims in arbitration.[38] In one case, students brought a class action alleging that Corinthian misled them about program information at Everest College—including with respect to job placement rates, the subject of ongoing borrower defense proceedings before the Department of Education.[39] The court noted that twenty-eight of the plaintiffs had signed a version of the agreement with a class waiver that permitted opt-outs, and had even initialed the paragraph advising of their right to opt out.[40] Not one of them did so.[41] As this example makes clear, permitting schools to use pre-dispute arbitration agreements with opt-out provisions will continue to leave students and taxpayers at risk of paying for schools' wrongdoing. The Department has now forgiven more than $8 million in student loans for former Everest students, based on its findings that Corinthian misrepresented job placement data.[42]

In another particularly egregious case involving Everest, the school included both a class-action waiver in its arbitration provision and a provision elsewhere in its enrollment agreement waiving all potential claims that the student might have against the school arising from or relating to the student's education.[43] This latter clause was a unilateral waiver of all claims; it provided *no* benefit at all to the student.[44] Both waivers included a notice of the opportunity to opt out for a limited time, which appeared in italics, and which required initialing.[45] However, the student who brought the suit on behalf of a class declared that her recruiter "did not explain

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[37] Public Citizen Petition Appendix at A41 (Brown Mackie), A131 (South University), attached as Appendix D to these comments, *also available at* http://www.citizen.org/documents/Appendix-Arbitration-Clauses-Educational-Institutions.pdf. For other examples of onerous opt-out provisions, see, e.g., *O'Connor v. Uber Techs., Inc.*, No. C-13-3826, 2013 WL 6407583, at *6 (N.D. Cal. Dec. 6, 2013) (describing a provision that required workers to opt out of an arbitration agreement by hand-delivering a letter or sending it by overnight mail to the company's general counsel).

[38] *Montgomery*, No. 11 C 365, 2011 WL 1118942, at *2.

[39] *Id.*

[40] *Id.*

[41] *Id.* at *4.

[42] U.S. Department of Education, Fourth Report of the Special Master for Borrower Defense to the Under Secretary 3, June 29, 2016, *available at* http://www2.ed.gov/documents/press-releases/report-special-master-borrower-defense-4.pdf.

[43] *See* Decl. of Ben Suter in Supp. of Defs.' Mot. to Compel Individual Arbitration and Dismiss or Stay Proceedings at 13-15, *Kimble*, 2011 WL 2175249 (No. 10-cv-05786) ("I hereby release and hold this School harmless from and against any and all claims of any kind whatsoever, including allegations related to needle sticks, allied health and automotive practice and techniques, slips and falls and quality of equipment and instructions . . . against the School . . . , which I may have for any reason arising out of or relating to my education. . . . I further agree that if I bring any Claim against the School, I shall reimburse the School for its attorney's fees and costs incurred as a result thereof.").

[44] *See id.* at 13-14.

[45] *Id.* at 14-15.

. . . what all the paperwork was for" or mention that she "could opt out of any terms in the paperwork"; instead, the recruiter "made clear that [she] just needed to sign the paperwork."[46] The student did not opt out of either waiver.[47]

Available data outside the education context confirm that individuals rarely exercise opt-out provisions in adhesion contracts (and it is not clear that they even know about their right to do so). As part of its comprehensive study of arbitration in the consumer financial context, the CFPB surveyed hundreds of consumers about their credit card contracts. Although more than one-quarter of credit card agreements that the CFPB reviewed included an opt-out provision, the CFPB identified only three consumers who stated that an opt-out right had been available to them in their credit-card agreements, none of whom recalled exercising that right.[48] In the employment context, data disclosed in litigation against the ride-sharing company Uber showed that only 0.17% of Uber drivers in California opted out of an arbitration clause included in their agreements with the company.[49]

Condoning the use of opt-out provisions could even have a *negative* effect on students. Such a rule would create incentives for schools to adopt these provisions, which would in turn make it more difficult for students to show that the provisions are unconscionable under state law. For example, in one of the cases described above involving Corinthian, a court relied on the fact that students could have opted out of a class-action waiver as support for its conclusion that the arbitration agreement was not an "adhesion agreement in which the[] [plaintiffs] were forced to accept Defendants' terms."[50] In another case involving a suit over consumer lending practices, a court declined to hold an arbitration provision unconscionable based in part on the defendant's use of an opt-out provision, which—in the court's view—gave the plaintiff "complete control over the terms of the agreement."[51]

D. The Department should stand firm in its view that conditioning federal funds on a school's agreement not to use or rely on forced arbitration clauses is permissible under federal law.

1. The Department may condition federal funding on a school's agreement not to use pre-dispute arbitration agreements without violating the Federal Arbitration Act (FAA). Doing so is fully consistent with Section 2 of the FAA, which provides that written agreements to arbitrate are "valid, irrevocable, and enforceable," except where grounds "exist at law or in equity for the revocation of any contract."[52] The proposed rule, and a rule that incorporates our recommendations, would not purport to render unenforceable any existing pre-dispute arbitration

[46] Decl. of Jacquel Kimble ¶¶ 5-6, *Kimble*, 2011 WL 2175249 (No. 10-cv-05786).

[47] *See id.* ¶ 7.

[48] CFPB, *Arbitration Study*, § 2.5.1, at 31, § 3.4.3, at 20-21.

[49] Appellees' Joint Resp. Br. at 8, *Mohamed v. Uber Techs., Inc.*, Nos. 15-16178, 15-16181, 15-16250 (9th Cir. Jan. 11, 2016) (citing a district court exhibit as the basis for the calculation).

[50] *Montgomery*, No. 11 C 365, 2011 WL 1118942, at *4.

[51] *Fluke v. Cashcall, Inc.*, No. 08-5776, 2009 WL 1437593, at *8 (E.D. Pa. May 21, 2009).

[52] 9 U.S.C. § 2.

agreements between institutions and their students.[53] Schools could attempt to modify existing agreements if they wished and were legally able to do so, but they would also have the alternative of notifying students subject to the agreements that the schools would not enforce their contractual right to compel arbitration. In the event that any student subject to an existing agreement wished to arbitrate a claim, he or she would still have the right to compel arbitration by the school under the terms of the agreement.

Nor would regulating pre-dispute arbitration agreements as proposed or with our recommendations included interfere with the FAA's purposes. As the Supreme Court has explained, the FAA was enacted "in response to widespread judicial hostility to arbitration agreements."[54] Under the English common law and in American courts until 1925, when the FAA was adopted, many judges refused to enforce existing arbitration agreements.[55] Section 2's mandate thus evinces Congress's goal of ensuring that private arbitration agreements, once entered into by the parties, "are enforced according to their terms."[56] Restricting Title IV funds in the manner contemplated does nothing to interfere with that goal.

Indeed, the Supreme Court has repeatedly stated that "arbitration is a matter of contract,"[57] and that "the FAA does not require parties to arbitrate when they have not agreed to do so."[58] Here, institutions have a choice. They remain free to use pre-dispute arbitration agreements with their students, but they may not—through the receipt of funds through the Direct Loan program—require U.S. taxpayers to provide financial support to them. Conversely, they may opt to receive Title IV money, but they must agree as a reasonable condition on that funding not to use pre-dispute arbitration agreements or rely on existing ones with their students. Nothing in the FAA prevents anyone, including an educational institution, from agreeing *not* to arbitrate, or from agreeing, in exchange for money, to forgo contractual rights to enforce an arbitration clause under an existing agreement.

2. The Department has authority under 20 U.S.C. §§ 1087d and 1094 of the Higher Education Act to amend 34 C.F.R. § 685.300 as it has proposed and as we urge it do in strengthening the proposal. The Department's authority to adopt stand-alone conditions on funding as part of its PPAs with institutions is broad with respect to the Federal Direct Loan Program, where it may add "such other provisions" that it "determines are necessary to protect the interests of the United States and to promote the purposes of" the Direct Loan Program.[59]

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[53] *Compare, e.g.*, *Doctor's Assocs.*, 517 U.S. 681, 683 (1996) (holding that a state law was preempted by the FAA where it declared unenforceable any arbitration clause that did not comply with a state law notice requirement); *Southland v. Keating*, 465 U.S. 1, 10 (1984) (holding that a state statute requiring judicial consideration of certain state law claims and purporting to render "void" any agreement to the contrary conflicted with the FAA).

[54] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

[55] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974).

[56] *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered . . . .").

[57] *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

[58] *Volt*, 489 U.S. at 478.

[59] 20 U.S.C. § 1087d(a)(6).

Barring pre-dispute arbitration clauses that hamper students' access to justice would meet this standard because it would force schools to internalize the costs of their misconduct and thereby reduce the United States' exposure to financial liability in the form of student loans that cannot or will not be repaid.

Pre-dispute arbitration agreements affect the United States' interests in multiple ways. First, U.S. taxpayers become liable where students successfully assert a defense to repayment of a federal loan, and although the Department's standard for such defenses is under development, the potential liability going forward may be substantial. Second, where a school collapses under the weight of its own wrongdoing and must close, federal law provides that students affected by the closure may receive discharges of their student loans.[60] Third, U.S. taxpayers are put at risk when students default on loans used to attend institutions that fraudulently induce students to enroll in worthless programs because those students cannot then obtain employment to repay their loans.

The collapse of Corinthian Colleges provides a concrete example demonstrating that a restriction on Direct Loan funding to schools that use pre-dispute arbitration agreements would be in the United States' interests. Between 2010 and the school's closure in 2015, roughly 350,000 students borrowed federal money—totaling approximately $3.5 billion—to attend Corinthian.[61] Before closing, Corinthian had for years been accused of engaging in widespread fraud and other misconduct.[62] However, because Corinthian included an arbitration clause in its enrollment agreements, courts repeatedly compelled students to arbitrate their claims against Corinthian and its related schools, frequently on an individual basis.[63] As a result, many former students are deeply in debt, and they have had no realistic opportunity to be made whole by Corinthian. Fortunately, former Corinthian students may be able to rely on fraud and other wrongdoing by the school as a defense to repayment of their federal loans. Yet the cost of defense-to-repayment claims based on Corinthian's wrongdoing is significant and should have been borne by Corinthian, instead of students and taxpayers.

As the Corinthian example demonstrates, pre-dispute arbitration agreements place the cost of a school's wrongdoing and any closure related to that wrongdoing on U.S. taxpayers and students instead of the school responsible for the harm. The United States has a firm interest in protecting the federal fisc from predatory schools that use these clauses.

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[60] *See* 34 C.F.R. § 685.214.

[61] Michael Stratford, *Debt Relief Unveiled*, Inside Higher Ed, June 9, 2015, *available at* https://www.insidehighered.com/news/2015/06/09/us-will-erase-debt-corinthian-students-create-new-loan-forgiveness-process.

[62] *See, e.g.*, NCLC, Government Investigations and Lawsuits Involving For-Profit Schools (describing various investigations of Corinthian).

[63] *See, e.g.*, *Ferguson v. Corinthian Coll., Inc.*, 733 F.3d 928, 930 (9th Cir. 2013); *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 632 (5th Cir. 2012), *abrogated in part by Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *Miller v. Corinthian Coll., Inc.*, 769 F. Supp. 2d 1336 (D. Utah 2011); *Montgomery v. Corinthian Coll., Inc.*, No. 11 C 365, 2011 WL 1118942, at *1 (N.D. Ill. Mar. 25, 2011); *Kimble v. Rhodes Coll., Inc.*, No. C-10-5786, 2011 WL 2175249, at *1 (N.D. Cal. June 2, 2011); *Eakins v. Corinthian Coll., Inc.*, No. E058330, 2015 WL 758286, at *1, *3 (Cal. Ct. App. Feb. 23, 2015).

II. Amendments to § 685.300 Should Protect All Students at Schools That Participate in the Direct Loan Program.

The proposed rule's provisions on forced arbitration, class-action waivers, mandatory internal dispute resolution processes, and record submission appear to cover only those students who take out Direct Loans or for whom Parent PLUS loans (also part of the Direct Loan program) are obtained. Some portions of proposed § 685.300 make this limited coverage express.[64] Others state that they apply to "a student" or "any student" or do not say to whom they apply, but they limit covered claims to "borrower defense claim[s]," which can only be asserted by students who rely on loans through the Direct Loan program.[65] This limitation on covered claims, in addition to being far too narrow as a policy matter (see *infra* Part III), is likely to be interpreted to impliedly exclude non-Direct Loan program borrowers from protection.

A. We strongly urge the Department to adopt a rule that covers *all* students at schools participating in the Direct Loan program. The Department's proposal will leave many students unprotected from forced arbitration, make it more difficult for those students who *are* covered by the rule to bring claims, and continue to hamper regulators in uncovering wrongdoing.

1. A rule that covers only students who rely on the Direct Loan program will create an unfair, bifurcated system of justice within individual schools. Of particular concern, the Department's approach will not provide any protection to members of the military and veterans who rely on GI Bill benefits instead of federal loans, despite the well-documented practice of predatory schools to target these students.[66] For example, the Institute for College Access and Success (TICAS) found that in 2011-12 more than one million students at for-profit colleges, including many veterans, did not take out a federal student loan.[67] As a result, nearly one-third of the students enrolled in for-profit colleges that year might not benefit from the proposed amendments to § 685.300, which are designed to protect former as well as current students. Even at Corinthian Colleges, nearly one out of four students might not have been protected if the proposed rule had been in effect in 2011-12 because they did not take out a federal student loan that year.[68]

2. For two reasons, the Department's proposal will blunt the efficacy of allowing class claims that bring relief to Direct Loan borrowers to proceed in court. First, under the Department's proposal, it may be impossible for a federal borrower to represent a class including non-federal borrowers subject to forced arbitration, even though all students may have been victimized in the same way. For example, a federal court recently held that a class action brought

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[64] 81 Fed. Reg. at 39,421 (to be codified at 34 C.F.R. § 685.300(e)(3), (f)(3))

[65] *See id.* at 39,420-21 (to be codified at 34 C.F.R. § 685.300(d), (e)(1), (f)(1)-(2)); *see also id.* (to be codified at § 685.300(g), (h)) (record submission provisions that appear to apply to arbitrations and cases brought by any party, including the government, but that are likewise limited to borrower defense claims).

[66] Senate HELP Report at 4-5, 68-71; Gainful Employment Rule, 79 Fed. Reg. at 64,911.

[67] Calculations by TICAS using data from the U.S. Department of Education, National Postsecondary Student Aid Study (NPSAS), 2011-12. Figures cover undergraduate and graduate students who attended for-profit colleges in 2011-12 and track whether students obtained federal Stafford loans, PLUS loans, or Perkins loans.

[68] Calculations by TICAS using data from the U.S. Department of Education, Integrated Postsecondary Education Data System (IPEDS) Data Center, accessed July 14, 2016.

by students against Bridgepoint Education, Ashford University, and the University of the Rockies could not be certified because it was unclear what share of the schools' students were bound by arbitration agreements.[69] The court explained that the class was not "presently ascertainable"—a requirement that the court ascribed (we believe erroneously) to Federal Rule of Civil Procedure 23, which governs class certification in federal court.[70] It also suggested that the class might not meet Rule 23's requirement that common questions of law or fact predominate over individual ones in a class action that seeks monetary damages.[71] Other courts have come to conflicting conclusions as to whether a class can be certified where some share of class members are subject to an arbitration agreement.[72]

To avoid extended litigation over the impact of arbitration clauses on class certification, a Direct Loan borrower bringing a class action could, in theory, define the class to exclude all students left unprotected by the Department's rule. But class representatives and their attorneys depend on the cost-sharing benefits of the class action mechanism; reducing the size of the potential class of students at a given school, campus, or program could render the action economically infeasible and thus deny meaningful relief to federal borrowers who have been harmed. As the data from TICAS described above demonstrates, the impact of the Department's proposal on the economic feasibility of class actions could be significant.

Second, the Department's proposal will reduce the likelihood that federal borrowers will obtain relief through class actions because it will simultaneously limit the pool of potential named class representatives. Not all students who have been injured will bring class actions. Named plaintiffs must have the time and temperament to play an active role in the case. They often must submit to discovery, including depositions. And they risk retaliation if they remain current students or depend on the school for post-graduate services or transcripts. Access to a judicial forum for non-federal borrowers who are able and willing to be named plaintiffs in a class action will further the interests of federal borrowers who are members of that class, and by extension the United States as a lender.

3. The Department's narrow approach will hamper regulators in uncovering wrongdoing that threatens the Title IV program. Under the Department's proposal, schools will apparently have no obligation to report any information to the Department about arbitrations or

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[69] *Guzman v. Bridgepoint Educ., Inc.*, 305 F.R.D. 594, 612 (S.D. Cal. 2015).

[70] *Id.* at 611.

[71] *Id.*

[72] *Compare, e.g., In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840, 862-63 (D. Md. 2013) (holding that a class including members who were subject to arbitration agreements did not meet Rule 23's requirements of commonality, typicality, and predominance); *Pablo v. ServiceMaster Glob. Holdings Inc.*, No. C 08-03894, 2011 WL 3476473, at *2 (N.D. Cal. Aug. 9, 2011) (denying class certification based on "concerns about whether plaintiffs will be able to satisfy Rule 23(a)'s numerosity requirement" given that many class members might have signed arbitration agreements and noting that the fact that some class members were subject to arbitration agreements supported finding that a class action was "not the superior method of adjudication in this case," as required by Rule 23(b)(3)), *with, e.g., Davis v. Four Seasons Hotel Ltd.*, No. CIV. 08-00525, 2011 WL 4590393, at *4 (D. Haw. Sept. 30, 2011) (concluding that "the presence of arbitration agreements with 24 members of a putative class of over 100 individuals does not bar class certification"); *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64, 91 (M.D. Tenn. 2004) ("The possibility that some class members might have signed arbitration agreements does not defeat class certification, although the court reserves the right to create a subclass, modify the class definition, or otherwise specially treat the class members subject to arbitration at a later juncture.").

court cases initiated by or on behalf of students who do not rely on the Direct Loan program. The proposal will also permit schools to subject students who are non-federal borrowers to gag clauses forbidding them from discussing any arbitrations that they bring and imposing other restrictions on their potential claims. Because students who do not rely on the Direct Loan program are just as likely as students who do to blow the whistle on predatory schools that use fraud and other wrongdoing as a business model, the government has a strong interest as a lender in ensuring that *any* student at a school receiving Direct Loan funds can expose wrongdoing.

B. If the Department does not adopt our recommendation on student coverage in full, it should at least cover all students receiving federal financial assistance (and make changes to the scope of covered claims, as discussed in Part III, necessary to ensure that these changes are effective). In addition, the Department must clarify that the rule's protections attach to a student who receives federal financial assistance (or, under the current proposal, a Direct Loan or for whom a Parent PLUS Loan is obtained) *in any term* and protect that student with respect to claims based on conduct that occurs *at any time* during the student's relationship with the school.[73] Otherwise, for-profit schools will surely attempt to evade the rule by arguing, for example, that a student must arbitrate individually any claim that does not arise during the same term that the student received federal assistance. This argument, if accepted, could bar a student's access to the class-action mechanism and to court for claims that unquestionably affect the student's later ability to repay federal loans or find employment. It could also force a student to arbitrate some of her claims yet permit her to litigate others identical in all respects but for the term in which they arose. And it could significantly complicate the process of class certification by creating more individualized questions about whether a student is subject to a forced arbitration provision.

III. Amendments to § 685.300 Should Cover a Wider Range of Claims.

A. The Department's proposed rule is ambiguous as to the scope of claims covered by amendments to § 685.300, but it is unambiguously insufficient to ensure the integrity of the Title IV program and the protection of vulnerable students. Some portions of the rule apply only to a claim that is a "borrower defense claim"[74] or that is related to a "borrower defense claim."[75] That term is, in turn, defined as a "claim that is or could be asserted as a defense to repayment under § 685.206(c) or § 685.222" (that is, provisions of the proposed rule that lay out the standards for the defense-to-repayment regime for old and new loans, respectively, when students seek debt relief from the Department).

These provisions leave significant uncertainty in their wake. For example, can a student who obtained all of her Direct Loans before July 1, 2017, bring a claim in court so long as it falls into *either* the standard for a borrower defense claim laid out at § 685.206(c), which applies to loans disbursed before July 1, 2017, or the standard at § 685.222, which applies to loans

[73] The Department must also amend the notice provisions in § 685.300(e) and (f) to ensure that students who are not Direct-Loan-program borrowers when they sign forced arbitration agreements or class-action waivers otherwise forbidden by the rule receive notice of their rights to arbitrate or participate in a class action once they become borrowers.

[74] *See* 81 Fed. Reg. at 39,420-21 (to be codified at 34 C.F.R. § 685.300(d), (f)(1)).

[75] *Id.* at 39,421 (to be codified at 34 C.F.R. § 685.300(e)(1)).

disbursed on or after July 1, 2017? Or can she rely only on the standard set out at § 685.206(c)? Similarly, what must a student show in order to bring a class action if she alleges a state-law claim for unfair and abusive practices at the time of enrollment—a claim clearly covered under the old regime yet not directly covered under the new regime—but obtains Direct Loans for her education *before and after* July 1, 2017? Can she litigate the claim as a class for one set of damages yet be forced to arbitrate the claim individually for another set of damages? The proposed rule provides no answers to these questions, which address scenarios that are likely to be common.

Adding to the ambiguity, other portions of the proposed rule do not use the term "borrower defense claim" at all. The Department proposes to require schools to use specific language carving out covered claims in any future contracts that include pre-dispute arbitration agreements or class-action bans.[76] That language would entitle a student to bring class-action or other claims in court where those claims concern a school's "acts or omissions regarding the making of [a] Direct Loan or the provision [by] the school of educational services for which the Direct Loan was obtained."[77] The Department uses the same language in provisions that entitle a school, with respect to existing agreements, to give notice to students—in lieu of modifying their agreements—that it will not enforce class-action bans or mandatory pre-dispute arbitration agreements as applied to covered claims.[78]

It is not clear how the Department harmonizes this language with its definition of "borrower defense claim," which incorporates the standards from §§ 685.206(c) and 685.222. Both of those subsections require more than just a showing that a claim is related to a school's act or omission with respect to the making of a Direct Loan or the school's provision of educational services financed by that loan. For example, students seeking to assert a defense-to-repayment claim under § 685.206(c) must also show that the claim is based on an act or omission that "would give rise to a cause of action against the school under applicable *State* law."[79] Students seeking to assert a defense-to-repayment claim under § 685.222 must demonstrate that they have obtained a non-default, favorable contested judgment for a violation of state or federal law in a court or administrative tribunal, have been victims of a breach of contract, or have been victims of a "substantial misrepresentation"—as defined in a new federal standard under the regulations—by the school or its agents.[80]

Without modification, the Department's proposal would lead to the odd outcome that schools are directly prohibited from enforcing arbitration agreements and agreements that

[76] *See id.* at 39,421-22 (to be codified at 34 C.F.R. § 685.300(e)(3), (f)(3)).

[77] *Id.*

[78] *Id.*

[79] 81 Fed. Reg. at 39,415 (to be codified at 34 C.F.R. § 685.206(c)(1)) (emphasis added).

[80] *Id.* at 39,417 (to be codified at 34 C.F.R. § 685.222(a)(6)). We note that proposed § 685.222(a)(5) appears to replace completely the borrower defense standard for old loans—i.e., a claim based on an act or omission that "would give rise to a cause of action against the school under applicable State law"—with the new standard that addresses contested judgments, breach of contract actions, and substantial misrepresentations. *See id.* (to be codified at 34 C.F.R. § 685.222(a)(5)) (stating that "[f]or the purposes of this section *or § 685.206(c)*," a borrower defense must meet[] the requirement under paragraphs (b), (c), or (d) (emphasis added)). Given the Department's statements elsewhere in the rule, we assume this is a drafting error that will be corrected in the final version of the rule.

include class-action bans in a seemingly narrower class of cases than those permitted to go forward under the rule's notice and contractual-modification provisions.

In addition, to the extent the Department intends to use the standard for the borrower defense regime set out in § 685.222 to determine the scope of covered claims under § 685.300, that position would leave students particularly hampered in bringing their claims. Section 685.222 provides, in addition to two other bases for borrower defenses, that students have a defense to repayment of federal loans if they have obtained a contested, non-default judgment against a school "in a court or administrative tribunal of competent jurisdiction." This provision is arguably of little utility as applied to the claims for which pre-dispute agreements are impermissible under § 685.300. After all, except where a governmental entity brings suit on behalf of students, a student presumably will not be covered by a contested, non-default judgment against a school in court because a pre-dispute arbitration agreement forbids her from suing in court in the first place. Put another way, to get a court judgment, a student would have to have access to the courts, yet the Department's proposal appears not to give her that access unless she can show her claims are covered by one of the other borrower defense bases (i.e., breach of contract or the Department's new federal standard for "substantial misrepresentation").

B. Regardless of what the Department intended, both variations of covered claims that it put forward in the proposed rule are insufficient to fully protect students and taxpayers. As noted in Part II, all students at schools participating in the Direct Loan program should be covered. Accordingly, the definition of covered claims should not be limited to those claims that only federal borrowers could assert in the defense-to-repayment regime. Nor should the rule's scope be limited to claims that are related to the making of a federal loan or educational services *financed by that loan*.

Instead, at a minimum, the Department should cover any claim regarding a school's acts or omissions related to (1) the making of a Direct Loan or a Parent PLUS loan or (2) to the educational services or programs provided by the school, regardless whether those services or programs are specifically financed by a loan. It should also clarify that claims regarding a school's representations through marketing or enrollment constitute acts or omissions related to a school's educational services or programs.

An approach that is at least this comprehensive is warranted to ensure that conduct by a school that might lead to a defense-to-repayment claim if it had targeted a federal borrower or that might otherwise cast doubt on a school's ability to act as a sound fiduciary to the government is brought to the attention of regulators and deterred. In this way, a broad definition of covered claims serves the financial interests of the United States as a lender through the Direct Loan program.

This approach is also necessary to avoid the confusion that would surely ensue if § 685.300's scope is limited to "borrower defense claim[s]." We have serious concerns about how the definitions of borrower defense claims in § 685.206(c) and § 685.222 will work even in defense-to-repayment proceedings. Those concerns are exponentially greater to the extent those definitions are incorporated into § 685.300. In particular, it would be very difficult for a student to determine with certainty at the outset of a case whether her claim is carved out of an otherwise

applicable pre-dispute arbitration agreement because it is based on conduct that would constitute a "substantial misrepresentation" under the federal standard described in § 685.222, one of the three bases for a borrower defense claim under the new regime. And the consequences of guessing incorrectly—both in terms of a student's time and potential liability for costs and attorney's fees incurred by the school in successfully compelling arbitration—are significant.

In adopting a broader definition of covered claims for the purpose of § 685.300, we also urge the Department to recognize that discrimination claims, including claims of sexual assault and harassment, are covered. Doing so is in keeping with this Administration's stated "commit[ment] to putting an end to sexual violence—particularly on college campuses,"[81] and with the Department's longstanding policy that sexual assault or harassment claims may amount to a denial or limitation on a student's access to a school's educational programs or activities in violation of federal law.[82] In addition, we note that in reviewing for-profit schools' enrollment agreements to analyze the use of forced arbitration and other restrictive clauses, we came across several that included express provisions restricting the participation of pregnant students without stating whether such restrictions applied to other students with health conditions.[83] The Department has made clear that under Title IX, "schools cannot treat a pregnant student differently from other students being cared for by a doctor, even when a student is in the later stages of pregnancy; schools should not presume that a pregnant student is unable to attend school or participate in school activities."[84] For-profit colleges should not get a pass on our nation's anti-discrimination laws by cutting off students' access to court.

IV. Judges, Not Arbitrators, Should Determine Whether Arbitration Agreements Used by Direct-Loan-Participating Schools Apply.

Many for-profit schools use what are called "delegation clauses" in their pre-dispute arbitration agreements with students. A delegation clauses acts as an agreement to arbitrate "gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."[85] Some of these clauses are express.[86]

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[81] U.S. Department of Education, *Press Release, U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, May 1, 2014, *available at* http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations.

[82] *See, e.g.*, U.S. Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at v (2001), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (recognizing that "gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX [i.e., a federal law prohibiting sex discrimination in educational programs] if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program").

[83] *See, e.g.*, Decl. of Ben Suter in Supp. of Defs.' Mot. to Compel Individual Arbitration and Dismiss or Stay Proceedings at 14, *Kimble*, 2011 WL 2175249 (No. 10-cv-05786) (presenting an enrollment agreement requiring that a pregnant student obtain a doctor's release in or order to participate in lab sessions, both during pregnancy and upon returning to School after delivery of the baby).

[84] U.S. Department of Education, Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972, at 8 (2013), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf.

[85] *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) (internal quotation marks omitted).

Others, such as one used by American Intercontinental University Online, designates AAA as the arbitration service firm and states that AAA's rules will apply to the arbitration.[87] Because AAA's rules in turn state that an arbitrator can rule on whether she has jurisdiction over an arbitration, some courts of appeals—including one in a case brought by students against a for-profit school—have held that the incorporation of AAA's rules in an arbitration agreement constitutes an enforceable delegation clause.[88]

We strongly urge the Department to prohibit the use of "delegation clauses" to ensure that any questions about the enforceability or scope of pre-dispute arbitration agreements that are subject to the requirements of the regulation are resolved by a court instead of an arbitrator. Otherwise, by using delegation clauses in their pre-dispute arbitration agreements, schools will be able to force students into arbitration to resolve threshold questions about whether the arbitration agreement is enforceable, and if so, whether it applies to the dispute at issue. This process will be time-consuming and costly for students. In addition, some Title-IV-participating schools include in their arbitration clauses a provision entitling a party to all fees and costs for a successful motion to compel arbitration filed in court.[89] As a practical matter, schools, not students, file such motions, so any ambiguity as to whether arbitration can be compelled ratchets up the financial exposure of students who believe, but are not certain, that their claims can be brought in court.[90]

In addition, if the Department does not bar delegation clauses as described above, it will have left to arbitrators, not judges, the important work of interpreting language used in amendments to § 685.300. Moreover, to the extent that § 685.300 continues to use the term "borrower defense claim," delegation clauses could leave to arbitrators the work of interpreting language used in § 685.206 and § 685.222. Neither the public nor, in some circumstances, the

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[86] *See, e.g.*, Appendix D at A131 (South University, Savannah Campus, Student Handbook 2015-2016) (providing that "[a]ll determinations as to the scope, enforceability, validity and effect of this Arbitration Agreement shall be made by the arbitrator, and not by a court," except that a court must determine whether a student's claims can be heard as a class or mass action or litigated jointly with other students); Appendix D at A41 (Brown Mackie College–Kansas City, 2016-2017 Academic Catalog) (same); Appendix D at A77 (ITT Technical Institute, Marlton, NJ, 2015-2016 Catalog, at 27) (providing that the arbitrator "will have the exclusive authority to determine and adjudicate any challenge to the enforceability of this Resolution of Disputes Section").

[87] *See, e.g.*, Appendix D at A5 (American Intercontinental University Online Agreement at 4).

[88] *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (agreeing with "[m]ost of [its] sister circuits" that have held "that an arbitration provision's incorporation of the AAA Rules—or other rules giving arbitrators the authority to determine their own jurisdiction—is a clear and unmistakable expression of the parties' intent to reserve the question of arbitrability for the arbitrator and not the court"); *see also Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (collecting cases).

[89] Appendix D at A41 (Brown Mackie College–Kansas City, 2016-2017 Academic Catalog, at 62) ("The parties agree that the moving party shall be entitled to an award of costs and fees of compelling arbitration."); Appendix D at A27 (Argosy University, 2015-2016 Academic Catalog, Section Two, Institutional Policies) (same).

[90] As one example of the high stakes for students, an individual who sued Corinthian and its subsidiaries and was later compelled to arbitration was found to have "breached his agreement" with his school by "filing in court rather than seeking arbitration and [was] therefore responsible to pay [the school's] damages associated with compelling the action to arbitration." Corinthian Colleges, Inc., SEC Form 10-Q for Period Ending Mar. 31, 2009, at 10, *available at* https://www.sec.gov/Archives/edgar/data/1066134/000119312509098049/d10q.htm (discussing *Satz v. Rhodes Colleges, Inc., Corinthian Colleges, Inc., and Florida Metropolitan University*).

Department will have any right to learn about those important interpretations of public law.[91] Yet colleges will be able to hone their arguments through trial-and-error in arbitration before using them to defend against any liability through the defense-to-repayment regime as administered and enforced by the Department.

V. Additional Changes in the Rule Should Provide Greater Protection for Students and Help Deter Misconduct By Schools.

A. *Stronger protections against mandatory internal dispute resolution processes.* We strongly support the Department's attention to schools' use of contract clauses that require students to exhaust claims through internal institutional dispute resolution processes before bringing them elsewhere. A number of schools use these restrictive clauses, and at least one school has admonished students who complained to the Veterans Administration for not using the school's internal grievance procedure, contrary to the enrollment agreement that the students signed.[92]

We urge the Department to take further steps to strengthen this provision. Mandatory internal dispute resolution clauses should be prohibited not only when they impede access to accreditors and regulators, but also when they impede a student's access to court. Although a student might be able to get a court to rule that such clauses are unenforceable as applied to certain causes of action with which the clauses are incompatible, that possibility is cold comfort to a student considering whether to blow the whistle on a school's conduct by filing a lawsuit. The possibility that a student could be held to have breached her contract with a school (and to be liable for costs associated with that breach) will discourage students from coming forward.

We also recommend that the Department expand the definition of accreditors and government agencies to whom a student may complain without fear of breaching her contract with a school. The current proposal states that a school cannot compel use of an institutional dispute resolution process "before the student presents the complaint to an accrediting agency or government agency *authorized to hear the complaint*."[93] The italicized portion of that provision should be omitted. It is not clear what being "authorized to hear" complaints means in this context, beyond just having some role in regulating a school's conduct. In addition, students do not necessarily know which agencies or accreditors have supervisory authority over their schools, and they should not be penalized for guessing incorrectly. At a minimum, this provision should apply when a student presents a complaint to an accrediting agency or government agency that the student in good faith believes has the power to address the complaint.

B. *Prohibitions on other exculpatory clauses.* We urge the Department to bar schools from using other exculpatory contract terms, particularly clauses that require a student to waive

[91] The proposal to require submission of certain arbitral records to the Department would apply to such interpretations only if they result from claims "filed in arbitration" against the school and are contained in a "judgment or award" issued by an arbitrator. *See* 81 Fed. Reg. at 39,422 (to be codified at 34 C.F.R. § 685.300(g)(1)(iii)).

[92] *See* Letter to the Secretary King from Organizations Representing Veterans, Servicemembers, and Their Families at 2 (and accompanying exhibit), Mar. 9, 2016, attached as Appendix F to these comments, *also available at* http://www.republicreport.org/wp-content/uploads/2016/03/Arb-VSO-Ltr.pdf.

[93] 81 Fed. Reg. at 39,420 (to be codified at 34 C.F.R. § 685.300(d)) (emphasis added).

the right to a jury trial for any future claim brought in a court and those that purport to limit the liability of the school for any future claim. Some schools already use jury waivers in pre-dispute agreements with respect to claims that will not or cannot be brought in arbitration.[94]

And others have attempted to impose waivers of liability or limitations on damages. As described in Part I, Everest College previously used a unilateral waiver of claims that purported to cover all conceivable causes of action a student might have against the school. In addition, an arbitration agreement used by the online program at Colorado Technical University purported to preclude an arbitrator from requiring "the University to change *any* of its policies or procedures."[95] The provision also purported to limit the arbitrator's authority to "award consequential damages, indirect damages, treble damages or punitive damages, or any monetary damages not measured by the prevailing party's economic damages."[96] Schools that currently impose such provisions through their arbitration agreements will undoubtedly reinsert those provisions elsewhere in their contracts even if the Department curtails the use of forced arbitration. Based on this evidence, the Department should bar exculpatory clauses when used by schools that are supposed to act as fiduciaries to the agency.

C. *Protection for other forms of aggregate litigation.* The Department's proposal to preclude the use of class-action waivers should extend to other forms of aggregate litigation. For example, an entity that acquired some of the failed Corinthian campuses agreed to discontinue the use of forced arbitration clauses in contracts with students. However, it included in new enrollment agreements a provision that barred not only class actions, but also any joinder or consolidation of student claims.[97]

This type of broad bar on any form of aggregate litigation is harmful to students because it discourage claims and, if enforceable, makes those claims that students *do* bring more difficult to litigate successfully, given the time and resources available to students and their counsel. There are many cases in which students with important claims can, as either a practical or legal matter, only bring them outside of a class action, but these students may still want to litigate their claims jointly with a small number of classmates. For example, the Supreme Court of Mississippi

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[94] *See* Appendix D, Public Citizen Petition Appendix at A41 (Brown Mackie agreement), A131 (South University agreement), *also available at* http://www.citizen.org/documents/Appendix-Arbitration-Clauses-Educational-Institutions.pdf (providing that if class-action waiver in agreement is "found to be unenforceable, any putative class or mass action may only be heard in court on a non-jury basis"); *see also* Everest College, Virginia, Application/Enrollment Agreement at 3, attached as Appendix G to these comments, *also available at* http://www.republicreport.org/wp-content/uploads/2016/02/Zenith-Virginia-enrollment-agreement.pdf (agreement used after sale to Zenith Education Group, Inc., that does not include a forced arbitration provision, but does include numerous other limitations on students' right to sue the school, including a jury waiver).

[95] Appendix D, Public Citizen Petition Appendix at A47 (Colorado Technical University Online, Enrollment Agreement) (emphasis added); *accord id.* at A5 (American InterContinental University Online, Enrollment Agreement).

[96] *Id.* at A47 (Colorado Technical University Online, Enrollment Agreement); *accord id.* at A5 (American InterContinental University Online, Enrollment Agreement).

[97] *See* David Halperin, *Misleading Assurances in the Corinthian-ECMC Deal*, Huffington Post, Feb. 13, 2015, *available at* http://www.huffingtonpost.com/davidhalperin/misleading-assurances-in_b_6680668.html; Appendix G, Everest College, Virginia, Application/Enrollment Agreement at 3 ("[I]f I file suit against the School in any court, or if I seek arbitration, I agree not to combine or consolidate any Claims with those of other students, such as in a class or mass action.").

has held that class actions are not authorized in that state's courts.[98] In addition, at least five other states (Alabama, Georgia, Louisiana, Montana, and South Carolina) bar consumers from bringing claims under state consumer-protection statutes as part of a class or representative action in some or all circumstances.[99]

In addition, depending on the circumstances, students who seek to pursue their claims in court may not be able to demonstrate that a class is sufficiently numerous to be certified. Under Federal Rule of Civil Procedure 23, a court must find that the number of class members is so numerous as to make joinder impracticable.[100] Groups of ten, twenty, or even thirty students alleging fraud within a specific program may not be able to satisfy that requirement, but they might determine that a case in which all plaintiffs joined would be most economical.

Moreover, as barriers to class certification have grown, some attorneys have begun experimenting with aggregate litigation on behalf of very large groups of plaintiffs in court.[101] Pursuing students' claims through non-class cases where many plaintiffs are nevertheless joined can provide economic advantages over individual suits by spreading the cost of discovery and motion practice, while allowing students and their attorneys to present individualized evidence and seek significant individual damages not recoverable on a class basis.[102]

Under the Department's proposal, schools could attempt to force students in each these situations to litigate their claims individually in court because the proposal only addresses class-action waivers.[103]

D. *Submission of judicial and arbitral records.* The provision on submission of arbitral and court records should require submission of covered documents to the Department within a shorter period of time and ensure greater access, both by the Department and the public, to documents.[104] Schools should have no more than 10 days to provide covered documents filed in arbitration and in court. A 30- or 60-day notice requirement is far too long to ensure that the Department is able to review filings and determine whether to participate in the proceedings in

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[98] *USF&G Ins. Co. of Miss. v. Walls*, 911 So. 2d 463, 467 (Miss. 2005) ("Since there is no rule or statute which expressly or impliedly provides for class actions, we are compelled to conclude that they are not permitted in any legal proceedings in our state courts."); Miss. Code Ann. § 75-24-15(1), (4) (expressly barring class actions for consumer-protection claims); *see also* National Consumer Law Center, Consumer Class Actions, Appendix C – Survey of State Class Action Law – 2012 (8th ed.) (stating that "[t]here is no class action under state law in Virginia" but describing "case law addressing [an] "equity proceeding known as 'parties by representation'").

[99] Ala. Code § 8-19-10(f); Ga. Code Ann. § 10-1-399(a); La. Rev. Stat. Ann. §§ 51:1409(A), 51:1405(A); Mont. Code Ann. § 30-14-133(1); S.C. Code Ann. § 39-5-140(a).

[100] *See, e.g.*, Wright & Miller, 7A Fed. Prac. & Proc. Civ. § 1762 (3d ed.) (collecting cases and emphasizing the broad discretion of a district court in determining whether joinder is impracticable).

[101] *See, e.g.*, Michael Zuckerman, Can David Still Sue Goliath?, The Atlantic, Nov. 20, 2014, *available at* http://www.theatlantic.com/business/archive/2014/11/can-david-still-sue-goliath/382966/; Ray E. Gallo, *A New Aggregate Litigation Model Emerges—Technology-Driven Mass Actions*, California Litigation, Vol. 27, No. 3, *available at* http://bit.ly/1UWwWaY.

[102] *Id.*

[103] A plaintiff could likely bring these claims in federal court as a class action, *see Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), but would need to demonstrate some basis for federal subject-matter jurisdiction.

[104] *See* 81 Fed. Reg. at 39,422 (to be codified at 34 C.F.R. § 685.300(g), (h)).

some capacity, if permissible, or to weigh in with a school on the verge of taking a position inconsistent with its contractual obligations under its PPA. In addition, the regulation should provide that schools submit amended claims and complaints, not just initial ones, because those revised documents may include critical information for the Department as it monitors ongoing allegations of wrongdoing. It should also provide that the Department is entitled to, upon request and within 10 days, any other arbitral documents not expressly listed in the regulation. The Department should not have to rely on a school's discretion in disclosing other documents that may prove critical to the Department's oversight. Schools with the most to hide in this respect are least likely to be willing to provide information to the Department, unless they have a legal obligation to do so.

In addition, although the preamble to the proposed rule states that the Department is proposing the "same kind of requirement" for submission of records that was proposed by the CFPB, and notes that the CFPB "is considering whether to make [submissions] available to the public by posting them to its Web site," the Department's proposed regulatory language does not address public disclosure.[105] The Department's regulation should create a mechanism for proactive public disclosure (that is, disclosure without need for a Freedom of Information Act (FOIA) request) on its website for arbitral and court documents submitted under the regulation.[106] Ensuring public access in this way is smart policy because it will allow the public to help hold schools accountable and monitor key allegations of wrongdoing that suggest federal dollars are not being spent wisely. In addition, the Department may become subject to a legal obligation under FOIA to affirmatively disclose by electronic means some of the documents that the rule requires to be submitted.[107] By incorporating a process for public disclosure into the establishment of this document-submission system, the Department can easily apply with any obligations in this regard.

E. *Requirement of specificity in post-dispute arbitration agreements.* As described in Part I, we urge the Department to prohibit the use of or reliance on all pre-dispute arbitration agreements. For those post-dispute agreements that remain permissible, we also recommend that the Department put an additional safeguard in place. The agreements should describe covered disputes with specificity to ensure that schools cannot avoid liability by, for example, asking students at the time of withdrawal or graduation to sign an ostensibly post-dispute arbitration agreement for "any and all disputes" the student has had with the school to eliminate claims for complaints that a student may have voiced to a school but for which suit has not yet been filed.

F. *Timing of new PPAs or addenda.* The Department should make clear that it will require Direct-Loan-participating schools to sign new PPAs or addenda to existing agreements once the rule is issued to ensure that the rule's mandates apply immediately. The amendments to

[105] *Id.* at 39,385; *see generally id.* at 39,422 (to be codified at 34 C.F.R. § 685.300(g), (h)).

[106] The Department may exempt from the affirmative public disclosure requirement under this rule those arbitral documents that are subject to a post-dispute confidentiality agreement between the parties and judicial documents subject to a court's sealing order. However, such exemptions should not purport to address whether these documents would be available in response to a FOIA request, which would depend on whether one of that statute's exemptions permits withholding. *See* 5 U.S.C. § 552(b).

[107] *See id.* § 552(a)(2), as amended by the FOIA Improvement Act of 2016 (requiring that an agency make available for public inspection "in an electronic format" all records released in response to a FOIA request and "requested 3 or more times" by the public).

§ 685.300 require an institution to agree through its PPA to comply with new provisions concerning certain types of restrictive contract clauses with students. However, PPAs may last for up to six years.[108] If the Department waits until a school's next-scheduled PPA expiration to incorporate the new mandates, many students who would be able to bring their claims in court under the new rule could lose out on the opportunity to be made whole because of applicable statutes of limitations that are shorter than the time remaining on a school's PPA.

VI. The Proposed Amendments to § 685.300 Must Not Be Weakened.

Although we have a number of recommendations for strengthening the final rule, we believe the Department is right to address the problems of forced arbitration and other contractual limitations on students' rights to relief. As documented in a petition that Public Citizen filed with the Department earlier this year, existing evidence demonstrates that for-profit schools' use of forced arbitration is pervasive.[109] And in just the past few years, institutions have repeatedly relied on such clauses in court where students have accused the schools of violating the law, including through the commission of fraud and other misrepresentation.[110]

The Department is also correct that the use of forced arbitration clauses, particularly when combined with waivers on aggregative litigation, has harmed students, kept regulators in the dark, and allowed predatory schools to act with impunity.[111] The practices of Corinthian Colleges provide a case in point. Before it filed for bankruptcy in 2014, Corinthian was one of the largest for-profit schools in the country. Beginning in 2010, it was served with a series of civil investigative demands and subpoenas by state attorneys general for information on its activities relating to financial aid, admissions, recruitment, lending, and job placement.[112] In 2011, the Department of Education's Office of Inspector General subpoenaed documents relating to one campus's correspondence with its accreditor regarding job placement and employment

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[108] 34 C.F.R. § 668.13(b).

[109] Public Citizen, Citizen Petition to the Department of Education at 4-5, Feb. 24, 2016, attached as Appendix C to these comments, *also available at* http://www.citizen.org/documents/Citizen-Petition-to-ED-Title-IV-Arbitration-Clauses.pdf.

[110] *See, e.g.*, *Ferguson*, 733 F.3d 928; *Reed*, 681 F.3d 630, *abrogated in part by Oxford Health Plans*, 133 S. Ct. 2064; *Fallo v. High-Tech Inst.*, 559 F.3d 874; *Grasty v. Colo. Tech. Univ.*, 599 F. App'x 596 (7th Cir. 2015); *Daniels v. Va. Coll. at Jackson*, 478 F. App'x 892 (5th Cir. 2012) (per curiam); *Miller*, 769 F. Supp. 2d 1336; *Bernal*, 793 F. Supp. 2d 1280; *Thornton v. Art Inst. of Charlotte*, No. 3:14-CV-00621, 2014 WL 6810407 (W.D.N.C. Dec. 3, 2014); *Perez v. Apollo Educ. Grp., Inc.*, No. 1:14-CV-00605, 2014 WL 5797148 (E.D. Cal. Nov. 6, 2014); *Cohen v. Career Educ. Corp.*, No. 13-CV-00125, 2013 WL 3287083 (M.D. Fla. June 28, 2013); *Asbell*, No. 3:12-CV-00579, 2013 WL 1775078; *Marshall v. ITT Tech. Inst.*, No. 11-CV-552, 2012 WL 1565453 (E.D. Tenn. May 1, 2012); *Rosendahl*, No. 11-CV-61, 2012 WL 667049; *Mitchell*, No. 11CV1581, 2011 WL 6009658; *Chisholm v. Career Educ. Corp.*, No. 11-CV-0994, 2011 WL 5524552 (E.D. Mo. Nov. 14, 2011); *Kimble*, No. C-10-5786, 2011 WL 2175249; *Montgomery*, No. 11 C 365, 2011 WL 1118942; *Va. Coll., LLC v. Blackmon*, 109 So.3d 1050 (Miss. 2013); *Brumley v. Commonwealth Bus. Coll. Educ. Corp.*, 945 N.E.2d 770 (Ind. Ct. App. 2011); *Eakins*, No. E058330, 2015 WL 758286.

[111] *See generally* Appendix C, Public Citizen, Citizen Petition; Letter from Public Citizen to the Department of Education, Apr. 20, 2016, attached as Appendix E to these comments.

[112] *See* Corinthian Colleges, Inc., SEC Form 10-Q for Period Ending Mar. 31, 2014, at 19-21, *available at* https://www.sec.gov/Archives/edgar/data/1066134/000110465914037670/a14-9787_110q.htm (providing a chronology of government investigations and enforcement actions).

rates.[113] The following year, the CFPB demanded information to determine whether Corinthian had engaged in "unlawful acts or practices relating to the advertising, marketing, or origination of private student loans."[114] And in 2013, the Securities and Exchange Commission (SEC) subpoenaed Corinthian for information on student "recruitment, attendance, completion, placement, defaults on federal loans and on alternative loans, as well as compliance with U.S. Department of Education financial requirements, standards and ratios."[115]

However, years before these government entities took action, students attempted to hold Corinthian accountable for unlawful conduct. Corinthian's use of an arbitration provision shielded the proceedings in most cases from public scrutiny. For instance, in 2005, students at a National Institute of Technology campus in Long Beach sued Corinthian in California state court. The students alleged that the school had misrepresented their eligibility to take the Certified Medical Assistant examination.[116] In response, Corinthian "filed demands in arbitration against each of the individual plaintiffs for breach of their contractual obligation to arbitrate rather than litigate disputes" and a state court compelled the plaintiffs to use binding arbitration.[117]

In another of many more cases, in 2004, four former students sued Corinthian for alleged misrepresentations at the company's Florida campuses regarding the school's accreditation, and they contended that they had been pressured to enroll immediately.[118] Plaintiffs' counsel estimated that misrepresentations regarding accreditation could affect 11,000 students then-enrolled in Florida, and more than 100,000 students nationwide.[119] However, a court appears to have ordered these plaintiffs, along with numerous others in similar class actions filed against Corinthian around the same time, to arbitrate their claims.[120] In the course of the litigation, Corinthian sued the plaintiffs' attorney in the Florida case for defamation and tortious interference with contractual and economic relationships based in part on the attorney's press release about the original court case and a website designed to locate additional plaintiffs and witnesses by informing them (and the public) about the case.[121]

That Corinthian continued to violate the law over a sustained period of time is not surprising given students' lack of access to the courts.[122] Corinthian had no reason to clean up its

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[113] *See id.* at 20.

[114] *Id.*

[115] *Id.* at 21.

[116] Corinthian Colleges, Inc., SEC Form 10-Q for Period Ending Mar. 31, 2007, at 10, *available at* https://www.sec.gov/Archives/edgar/data/1066134/000119312507110175/d10q.htm.

[117] *Id.*

[118] *Corinthian Coll., Inc. v. Price*, No. G034327, 2005 WL 1199069, at *1 (Cal. Ct. App. May 20, 2005).

[119] *Id.* at *3.

[120] Corinthian Colleges, Inc., SEC Form 10-Q for Period Ending Mar. 31, 2009, at 10, *available at* https://www.sec.gov/Archives/edgar/data/1066134/000119312509098049/d10q.htm.

[121] *Price*, 2005 WL 1199069, at *2-*3. The attorney ultimately prevailed on an anti-SLAPP (strategic lawsuit against public participation) motion, and the court ordered that Corinthian pay the attorney's costs and fees on appeal. *Id.* at *11.

[122] *See, e.g.*, NCLC, Government Investigations and Lawsuits Involving For-Profit Colleges 2-3 (describing judgment in a lawsuit brought by a state attorney general alleging that Corinthian schools inflated placement rates,

act because for years it faced no material consequences for alleged wrongdoing and was able to avoid public scrutiny by moving disputes with students into arbitration. By the time regulators stepped into the void, thousands of students had already been harmed. As a district court observed in *Ferguson v. Corinthian Colleges*, one of the later private cases against the company:

> Defendants exploit a vulnerable consumer population by encouraging students to borrow amounts they will never be able to pay back, let alone ever discharge in bankruptcy, ruining the students' financial future for life. Defendants are able to tap into this easy source of credit, realize significant profits, and pass all of the down-side credit risk on to the students. Not only are the students harmed, but since the loans are federally guaranteed, U.S. taxpayers subsidize this scheme at the expense of the students and for the benefit of Defendants' bottom line. Plaintiffs allege that in the past year, these practices have been investigated by the Department of Education, the Government Accountability Office, and the Higher Learning Commission, and they have also been considered by Congress. Plaintiffs' desire to obtain injunctive relief to protect the public, including protecting the interests of current and potential students, members of the military, and U.S. taxpayers, is clearly in the public interest.[123]

Nevertheless, the district court compelled the students to arbitrate most of their claims on an individual basis, and on appeal, Corinthian successfully forced the plaintiffs' claims out of court altogether on the ground that they were covered by a pre-dispute arbitration clause.[124]

The experiences of the few students who arbitrated against Corinthian Colleges provide further evidence that a strong rule prohibiting forced arbitration is necessary. Data show that between 2011 and 2015, only 71 students pursued arbitration against Corinthian with the American Arbitration Association (AAA), an arbitration firm that Corinthian had designated in its arbitration provisions.[125] Yet we know that during that period Corinthian Colleges engaged in widespread wrongdoing and that, based on the amount of borrower relief already provided to Corinthian students by the Department, many of the students had significant economic injuries. The students' claims in arbitration with AAA reflect those injuries: The median claim against Corinthian was $75,000.[126] However, of the ten students whose claims were resolved by an arbitrator's final decision (as opposed, for example, to a settlement), only one received *any* monetary award (of $14,445) and none received any non-monetary relief.

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failed to disclose completion rates, and overstated graduates' starting salaries); U.S. Department of Education, *Press Release: U.S. Department of Education Fines Corinthian Colleges $30 Million for Misrepresentation*, Apr. 14, 2015, *available at* http://www.ed.gov/news/press-releases/us-department-education-fines-corinthian-colleges-30-million-misrepresentation.

[123] 823 F. Supp. 2d 1025, 1035-36 (C.D. Cal. 2011).

[124] *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d at 930-31.

[125] Public Citizen prepared these calculations using publicly available AAA data provided by that organization as of April 19, 2016. The raw data is available at www.adr.org.

[126] AAA data demonstrates that for 8 of the 71 students the monetary amount in dispute was zero and that one of those students nevertheless received a monetary award in his or her favor. The amount in dispute for all other students ranged from $28,703.50 to $439,881.69.

For a more detailed description of the problems associated with schools' use of forced arbitration clauses and bars on aggregate litigation, please see Appendices C and E.

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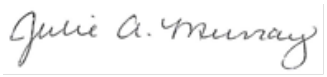
We thank the Department for its efforts in this rulemaking to protect students and the integrity of the Title IV program. With the changes identified above, we believe the amendments to § 685.300 will make a dramatic difference in the lives of students and will ensure that predatory schools do not leave taxpayers on the hook for their wrongdoing. For ease of reference, we include with these comments (as Appendix H) two versions of the Department's proposal that incorporate our suggested edits, one as a clean document and one with tracked changes.

Sincerely,



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