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400 Maryland Ave., SW
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Re: Docket ID ED-2018-OPE-0027

To Whom It May Concern:

Thank you for the opportunity to comment on the 2018 Borrower Defense Proposed Rule, docket number ED-2018-OPE-0027-0001.[1] The National Student Legal Defense Network ("NSLDN") is a non-profit organization that works, through litigation and advocacy, to advance students' rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility.

Although NSLDN will be submitting additional comments regarding the proposed rule, we write here to express our sincere concern that the Department's proposal, if adopted, abdicates the Department's responsibilities to taxpayers and the federal financial interest.

It is no secret that the Department oversees an enormous federal program – providing approximately $120 billion annually in federal grants, loans, and other financial assistance programs to approximately 13 million students attending nearly 6,000 institutions of higher education. Not surprisingly, as part of this program, as noted below, Congress required the Department to ensure that institutions of higher education meet certain "financial responsibility" standards. While the borrower defense rulemaking was an important opportunity to reaffirm and maintain existing protections for taxpayer, unfortunately, the proposed rule indicates that the Department does not take seriously its obligations in this regard.

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1 83 Fed. Reg. 37,242 (July 31, 2018).

I. The Department has an obligation to taxpayers to ensure its financial responsibility rules adequately protect against high-risk institutions.

Starting in the 1970s, Congress has required that the Department only permit an institution of higher education to participate in the student financial assistance programs if the institution met certain standards of financial responsibility.[2] *See generally* 20 U.S.C. § 1099c(c). The financial responsibility rules established by the Department, broadly stated, serve as a mechanism to ensure that institutions – and not students or taxpayers – cover the financial costs of "liabilities and debts incurred" in connection with the administration of the Title IV, HEA programs. More specifically, the financial responsibility standards established by the Department are designed, in part, to provide financial protection to the government for losses incurred when an institution commits illegal acts, cheats students out of the education advertised, or closes unexpectedly.

The Department's proposed rule abandons this critical obligation to the U.S. taxpayer by removing the use of common-sense signals of institutions' financial viability as part of its financial responsibility analysis. The proposal removes certain automatic triggers that would require institutions to timely post Letters of Credit ("LOCs") in order to protect federal fiscal interests. Indeed, the Department's own Inspector General stated in 2017 that "LOCs protect Department and taxpayer dollars against loss and help mitigate the potential harm to students. When LOCs are not obtained when warranted, taxpayers are exposed to the risk of significant loan discharges and potential harm to students increases. LOCs provide some assurance that the school has the money to pay required refunds to students or provide teach-out facilities in the event of a closure."[3] The Department should reevaluate its proposal and restore the triggers indicating risky behavior from colleges that require financial protection.

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2 These standards have increased over time. For example, the "the 1992 reauthorization revamped the Department's oversight methods for student aid programs, such as by streamlining and standardizing how it measured schools' financial soundness and creating new mechanisms to curb conflicts of interest in the accreditation process." *See* S. Protopsaltis & L. Masiuk, Protecting Students and Taxpayers: Why the Trump Administration Should Heed History of Bipartisan Efforts (Nov. 30, 2017) *available at* https://www.cbpp.org/research/federal-budget/protecting-students-and-taxpayers.

3 *See* Final Audit Report ED-OIG/A09Q0001 at 11 (Feb. 24, 2017) available at: https://www2.ed.gov/about/offices/list/oig/auditreports/fy2017/a09q0001.pdf

II. The Department has failed to conduct a reasoned rulemaking in which it has provided the public an adequate opportunity to comment.

The Department's proposal is especially egregious in light of the fact that the Department apparently has not analyzed data on the existing financial protection held by the Department to assess the degree to which it may fall short of institutional liabilities. Nor has the Department provided the public with key information necessary to establish the extent to which the Department's current policies and practices meet the statutory requirement that the Department ensure that institutions of higher education are financially responsible.

In March 2018, NSLDN submitted a FOIA request with the Department, assigned tracking number 18-01340-F, in which NSLDN sought, roughly stated, the release of letters of credit "currently held" by the Department, or a log of that information. As noted in the request, NSLDN sought this information in order to better understand the "standards the Department uses to require institutions to post letters of credit and sureties and the degree to which the Department uses such instruments to protect taxpayers from unnecessary risk in connection with the Title IV programs." NSLDN also specifically cited its ability to disseminate the information received, and its analysis thereof, in regulatory comments.

The following month, the Department provided a "final response" that "[s]taff in [Federal Student Aid] informed the FOIA Services Center that they have no documents" responsive to the request. The Department further stated that the request was prohibitively burdensome, but that it promised to release a log of FY 2016 – but not 2018 – letters of credit on its website "this summer." As of August 29, 2018, the Department had not even done that.[4] On May 1, 2018, NSLDN filed an administrative appeal of the Department's FOIA request. No response was received, so on July 16, 2018, NSLDN filed a lawsuit in order to compel the Department to completely respond to the FOIA. That lawsuit remains pending and on August 13, 2018, the Department – rather than answering the complaint – filed a motion to extend the deadline to file an answer until September 21, 2018. *See generally National Student Legal Defense Network v. U.S. Department of Education*, No. 18-

[4] *See* https://studentaid.ed.gov/sa/about/data-center/school/loc (last visited Aug. 29, 2018).

CV-1673 (TJK) (D.D.C.). To date, the Department has not even acknowledged the existence of letters of credit, much less provide the requested materials.[5]

In addition, the Department has failed to provide information to the public during this rulemaking process regarding how the Department sets the amount of a required LOC. Longstanding Departmental regulations create certain *floors* for the amount of a letter of credit (tied as a percentage to the amount of an institution's prior year Title IV funding). In revoking the automatic triggers, the Department has failed entirely to consider whether proposal should be accompanied by an *increase* to the floor. Nor has the Department even acknowledged that the removal of the triggers could subject taxpayers to heightened financial risk, which could be mitigated by an increase in the floor. Nor has the Department provided any information to the public to comment on the methodology the Department uses, if any, to set the amount of an LOC required to be posted by an institution.

As noted, the Department cannot—or will not—share the necessary information to say whether it is adequately protecting taxpayers from significant liabilities. Nor has the Department provided the basic data necessary to understand what risk will exist to taxpayers under its proposed borrower defense rule. It is impossible for the Department to engage in a reasoned rulemaking, or for commenters to have a fulsome opportunity as required by both the Higher Education Act and the Administrative Procedures Act to provide input on the proposed rule, without first analyzing this information.

III. The Proposed Rule fails to provide good reasons for revoking the automatic triggers; the Department should automatically require financial protection for the highest-risk events at institutions of higher education.

As the Department wrote in 2016, "recent experiences with Corinthian, in which the Department ended up with no financial protection for either closed school or borrower defense claims, highlight the need to develop more effective ways to

[5] As noted in the administrative appeal, the public record is replete with information suggesting that the Department's "final response" is inaccurate. Yet the Department has refused to acknowledge this or correct the record. For example in an SEC Form 8-K disclosure filed on April 13, 2018 by Adtalem Global Education, Inc., previously known as DeVry Education Group, Adtalem asserted that "[c]urrently, a letter of credit with an original face amount of $68,435,908 and $300 million of term loans are outstanding under the Credit Agreement" with a lender.

identify events or conditions that signal *impending* financial problems and secure financial protection while the institution has resources sufficient to provide that protection…" (emphasis added).[6] However, the Department states in this proposed rule that it now believes those triggers would have "unnecessarily required institutions to provide a letter of credit or other financial protection,"[7] without explaining or articulating a good reason why those early warning signs are no longer appropriate triggers for common-sense protections for taxpayers. The Department's proposed changes to the financial responsibility triggers raise serious concerns about whether the agency will truly be able to anticipate potential taxpayer liabilities and obtain financial protection prior to incurring those liabilities.

Apart from and in addition to the Department's failure to appropriately justify its departure from the 2016 rule, before finalizing this proposed rule, the Department must reconsider its proposed triggers to ensure they are able to adequately anticipate potential problems and protect taxpayers. To the Department's credit, several of the remaining mandatory triggers are strong and will offer an important preview of potential financial issues, enabling the Department to obtain financial protection before it's too late. In particular, the trigger related to withdrawal of owner's equity at proprietary institutions is important. However, others should be made stronger. An accounting of those proposed triggers, and suggestions for improving several of them, is included below.

- **Defense to repayment claims:** The Department proposes to potentially require letters of credit only around borrower defense liabilities that have been paid out to students. However, although this would help ameliorate the impact to the government of outstanding liabilities before an institution submits its next set of financial statements, it does not adequately account for liabilities that may have been approved and not yet paid out. Nor does it account for unadjudicated borrower defense claims that are substantially similar to those that have been approved, but for which a final determination has not yet been made. Given that the Department has paid out very few borrower defense discharges this year, even among discharges that have been adjudicated and flagged for approval already, while the backlog of roughly

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6 81 Fed Reg. 39,361 (June 16, 2016)

7 83 Fed. Reg. 37,273 (July 31, 2018)

100,000 claims continues to grow, it is clear that considering only actual discharges could easily become untenable as the Department continues to develop an infrastructure for processing, approving, and discharging claims, and implements the Next Generation servicing environment with new requirements for servicers. Especially given that claims may not be adjudicated until three years after the borrower has left school, this is far too much lag time to serve as adequate protection against future liability. The Department should restore any final debts or liabilities, including borrower defense liabilities, to this trigger, factoring in the entirety of the potential amounts the institution may be required to pay, rather than only borrower defense payments and only those discharges the Department has already sent out the door.

- **Lawsuits and other actions:** The Department, in 2016, included a mandatory trigger for certain legal actions brought by state or federal agencies that met a threshold for validity, as well as for borrower-defense-related lawsuits that survived a summary judgment motion. The Department's proposal, without explanation or justification, removes these mandatory triggers, opting to rely only on final judgments for which public records are available. As the Department noted in 2016, this is a mistake: "we stress that ignoring the threat until judgment is entered would produce a seriously deficient assessment of ability to meet financial obligations, and worse, would delay any attempt by the Department to secure financial protection against losses until a point at which the institution, by reason of the judgment debt, may be far less able to supply or borrow the funds needed to provide that protection." The Department went on to say, "[w]e reject this suggestion as contrary to the discharge of the duty imposed on the Department by section 498 of the HEA."[8] The Department should restore these types of legal actions to the mandatory trigger to ensure taxpayers are protected and institutions are not able to obscure impending problems from the federal agency responsible for their oversight.

  If the Department opts not to restore the federal/state agency legal actions and other borrower-defense-related lawsuits to the mandatory trigger, it should at least maintain those as discretionary triggers and their

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8 81 Fed. Reg. 75,990 (Nov. 1, 2016)

accompanying disclosure requirements. Currently, the Department does not receive reporting on federal or state agency lawsuits consistently or in a timely manner. Too often, the Office of Federal Student Aid is left in the dark about the institutions under its oversight. Requiring institutions to report this information, and the Department to at least consider its potential implications, would be an important improvement to strengthen the program integrity triad and ensure the adequacy of federal oversight.

- **SEC or exchange actions at publicly traded institutions:** The Department proposes to remove certain types of SEC warnings from the mandatory trigger for financial protection. However, given the severity of SEC actions for publicly traded institutions, this would greatly limit the Department's ability to anticipate a financial crisis at affected colleges. In 2016, the Department considered this suggestion and said that "doing so would further distance these events as early but significant indicators of serious financial distress."[9] Moreover, as the Department described in the 2016 final rule,[10] SEC warnings such as those to institutions that fail to file required reports in a timely manner are not made lightly; the SEC makes repeated attempts to resolve concerns prior to issuing a warning. Weakening this trigger would also close a window for the Department to have greater knowledge of other agencies' actions by eliminating reporting for earlier actions from the SEC, like warnings. The Department should incorporate SEC warnings back into the trigger for publicly traded institutions.

- **Accrediting agency teach-out agreements:** The 2016 borrower defense rule included a mandatory trigger when an accreditor required a teach-out agreement from an institution; this proposed rule would remove that trigger entirely. However, the Department should revise the final rule to add back a mandatory trigger. As we have described in separate comments, the Department's proposed closed school discharge policy is replete with problems. And nothing about the closed school discharge component of the proposed rule alters the *potential* taxpayer liability that may be created when an institution closes, even if a school may be able to minimize the amount of closed school loan discharges by simply offering a teach out. The final rule

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9 81 Fed. Reg. 75,997 (Nov. 1, 2016)

10 *Id.*

should continue to protect taxpayers from those liabilities by requesting financial protection at the first indication of impending closure: often a teach-out agreement requirement.

Moreover, the trigger from the 2016 rule was from when the accreditor *required* a teach-out agreement, whereas the Department's new proposed policy on closed school discharges requires accreditor *approval* of such agreements. The submission of a teach-out agreement pursuant to an accreditor's requirement to do so does not imply the approval of that agreement—particularly once accreditors adapt to the fact that borrowers' access to loan discharges could hinge on their approval or disapproval of the agreement. Liabilities may be reduced under the proposed new closed school discharge liability, but the responsible approach to taxpayer dollars would be to further protect the federal fisc by requiring financial protection based on this early warning indicator.

IV. The Department should require financial protection on a case-by-case basis for certain high-risk events at institutions of higher education.

As the Department noted in 2016, discretionary triggers are designed to "identify factors or events that are reasonably likely to, but would not in every case, have an adverse financial impact on an institution."[11] As with the mandatory triggers, these elements are an essential aspect of ensuring the Department has access to the information it needs to properly oversee institutions of higher education, and to ensuring the strength and efficacy of the program integrity triad. However, the Department should strengthen some of these triggers to better protect taxpayers from potentially significant financial problems at affected institutions. An accounting of the Department's proposed triggers, and suggestions for improving several of them, are included below.

- **Non-Title IV revenue and cohort default rates:** The Department indicates that it would like to make the triggers for failure to meet non-Title IV revenue (90-10) requirements in a given year or failure to meet cohort default rate requirements in two consecutive years without a successful challenge or appeal discretionary, rather than mandatory. Specifically, the

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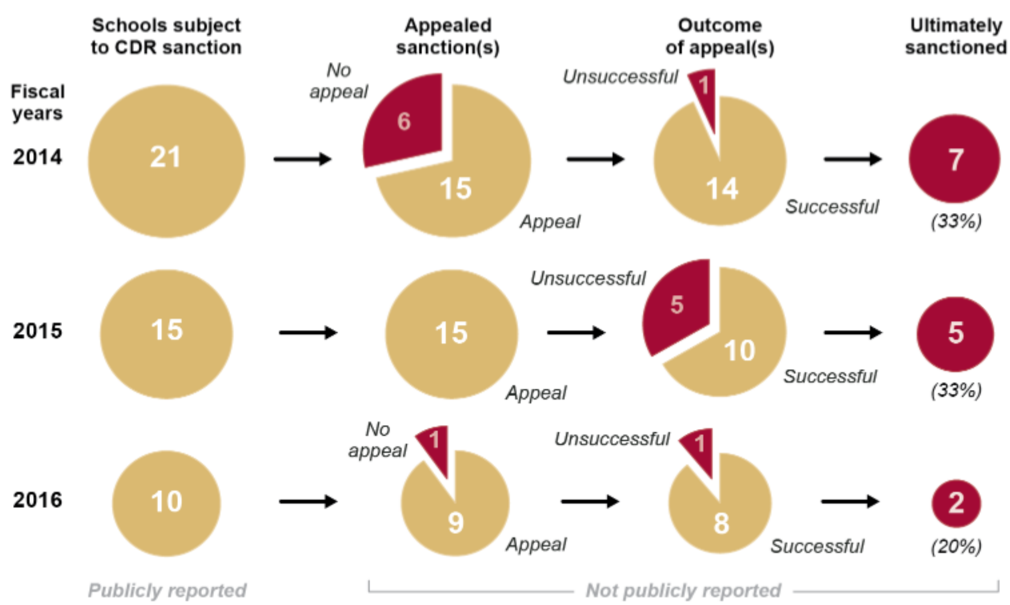
[11] 81 Fed. Reg. 76,000 (Nov. 1, 2016)

Department suggests that first "it is more appropriate for the Department to review the institution's efforts to remedy or mitigate the reasons for [an institution's] failure, to evaluate the institution's potential and plan to teach-out students if closure appears inevitable, and to assess the extent to which there were anomalous or mitigating circumstances leading to its failure."[12] However, the statutory requirements that institutions lose access to federal financial aid after two years of 90-10 failures or three years of unchallenged cohort default rates do not require--or indeed, allow--the Department to consider alternative remedies or mitigating circumstances instead of withdrawing institutions' eligibility. As demonstrated by a recent study of cohort default rate failures from the Government Accountability Office, while it is relatively uncommon for institutions to fail the CDR measure and even less common for such institutions not to appeal their failed default rates, data confirm that institutions with unappealed rates or unsuccessful appeals are, indeed, sanctioned by the Department.[13]

Figure 8: Schools Subject to Education Cohort Default Rate (CDR) Sanction and Appeals Outcomes, Fiscal Years 2014–2016



Source: GAO analysis of U.S. Department of Education (Education) data. | GAO-18-163

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12 83 Fed. Reg. 37,273 (July 31, 2018)

13 *See* Actions Needed to Improve Oversight of Schools' Default Rates, GAO Report 18-163 (Apr. 26, 2018) *available at*: https://www.gao.gov/products/GAO-18-163

Leaving it to the Department to determine, on an individual basis, which institutions that have failed a statutory test that will lead to a mandated loss of federal aid should be required to post financial protection opens the agency to inevitable arbitrary decision-making. There is no reasonable basis on which the Department could determine no risk exists when an institution has an unappealed two years of failed cohort default rates, or a failed 90-10 test. By making these triggers discretionary, the Department is setting itself up for unfair and arbitrary decision-making with respect to individual institutions.

To ensure the Department adequately upholds Congressional requirements around both 90-10 and cohort default rates, and around financial responsibility in the event of closure, the Department should maintain failure of either as mandatory triggers.

- **Accreditor show-cause orders:** The Department proposes to maintain a discretionary trigger from 2016 regarding accreditor actions that may pose a serious threat to the viability of the institution as a Title IV-eligible entity. As the GAO recommended--and the Department concurred--in a 2014 report, better integration across relevant offices and increased use of information on accreditation statuses by the Department is a necessary improvement.[14] In that report, the GAO noted that the Department's failure to adequately consider accreditor actions could have significant implications for the oversight of postsecondary institutions, indicating that the failure meant that its "analysts may have missed a chance to identify and respond to issues that could affect the administration of federal student aid funds."[15]

  However, the proposed changes create confusion. For instance, accreditor definitions of show cause orders can vary significantly; one accreditors says a show cause order is a decision to terminate accreditation within one year unless the institution can show cause as to why it should not take that action, while another accrediting agency defines it simply as when an institution

14 *See generally* Education Should Strengthen Oversight of Schools and Accreditors, GAO Report 15-69 (Jan. 22, 2015) *available at* https://www.gao.gov/products/GAO-15-59.

15 *Id*. at 32.

"does not materially operate" according to its criteria. As the Department said in recent guidance to accrediting agencies, "probation is typically defined as significant noncompliance with accrediting agency standards" -- a status that may or may not include show-cause orders, depending on the agency.[16] Thus, using a standard definition for reporting would be more useful to the Department and more comprehensible for accreditors and institutions. The definition used by the Department in that guidance for probation or an equivalent status will serve these purposes well; it reads that probation or an equivalent status means "[a]n action or assessment that indicates an institution or program is significantly out of compliance with one or more of the accrediting agency's standards, but it is possible that the noncompliance could be remedied by the institution or program within a period allowed by the agency and the regulations."

- **Noncompliance with state authorization requirements:** First, we note an apparent missing word in the Department's language for this trigger, which reads, "The institution violated a State licensing or authorizing agency and was notified…" The trigger should say "violated the requirements of…," to indicate the nature of the violation.

  Additionally, it is critical that the Department get information on all state actions. States vary considerably in their oversight of institutions. Some institutions require extensive authorization processes; others are more minimalist in what they require of institutions. Some states have strict licensure requirements; others do not. The share of workers with licensure requirements can range from as little as 15 percent in some states, to more than twice that in other states.[17] Unless the Department is willing to conduct a thorough analysis of state authorization and licensure policies, reviewing the specific warnings, sanctions, and termination policies of all institutions and determining the most appropriate terminology for the trigger, the more

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16 *See* Clarification of Terminology and Requirements for Accrediting Agency Reporting to the U.S. Department of Education at 5 (Nov. 17, 2016) *available at*: https://www.regulations.gov/contentStreamer?documentId=ED-2016-ICCD-0035-0024&attachmentNumber=1&contentType=pdf

17 Moris Kleiner, Reforming Occupational Licensing Policies, The Hamilton Project Discussion Paper No. 2015-01 at 9 (March 2015) *available at* https://www.brookings.edu/wp-content/uploads/2016/06/THP_KleinerDiscPaper_final.pdf

responsible action is to accept all disclosures and review them on a case-by-case basis to determine whether financial protection should be required under the circumstances.

- **Fluctuations in Pell Grant or loan revenue and high drop-out rates:** The Department proposes to remove two of the discretionary triggers provided for in the 2016 rule, one related to significant fluctuations in loan or Pell Grant volume year-over-year and another related to high annual dropout rates. The Department says it is removing these triggers because no threshold was ever established for either. However, the Department should continue to include both as discretionary triggers. They have been identified by Congress as areas of such significant concern that they should be factored into the Department's selection of institutions for program reviews, and the office of Federal Student Aid should thus already be equipped to assess the levels at which those elements become particularly concerning.[18] Moreover, as discretionary triggers, these items further ensure the Department is considering the continued viabilities with big swings in Title IV revenue--likely indicating substantial swings in enrollment that may threaten the institution's ability to continue offering a degree of academic quality--and high drop-out rates.

- **Anticipated borrower defense claims**: The Department's proposed rule would remove one of the clearest indicators of potential liabilities: a state or federal lawsuit, settlement, judgment, or administrative finding that an institution has engaged in behavior that would likely meet the standard for borrower defense, and therefore which indicates a potential influx of borrower defense claims, at least some of which will be valid. The Department offers no justification for why it intends to remove this requirement, or for why it doesn't believe institutions should report, and the federal oversight agency should track, the outcomes of borrower-defense related investigations. For instance, a recent settlement in May 2017 by DeVry University with the Federal Trade Commission for deceptive advertising raises the question of whether borrowers will have valid claims

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[18] 20 U.S.C. § 1099c-1(a)(1)(C) and (E).

backed up by the investigation of a federal agency.[19] Around the time of the settlement, as of August 2017, 1,905 borrower defense claims had been filed against DeVry University and its associated institutions (e.g., Carrington College and Ross University).[20] But as of May 1, 2018—less than a year later—more than 10,000 claims had been filed against DeVry University.[21] The potential for a large-scale influx of claims is significant, given that the most recently reported enrollments included over 60,000 students.[22] Moreover, the owners of DeVry have since transferred the assets of DeVry to a much smaller college[23] (Cogswell Polytechnical College, whose composite score is barely above the zone at 1.7[24]), leaving its financial status in question. This illustrative example offers a warning of the types of liabilities for which the Department is leaving taxpayers unprotected by eliminating this trigger.

- **Financial stress test**: The Department, in its 2016 regulations, included a financial stress test, to be developed or adopted at a later time, as a discretionary trigger. However, the Department has not justified its removal, beyond noting that the "test [was] never created."[25] The Department knew

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[19] FTC Blog Posting: DeVry Refund Update (May 1, 2017) *available at* https://www.consumer.ftc.gov/blog/2017/05/devry-refund-update

[20] Y. Cao & T. Habash, College Complaints Unmasked (Nov. 8, 2017) *available at*: https://tcf.org/content/report/college-complaints-unmasked/

[21] The Department's data do not appear to include other Adtalem institutions. *See* https://www.durbin.senate.gov/newsroom/press-releases/durbin-releases-shocking-new-data-on-department-of-educations-borrower-defense-application-backlog

[22] Adtalem recently announced it would transfer ownership of DeVry University and Keller Graduate School of Management to another institution with much lower enrollment; while they are listed as discontinued operations in Adtalem's 2018 Q3 financial report, that transfer raises additional questions about the potential for liabilities that DeVry's new owner may not be able to pay out. *See* https://www.businesswire.com/news/home/20180503006633/en/Adtalem-Global-Education-Announces-Quarter-Fiscal-2018

[23] *See* Handing Off DeVry, Inside Higher Education (Dec. 6, 2017) *available at* https://www.insidehighered.com/news/2017/12/06/devry-traded-private-small-company

[24] FSA Data Center Financial Responsibility Composite Scores, available at: https://studentaid.ed.gov/sa/node/119

[25] 83 Fed. Reg. 37,292 (July 31, 2018)

that even when it promulgated the original regulation, noting that "[t]he stress test could be used to assess an institution's ability to deal with an economic crisis or adverse event under a scenario-based model," and that, while the Department hadn't determined how it would develop that stress test, it "would seek [institutions' and other affected parties'] input in whatever process" would be used to do so.[26] That is an insufficient reasoning for removing this trigger, especially one that could be particularly adept at evaluating institutions' financial circumstances. The Department's own Inspector General noted that such a financial stress test "will be used to evaluate a school's ability (capital position) to absorb losses that may be incurred as a result of adverse conditions and continue to meet its financial obligations (34 C.F.R. Section 668.171(g)(3), effective July 1, 2017). *If properly designed, the financial stress test could be a useful tool for FSA to evaluate a school's capital position*" (emphasis added).[27] We agree with the Inspector General here, and request that the Department reinstate the stress test trigger and begin the necessary analysis to design such an assessment in coordination with other federal agencies, consumer protection advocates, and accounting experts.

We urge the Department to reconsider its proposal and put borrowers and taxpayers, not predatory institutions engaged in unlawful and irresponsible behavior, first.

Sincerely,

National Student Legal Defense Network

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[26] 81 Fed. Reg. 76,003 (Nov. 1, 2016)

[27] *See* Final Audit Report ED-OIG/A09Q0001 at 15 (Feb. 24, 2017) available at: https://www2.ed.gov/about/offices/list/oig/auditreports/fy2017/a09q0001.pdf