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August 19, 2021

To: Seth Frotman, *Executive Director*
Student Borrower Protection Center

From: Sabita J. Soneji, *Partner*
Leora Friedman, *Fellow*
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RE: Legal Analysis, and Need for Increased Enforcement, of the Student Loan Sunshine Act[1]

Mr. Frotman:

I write to detail our analysis of the legal obligations imposed on schools, lenders, and the Department of Education by the Student Loan Sunshine Act (P.L. 110-315) ("the Act"). As you are no doubt aware, gaps in compliance with the Act persist and obstruct transparency in the private education loan process. In hope of being a catalyst for changing that dynamic, this memo also identifies enforcement mechanisms with which regulators and student borrowers can hold schools and lenders accountable for practices that violate the Act. My hope is that this analysis will inform your organization's advocacy and litigation efforts to root out harmful student loan practices and also arm regulators to enforce existing laws, ensure compliance, and better protect student borrowers.

Sincerely,

Sabita J. Soneji

[1] This memorandum is meant to summarize legal obligations and potential consequences of non-compliance with the Student Loan Sunshine Act. It does not constitute legal advice. Individuals and entities that might be affected by the authorities cited herein should consult an attorney for individualized guidance.

I. Introduction

There is a long and troubling track record of schools and financial institutions teaming up to provide financial products and, in particular, student loan products.[2] Through student loan products, schools may encourage students to take on private education loans offered by lenders which may or may not have undisclosed relationships with the schools, potentially pushing students toward unfavorable lending agreements or increasing their educational costs and sometimes raking in lucrative kickbacks in the process.[3]

The problem of exploitative school-lender arrangements has historically attracted public (and investigators') attention. In 2007, *The Wall Street Journal* reported that "eight universities, including the University of Pennsylvania, New York University and Syracuse University, settled allegations of loan kickbacks by agreeing to stop accepting payments, travel and other perks from student lenders."[4] That year, CBS also noted how state law enforcement in New York was investigating "an alleged kickback scheme involving 100 colleges and a half-dozen student loan providers around the country," including behavior that led law enforcement to "believe the schools and lenders are engaged in deceptive lending practices that make the cost of higher education higher than it should be."[5] For example, investigation documents revealed that "under a preferred lender agreement with [the creditor Education Finance Partners (EFP)], Drexel University, in Philadelphia, gets a kickback of .25% on the interest earned on the first $1 to $2 million in loans it steers to EFP and .5% of the interest earned on the amount above $2 million."[6]

Today, evidence suggests that schools and lenders continue to engage in these problematic practices. In June 2021, the Student Borrower Protection Center reported that "[s]everal public schools are failing to comply with various transparency requirements that borrowers rely on to make informed decisions and other legal

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[2] *See Private Student Lending*, STUDENT BORROWER PROT. CTR. (Apr. 2020) https://protectborrowers.org/wp-content/uploads/2020/04/PSL-Report_042020.pdf; *see also Shadow Student Debt*, STUDENT BORROWER PROT. CTR. (July 2020), https://protectborrowers.org/wp-content/uploads/2020/12/Shadow-Student-Debt.pdf.

[3] *See* Danielle Douglas-Gabriel, *Public colleges and universities under fire for promoting controversial education loans*, WASH. POST (June 11, 2021), https://www.washingtonpost.com/education/2021/06/11/public-colleges-under-fire-for-lending-promotion/; *see also Pushing Predatory Products: How Public Universities are Partnering with Unaccountable Contractors to Drive Students Toward Risky Private Debt and Credit*, STUDENT BORROWER PROT. CTR. (June 2021), https://protectborrowers.org/wp-content/uploads/2021/06/SBPC_OPM.pdf.

[4] John Hechinger, *Probe Into College-Lender Ties Widens*, WALL STREET J. (Apr. 5, 2007), https://www.wsj.com/articles/SB117573094292160341.

[5] Melissa McNamara, *Student Loans Target of Investigation*, CBS (Mar. 16, 2007), https://www.cbsnews.com/news/student-loans-target-of-investigation/.

[6] *Id.*

protections that keep consumers safe," and that "[t]hese schools appear to be engaged in so-called 'preferred lender arrangements' with creditors."[7] The Student Borrower Protection Center found, for example, that "several of the schools driving students toward shadow student debt [an umbrella term for various risky, expensive private education credit products] are not disclosing key details around the types of products available to borrowers," and "it does not appear that institutions are meeting their obligation to publicly explain the nature and rationale behind their preferred lender arrangements."[8]

The Student Loan Sunshine Act ("the Act"), which was enacted in 2008 as part of the most recent reauthorization (P.L. 110-315) of the federal Higher Education Act ("HEA"), however, addresses these relationships between schools and lenders. It specifically modifies two federal laws: (1) the Higher Education Act (20 U.S.C. § 1001 et seq.), which is implemented through Department of Education ("DOE") regulations, and (2) the Truth in Lending Act ("TILA") (15 U.S.C. §§ 1601-1667f), which is implemented through Regulation Z, formerly administered by the Federal Reserve Board of Governors but now administered by the Consumer Financial Protection Bureau ("CFPB"). Through these modifications, the Act creates obligations for schools and lenders in the private educational lending space and on DOE with respect to these loans.[9]

II. BACKGROUND

Schools

The HEA, as modified by the Act, and its enacting DOE-promulgated regulations cover conduct by schools and provide definitions for schools that are subject to HEA obligations. By contrast, CFPB's Regulation Z covers the conduct of lenders (discussed later in this memorandum) and provides separate definitions for covered educational institutions and other terms therein. For example, CFPB's definition for covered educational institution reaches *un*accredited institutions,[10] but DOE's definition for covered institution does not—its definition refers to higher education institutions, which must be "[a]ccredited or preaccredited."[11]

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[7] *New Report Finds Public Universities are Driving Students Toward Risky Private Student Loans*, STUDENT BORROWER PROT. CTR. (June 11, 2021), https://protectborrowers.org/new-report-finds-public-universities-are-driving-students-toward-risky-private-student-loans/.

[8] *See Pushing Predatory Products: How Public Universities are Partnering with Unaccountable Contractors to Drive Students Toward Risky Private Debt and Credit*, *supra* note 3 at 15.

[9] By regulation, these loans are defined as those "provided by a private educational lender that is not a title IV loan and that is issued expressly for postsecondary education expenses to a borrower, regardless of whether the loan is provided through the educational institution that the student attends or directly to the borrower from the private educational lender," with some exceptions. *See* 34 C.F.R. § 601.2(b).

[10] 12 C.F.R. § 1026.46(b)(1)(i).

[11] 20 U.S.C. § 1019(2); 34 C.F.R § 600.4(a)(5)(i).

The institutions covered by the HEA provisions and implementing regulations are, in part: higher education institutions, proprietary institutions of higher education, postsecondary vocational institutions, and certain institutions abroad that receive federal funding/assistance.[12] A higher education institution is "a public or private nonprofit educational institution" that only admits "as regular students" those with high school diplomas, the "recognized equivalent," or those who are older than the age of mandatory attendance in that state.[13] Other requirements include, in part, that the school must be "legally authorized to provide an educational program beyond secondary education" in its state and must confer associate, baccalaureate, graduate, or professional degrees; provide a two-year program (or longer) that can contribute toward credit for a baccalaureate degree; or constitute "a one academic year training program that leads to a certificate, or other nondegree recognized credential" that "prepares students for gainful employment in a recognized occupation."[14] The school must usually be "[a]ccredited or preaccredited."[15] A proprietary higher education institution is neither a public nor private nonprofit educational institution but "[p]rovides an eligible program of training . . . to prepare students for gainful employment in a recognized occupation" or "[h]as provided a program leading to a baccalaureate degree in liberal arts," is accredited, and has existed for a minimum of two years, among other requirements.[16] A postsecondary vocational institution is, among other requirements, a public or private nonprofit educational institution that "[p]rovides an eligible program of training, as defined in 34 C.F.R. § 668.8, to prepare students for gainful employment in a recognized occupation" and is accredited.[17]

Bootcamps are short-term, non-degree granting credential programs frequently offered by for-profit companies, including companies who facilitate bootcamps on behalf of and using the branding of Title IV colleges.[18] Nothing in the Act's amendments to HEA explicitly excludes bootcamps from the Act's obligations, particularly where the bootcamp has a relationship with an accredited institution of higher education. In fact, DOE's implementing regulations contemplate a wide range of entities covered by these requirements. For example, a school that operates a bootcamp might be obligated to make certain disclosures regarding loans marketed to the bootcamp's students by virtue of the school's participation in a preferred lender arrangement at the institutional level.[19] A

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[12] *See* 34 C.F.R. § 601.2(b).
[13] 34 C.F.R. §§ 600.4(a)(1)-(2).
[14] *Id.* at (a)(4).
[15] *Id.* at (a)(5).
[16] 34 C.F.R. §§ 600.5(a)(1), (5)-(7).
[17] 34 C.F.R. §§ 600.6(a), (a)(4)-(5).
[18] *See Pushing Predatory Products: How Public Universities are Partnering with Unaccountable Contractors to Drive Students Toward Risky Private Debt and Credit*, *supra* note 3 at 2.
[19] *See* 20 U.S.C. § 1019(8) (defining preferred lender arrangement in part as "an arrangement or agreement between a lender and a covered institution or an institution-affiliated organization of such covered institution—(i) under which a lender provides or otherwise issues education loans to the students attending

bootcamp might also qualify as an institution-affiliated organization, which is also capable of entering preferred lender arrangements[20] and is defined as an organization that "is directly or indirectly related to a covered institution" and "is engaged in the practice of recommending, promoting, or endorsing education loans for students attending such covered institution or the families of such students."[21] Based on this language, if the bootcamp is considered "directly or indirectly related to a covered institution" and engages in loan marketing[22] and if the bootcamp's students are considered attendees of the school,[23] then the bootcamp should qualify as an institution-affiliated organization and could be considered a participant in a preferred lender arrangement under the Act. The bootcamp would then assume related disclosure requirements. Addressed later in this memorandum, lenders that participate in bootcamps that are or are associated with unaccredited schools might also incur obligations under Regulation Z, which defines covered educational institutions notwithstanding accreditation.[24]

1. Schools that communicate information about private education loans must disclose certain information to possible borrowers.

Covered institutions[25] that "provide[] information regarding a private education loan from a lender to a prospective borrower" must disclose the information in 15 U.S.C. § 1638(e)(1), such as "the potential range of rates of interest applicable," "limitations on interest rate adjustments," "fees or range of fees applicable" to the loan, "payment deferral options," and "an example of the total cost of the private education loan over the life of the loan."[26] They must also tell potential borrowers that the borrower might qualify for federal grant/loan aid and that those terms might provide greater benefit to the student than the terms in private loans.[27] The institution must also share information about private loans in a way that is "distinct" from information on federal loans.[28]

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such covered institution" and "that relates to such covered institution or such institution-affiliated organization recommending, promoting, or endorsing the education loan products of the lender"). Therefore, if the school is a covered institution and the bootcamp's students are considered attendees of the school, these obligations should be triggered.

[20] *See* 20 U.S.C. § 1019(8).

[21] 20 U.S.C. § 1019(5)(A). Based on this language, if the bootcamp is considered "directly or indirectly related to a covered institution" and engages in loan marketing, *see id.* at (5)(A), (8), and if the bootcamp's students are considered attendees of the school, *see id.* at (8), then the bootcamp should qualify as an institution-affiliated organization and could be considered a participant in a preferred lender arrangement under the Act.

[22] 20 U.S.C. §§ 1019(5)(A), (8),

[23] 20 U.S.C. § 1019(8),

[24] 12 C.F.R. § 1026.46(b)(1)(i).

[25] In this memorandum "covered institution" and "school" are used interchangeably.

[26] 20 U.S.C. § 1019a(a)(1)(B)(i); 15 U.S.C. §§ 1638(e)(1)(A), (C), (F), (I), (K); 34 C.F.R. § 601.11(b)(1).

[27] 20 U.S.C. § 1019a(a)(1)(B)(ii); 34 C.F.R. § 601.11(b)(2).

[28] 20 U.S.C. § 1019a(a)(1)(B)(iii); 34 C.F.R. § 601.11(c).

In addition, schools must give private education loan applicants a self-certification form at the applicant's request; described below, this form includes certain disclosures (*e.g.*, that the applicant may qualify for certain federal student financial aid).[29] And the school must supply information the student needs to fill out the form, if in the school's possession.[30]

2. Schools that enter preferred lender arrangements must disclose certain information, prohibit the lender's use of the school's name or logo to suggest that the school provides the loan, and must show the lender's name in all loan-related materials.

A preferred lender arrangement ("PLA") between a lender and school is an arrangement where the lender gives or issues loans to the school's students (or families) and the arrangement "relates to" the school "recommending, promoting, or endorsing the education loan products of the lender," with some exceptions.[31] DOE commentary has made clear that these arrangements are not narrowly defined. They exist notwithstanding whether the school and lender "entered into a formal agreement."[32] And the arrangement even exists "if the lender is not aware of the preferred lender arrangement" (although in that case the lender would not assume 12 C.F.R. § 226.48(f)'s disclosure obligations).[33]

When a school enters a preferred lender arrangement, the institution assumes certain disclosure requirements that seem designed to protect students from being exploited by that arrangement. With more information about available funding options, the student borrower can make an informed choice notwithstanding the arrangement. The Act thus seems to recognize that a preferred lender arrangement makes this information even more important.

First, the school must disclose certain information. If a school has a PLA, it must disclose on its website and on certain informational materials that address loans, in part, "the maximum amount of Federal grant and loan aid under subchapter IV available to students" and "a statement that such institution is required to process the documents required to obtain a loan under part B of subchapter IV from any eligible lender the student selects."[34] It must also disclose annually "such information as the [Consumer Financial Protection] Bureau determines to include in the model form developed under

[29] 20 U.S.C. § 1094(a)(28)(A); 34 C.F.R. § 601.11(d); 20 U.S.C. § 1019d(a)(3).
[30] 20 U.S.C. § 1094(a)(28)(A); 34 C.F.R. § 601.11(d)(2); 34 C.F.R. § 668.14(b)(29)(i).
[31] *See* 20 U.S.C. § 1019(8); 34 C.F.R. § 601.2(b).
[32] Institution and Lender Requirements Relating to Education Loans, 74 Fed. Reg. 55628 (Oct. 28, 2009).
[33] *Id.*
[34] 20 U.S.C. § 1019a(a)(1)(A)(i); *see* 34 C.F.R. § 601.10(a)(1).

paragraph (5)" for each loan the lender wants to offer students or their families the following award year.[35] Some of this information must be shared with students and their families with enough time for them to consider the information in choosing a lender or applying for a loan.[36] These schools must also guarantee that the lender's name is "displayed in all information and documentation related to such loans."[37]

Second, the school must prohibit certain marketing by the lender—the school may not permit the lender to use "the name, emblem, mascot, or logo" or "other words, pictures, or symbols readily identified with such institution organization" in the lender's marketing of private loans to students "*in any way that implies that the loan is offered or made by such institution or organization instead of the lender*."[38]

3. Schools that enter preferred lender arrangements must submit an annual report to the Secretary of Education.

Schools with preferred lender arrangements must issue an annual report to the Secretary of Education, and they must enable the public to access the report and make sure the report is given to students (those currently attending and intending to attend) and their families.[39] A school must provide certain information with respect to each lender in this arrangement with the school.[40] And the school must provide "*a detailed explanation of why such covered institution . . . entered into a preferred lender arrangement with the lender*," including why the terms and conditions for each loan advantage students or their families.[41]

4. Schools with preferred lender arrangements must create codes of conduct.

[35] *See* 15 U.S.C. §§ 1638(e)(5), (11); 20 U.S.C. § 1019a(a)(1)(A)(ii)(I); 20 U.S.C. 1019b(c)(1)(A)(ii)(I); 34 C.F.R. § 601.10(a)(2)(i). The latest versions of these forms can be found at: https://www.consumerfinance.gov/rules-policy/regulations/1026/H/#e3264d5fe43ddea4a500494177518084521309b9efe857fdbd86e760.
[36] *See* 20 U.S.C. § 1019b(c)(1)(B); 34 C.F.R. § 601.10(c)(2).
[37] 20 U.S.C. § 1019a(a)(3); 34 C.F.R. § 601.12(b).
[38] 20 U.S.C. § 1019a(2) (emphasis added); 34 C.F.R. § 601.12(a).
[39] 20 U.S.C. §§ 1019b(c)(2)(A)-(B); 34 C.F.R. §§ 601.20(a)-(b).
[40] 20 U.S.C. § 1019b(c)(2)(A)(i) (citing 20 U.S.C. § 1019b(c)(1)(A)(i)-(ii)); 34 C.F.R. § 601.20(a)(1) (citing 34 C.F.R. § 601.10(c)).
[41] 20 U.S.C. § 1019b(c)(2)(A)(ii) (emphasis added); 34 C.F.R. § 601.20(a)(2). The Student Borrower Protection Center was only able to track down one instance where a school actually created this report. *See Annual Report on Preferred Lender Arrangements*, MO. S. STATE UNIV. (Oct. 2020) https://www.mssu.edu/student-affairs/financial-aid/Annual%20Report%20on%20Preferred%20Lender%20Arrangements.pdf.

Schools with preferred lender arrangements must conduct themselves pursuant to 34 C.F.R. § 601.21.[42] The school must create a code of conduct that: "[p]rohibit[s] a conflict of interest with the responsibilities of an agent of an institution with respect to FFEL [Federal Family Education Loan] Program loans and private education loans" and that at least includes the items in 34 C.F.R. § 601.21(c), such as bans on revenue-sharing arrangements with lenders, solicitation or acceptance of gifts from lenders by individuals who perform work related to education loans for the institution, and "[r]efus[al] to certify, or delay certification of, any loan based on the borrower's selection of a particular lender or guaranty agency."[43] Revenue-sharing arrangements are "arrangement[s] between a covered institution and a lender" whereby "[a] lender provides or issues a FFEL Program loan *or private education loan* to students attending the institution or to the families of such students" and "[t]he institution recommends the lender or the loan products of the lender and in exchange, the lender pays a fee or provides other material benefits, including revenue or profit sharing, to the institution, [or] an agent."[44] Monetary or other benefits from a lender to a school may incentivize the school to advertise the lender more favorably and/or withhold information or guidance, contrary to the student borrower's best interest.

The institution must publish the code "prominently" on its website and "[a]dminister and enforce" it by *at least* mandating that its agents that perform work related to FFEL Program or private education loans "be annually informed" of the code's contents.[45]

5. Schools with preferred lender arrangements must create preferred lender lists.

As a precondition for eligibility to participate in Title IV loan and grant programs, most institutions must enter into program participation agreements with the Secretary of Education and those agreements must make eligibility dependent on the institution's satisfaction of its obligation to create a preferred lender list, among other requirements.[46] Specifically, an institution with a preferred lending arrangement must, in part, annually "compile, maintain, and make available for students attending the institution" and their families a list "of the specific lenders for loans made, insured, or guaranteed under this subchapter [Title IV] or *private education loans* that the institution recommends, promotes, or endorses in accordance with such preferred lender arrangement."[47]

[42] *See* 20 U.S.C. § 1019b(c)(3)(A).
[43] 34 C.F.R. § 601.21(a)(2); *id.* at (c)(1)-(2), (4)(ii).
[44] 34 C.F.R. § 601.21(c)(1) (emphasis added).
[45] 34 C.F.R. §§ 601.21(a)(2)(ii)-(iii).
[46] 20 U.S.C. §§ 1094(a), (a)(27).
[47] *Id.* at (a)(27) (emphasis added); 34 C.F.R. § 668.14(b)(28).

These lists must in part explain why the institution entered the arrangement with each lender (especially regarding terms that benefit the borrower) and indicate that attending students or their families have no obligation to borrow from a lender on the list.[48] The institution must also disclose how they choose lenders ("the method and criteria used") with which to have preferred arrangements for the purpose of guaranteeing lenders are chosen in the "best interests of the borrowers" (*e.g.*, for the lender's "highly competitive interest rates" or "high-quality servicing").[49] The Act also requires the institution to "exercise a duty of care and a duty of loyalty" in creating the preferred lender list and that the institution create the list "for the sole benefit" of students or their families.[50] Importantly, the institution cannot "deny or otherwise impede the borrower's choice of a lender or cause unnecessary delay in loan certification" under Title IV for those who choose an off-list lender.[51] These obligations are also outlined in the regulations.[52]

Private Student Lenders

Whereas the Act's modifications to HEA (and related DOE regulations) cover the conduct of schools, as indicated, its updates to TILA (and related CFPB regulations) cover the conduct of lenders. This section addresses the latter, specifically with respect to private educational lenders and private education loans.

Private education loans are, in part, those that are "provided by a private educational lender that" are "not made, insured, or guaranteed under . . . title IV" and that are "issued expressly for postsecondary educational expenses to a borrower, regardless of whether the loan is provided through the educational institution that the subject student attends or directly to the borrower from the private educational lender."[53] Private educational lenders issue such loans; specifically, by statute, private education lenders are financial institutions or federal credit unions that "solicit[], make[], or extend[] private education loans" as well as "any other person engaged th[is] business."[54]

At the outset, it is worth noting that CFPB's Regulation Z appears to cover a broader range of deals between private educational lenders and schools than do DOE's regulations discussed above. Specifically, Regulation Z defines covered educational institutions as: "An educational institution that meets the definition of an institution of

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[48] 20 U.S.C. § 1094(h)(1)(A).
[49] *Id.* at (h)(1)(C).
[50] *Id.* at (h)(1)(D).
[51] *Id.* at (h)(1)(E).
[52] 34 C.F.R. § 601.10(d).
[53] 15 U.S.C. § 1650(a)(8)(A). The other element that defines a private education loan is that it "does not include an extension of credit under an open-end consumer credit plan, a reverse mortgage transaction, a residential mortgage transaction, or any other loan that is secured by real property or a dwelling." 15 U.S.C. § 1650(a)(8)(B). Regulation Z also defines private education loans. *See* 12 C.F.R. § 1026.46(b)(5).
[54] *See* 15 U.S.C. § 1650(a)(7); *see also* 20 U.S.C. § 1019(6)(A)(3).

higher education, as defined in paragraph (b)(2) of this section, *without regard to the institution's accreditation status*,"[55] whereas DOE defines a covered institution by reference to higher education institutions which must be "[a]ccredited or preaccredited."[56] This means, for example, that even if DOE or a litigant cannot apply DOE's regulations to an *un*accredited educational program that participates in a preferred lender arrangement, CFPB's regulations could potentially be used to hold that same deal's private educational lender counterpart legally accountable.

1. Private educational lenders cannot give gifts to schools to benefit its private education loan business, share revenue with schools who market their private education loans, or compensate members of their advisory board who are private student loan/financial aid-related school employees.

TILA and HEA contain some parallel requirements. Just as a school with a preferred lender arrangement must include certain prohibitions in its code of conduct pursuant to DOE regulation,[57] TILA requires that private educational lenders also refrain from some of these activities. For instance, private educational lenders "may not, directly or indirectly—(1) offer or provide any gift to a covered educational institution in exchange for any advantage or consideration provided to such private educational lender related to its private education loan activities; or (2) engage in revenue sharing with a covered educational institution."[58] Revenue sharing, also defined above via DOE regulation, refers to a school-private educational lender "arrangement" whereby the lender issues private education loans to attending students, the school "recommends" the lender or its private education loans to students "or others," and the lender "pays a fee or provides other material benefits" to the school "in connection with the private education loans provided to [attending] students . . . or a borrower acting on behalf of a student."[59] This definition appears to encompass both informal gift-giving as well as formal revenue-sharing deals and kickback schemes.

In addition, TILA prohibits compensation of certain school employees for their participation in private educational lender advisory boards. In particular, a school's financial aid employees or those who perform work related to private education loans or financial aid "and who serve[] on an advisory board, commission, or group established by

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[55] 12 C.F.R. § 1026.46(b)(1) (emphasis added).
[56] 20 U.S.C. § 1019(2); 34 C.F.R § 600.4(a)(5)(i).
[57] *See* 34 CFR §§ 601.21(a), (c).
[58] 15 U.S.C. §§ 1650(b)(1)-(2).
[59] 15 U.S.C. § 1650(a)(9).

a private educational lender or group of such lenders" must not "receiv[e] anything of value from the private educational lender or group of lenders."[60]

2. Private educational lenders must disclose information throughout the lifespan of a loan.

These lenders are obligated to disclose material information about the conditions of their loans and satisfy other duties set forth in 15 U.S.C. § 1638(e).[61] These duties arise at different points in the lifespan of a loan: at the time of application and solicitation, approval, pre-consummation, and consummation.[62]

In a private education loan application or solicitation for the loan (absent an application requirement), for example, the lender must "*clearly and conspicuously*" disclose "the term of the private education loan," "payment deferral options," and "that the borrower may qualify for Federal student financial assistance through a program under title IV" instead of or combined with the private loan, among other disclosures.[63] And, at approval, the lender must disclose "fees or range of fees applicable to the private education loan" and "whether monthly payments are graduated," among other disclosures.[64] Before consummation of a private education loan for a student at a higher education institution, the lender must receive a signed self-certification form from an applicant, described below.[65] At consummation, the lender must make additional disclosures, such as "fees or range of fees applicable to the private education loan" and "the maximum term under the private education loan program," among others.[66] The regulations also set forth information lenders must disclose at approval/solicitation, upon notice of approval, and after consumer acceptance of the loan[67] along with the timing of such disclosures.[68]

3. Private educational lenders also must disclose certain information to schools if they enter preferred lender arrangements.

Like schools, private educational lenders also assume disclosure duties if they enter preferred lender arrangements. These lenders must provide schools the information requested by the Consumer Financial Protection Bureau's model form "for each type of

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[60] 15 U.S.C. § 1650(d). This prohibition does not include "reimbursement of reasonable expenses incurred." *See id.*
[61] *See* 20 U.S.C. § 1019a(b)(1)(A)(ii).
[62] *See* 15 U.S.C. §§ 1638(e)(1)-(4).
[63] *Id.* at (e)(1), (e)(1)(G), (I), (M) (emphasis added).
[64] *Id.* at (e)(2), (e)(2)(F), (K).
[65] *Id.* at (e)(3).
[66] *Id.* at (e)(4); *id.* at (e)(2)(F)-(G).
[67] 12 C.F.R. §§ 1026.47(a)-(c).
[68] 12 C.F.R. § 1026.46(d).

private education loan" the lender will offer students attending that institution or their families for the following award year.[69] In addition, the regulations obligate creditors that participate in such arrangements to provide annual information to the school.[70] Such information includes applicable interest rates, fees or modifications to the interest rate or principal if the borrower defaults or pays late, terms of repayment, and a sample of the loan's full cost, among other disclosures.[71]

4. Creditors cannot use the school's name or logo in marketing private education loans.

Creditors (other than schools) usually cannot use "the name, emblem, mascot, or logo of a covered educational institution, or other words, pictures, or symbols identified with a covered educational institution" to market private education loans "in a way that implies that the covered education institution endorses the creditor's loans."[72] However, the regulations create one exception—for some agreements "where the covered educational institution agrees to endorse the creditor's private education loans," and there is a "clear and conspicuous disclosure that is equally prominent and closely proximate to the reference to the covered educational institution that the creditor's loans are not offered or made by the covered educational institution, but are made by the creditor."[73] Also, a creditor can negate the inference that the covered educational institution "endorses" the loan through a "clear and conspicuous disclosure that is equally prominent and closely proximate to the reference to the covered educational institution" which indicates that the institution "does not endorse the creditor's loans and that the creditor is not affiliated with the covered educational institution."[74]

Department of Education

DOE is responsible for enforcing obligations that HEA imposes on schools and, relatedly, for promulgating HEA's implementing regulations (by contrast, CFPB enforces TILA, which creates obligations for lenders). This section briefly describes two responsibilities that HEA assigns to DOE: (1) DOE must create a self-certification form for private student loan applicants to ensure that student borrowers are made aware of facts that may influence their decision to undertake a private education loan, and (2) DOE must maintain a lender affiliates list, which helps schools satisfy their preferred lender list obligations.

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[69] *See* 15 U.S.C. § 1638(e)(11).
[70] *See* 34 C.F.R. § 1026.48(f).
[71] *See* 12 C.F.R. §§ 1026.47(a)(1)-(4).
[72] 12 C.F.R. § 226.48(a)(1).
[73] *Id.* at (b).
[74] *Id.* at (a)(2).

1. The Secretary of Education must create a self-certification form for private student loan applicants—for schools to give applicants and for applicants to submit to lenders.

The Act obligates the Secretary of Education to create a "self-certification form" for private education loans for higher education institutions to give applicants at their request[75] and which private lenders must obtain from an applicant (signed) before consummating the loan.[76] The form must disclose, in part, that the applicant may qualify for federal student financial aid through a subchapter IV program instead of or combined with a private loan, that the applicant "is encouraged to discuss the availability of Federal, State, and institutional student financial assistance with financial aid officials," and that a private loan might impact the applicant's eligibility "for free or low-cost Federal, State or institutional student financial assistance."[77]

2. The Secretary of Education must maintain a lender affiliates list.

The Secretary of Education must "maintain and regularly update a list of lender affiliates of all eligible lenders," and must give this list to institutions so they can satisfy their obligations under 20 U.S.C. § 1094(h)(1)(B) (a set of preferred lender list obligations, such as the requirement to "indicate[], for each listed lender, whether the lender is or is not an affiliate of each other lender" on the list and explain any affiliations of lenders on the list).[78]

III. ENFORCEMENT OPTIONS

Enforcement is critical to holding schools and lenders accountable to their obligations under the Act, which would in turn create a private student lending industry that works more fairly for students. This section discusses some enforcement options available to DOE, CFPB, and individuals to hold schools and lenders accountable to the strictures of the Act.

1. Enforcement by DOE

DOE can enforce the HEA and its implementing regulations against schools and potentially against schools' Online Program Managers that help expand their online education offerings (to the extent they are a school's third-party servicer and jointly and severally liable for an HEA violation, among other circumstances discussed below).

[75] *See* 20 U.S.C. §§ 1019d(a), (a)(2).
[76] *See* 15 U.S.C. § 1638(e)(3).
[77] 20 U.S.C. §§ 1019d(a)(3)(A)-(C).
[78] *See* 20 U.S.C. §§ 1094(h)(2), (h)(1).

First, DOE can rescind a school's Title IV eligibility if the school does not satisfy certain requirements. Most institutions only achieve Title IV eligibility if they enter into program participation agreements ("PPA") with the Secretary of Education, and those agreements must condition Title IV eligibility on satisfaction of these requirements.[79] For example, if a school participates in a preferred lender arrangement, its PPA must "condition the initial and continuing eligibility . . . upon compliance with" the requirement, in part, to "at least annually compile, maintain, and make available for students attending the institution, and the families of such students, a list, in print or other medium, of . . . private education loans that the institution recommends, promotes, or endorses in accordance with such preferred lender arrangement."[80] DOE can also rescind a school's Title IV eligibility if the school does not satisfy its obligation to give a private student loan applicant ("upon request") a self-certification form created by DOE that lenders must collect from certain student borrowers, along with "information required to complete such form" if in the school's possession.[81] Schools in PPAs must also agree "upon the request of the applicant, [to] discuss with the applicant the availability of Federal, State, and institutional student financial aid," so failure to do this offers another basis for withholding Title IV eligibility.[82] A school that wants to stay Title IV-eligible must also create a code of conduct; as described, the code must in part prohibit revenue-sharing arrangements and acceptance of gifts from lenders by an "officer or employee of the institution who is employed in the financial aid office of the institution or who otherwise has responsibilities with respect to education loans."[83]

Second, albeit not enforcement in the traditional sense, DOE can promulgate additional regulations to empower student borrowers in the private education lending process. For example, DOE could make Title IV eligibility contingent on more action by schools to promote the interests of student borrowers, as the regulations contemplate that program participation agreements "condition[] the initial and continued participation of an eligible institution in any Title IV, HEA program upon compliance with . . . any additional conditions specified in the program participation agreement that the Secretary requires the institution to meet," among other requirements.[84]

Third, even though DOE primarily has enforcement authority over schools, DOE could also bring an action against an Online Program Manager ("OPM"). An OPM is a third-party servicer that contracts with a school to expand its online education offerings through provision of services, such as teaching platforms and job placement management. Under 34 C.F.R. § 668.25, DOE could hold an OPM jointly and severally

[79] 20 U.S.C. §§ 1094(a); 34 C.F.R. §§ 668.14(a)(1), (b).
[80] 20 U.S.C. §§ 1094(a), (a)(27).
[81] 20 U.S.C. § 1094(a)(28)(A); 15 U.S.C. § 1638(e)(3).
[82] 34 C.F.R. § 668.14(b)(29)(ii).
[83] 20 U.S.C. §§ 1094(a), (a)(25), (e)(1)-(2).
[84] *See* 34 C.F.R. § 668.14(a)(1).

liable with a school if (1) the OPM is a "third-party servicer for the administration of any aspect of the institution's participation in any Title IV, HEA program," but "only to the extent that the servicer's eligibility to contract with the institution has not been limited, suspended, or terminated" through the process outlined in 34 C.F.R. §§ 668.81-668.99;[85] and (2) the OPM violated "any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, and any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA."[86]

For example, under 34 C.F.R. §§ 668.25, DOE could hold an OPM hired by a school to help facilitate its Title IV program jointly and severally liable with the school for fraudulent representations made to DOE in violation of the False Claims Act (discussed below).[87] If the OPM maintains preferred lender arrangements with lenders[88] but does not disclose a preferred lender list to students and families, for instance, that would contravene the school's program participation agreement that supports its claim to Title IV funds[89] and might constitute a false claim against DOE. In addition, an OPM in a revenue-sharing arrangement with a lender might also violate the False Claims Act by maintaining such an arrangement despite the school's program participation agreement that conditions its Title IV eligibility on creation of a code of conduct that, in part, *bans* revenue-sharing arrangements.[90] DOE could potentially hold the OPM jointly and severally liable with the school for that misrepresentation, as well.

2. Enforcement by CFPB

Meanwhile, the CFPB has enforcement authority over lenders under TILA and, relatedly, Regulation Z. TILA specifically gives the CFPB authority to obligate private educational lenders to make additional disclosures to student borrowers as they navigate the lending process and together with DOE, to create a model form that outlines disclosures schools in preferred lender arrangements must make

[85] *See* 34 C.F.R. § 668.25(a).
[86] *See* 34 C.F.R. § 668.25(c)(3).
[87] *See* 31 U.S.C. § 3729(a)(1).
[88] In fact, a preferred lender arrangement is not narrowly defined as an agreement between a school and a lender but, rather, encompasses agreements "between a lender and . . . an institution-affiliated organization of such covered institution." *See* 20 U.S.C. § 1019(8). Because an institution-affiliated organization is "directly or indirectly related to a covered institution," and "is engaged in the practice of recommending, promoting, or endorsing education loans for students attending such covered institution or the families of such students," an OPM could constitute an institution-affiliated organization that is capable of entering preferred lender arrangements. *See* 20 U.S.C. § 1019(5)(A). In addition, even though the statute defines revenue-sharing arrangements as "between a covered institution and a lender" and not between an institution-affiliated organization and lender, *see* 34 C.F.R. § 601.21(c)(1), as an extension of a school an OPM could potentially participate in such an arrangement.
[89] 20 U.S.C. § 1094(a)(27).
[90] *See* 20 U.S.C. §§ 1094(a)(25), (e)(1).

First, just as DOE can enact regulations to protect student borrowers, CFPB can do the same. For instance, 15 U.S.C. § 1638(e) includes among the disclosures private educational lenders must make to borrowers in applications/solicitations and at approval: "such other information as the Bureau shall prescribe, by rule, as necessary or appropriate for consumers to make informed borrowing decisions."[91] By promulgating regulations that require additional disclosures to student borrowers pursuant to this provision, CFPB can help ensure that students are provided critical information about the short- and long-term implications of their loans.

Second, CFPB is tasked by statute with creating the model form that sets forth information schools in preferred lender arrangements must disclose annually for each loan the lender wants to offer students or their families "pursuant to a preferred lender arrangement" the following award year.[92] Namely, TILA instructs that CFPB and DOE should "develop and issue model forms that may be used, at the option of the private educational lender, for the provision of disclosures required under this subsection."[93] In designing the model form, CFPB can ensure student borrowers have all material information to avoid unfair loans—such as information about their chosen lender, competing loan options, and their rights as borrowers under the law. This is an area where CFPB and DOE can, and should, collaborate.

3. Individual Enforcement

If dissatisfied with DOE's and/or CFPB's enforcement of the Act, private individuals could hypothetically sue either agency to compel enforcement, but only a suit that submits evidence that an agency has affirmatively contravened the Act might stand a chance. However, to the extent these agencies do not enforce the Act and/or to the extent schools and lenders fail to meet their obligations under the Act, individuals may be able to hold schools and lenders accountable with the following civil remedies:

a. **False Claims Act Litigation**: An individual could bring an action against a school or a lender for providing false claims to the United States government under the False Claims Act, 31 U.S.C. §§ 3729-3733.[94] The False Claims Act provides that "any person who—(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim

[91] *See* 15 U.S.C. §§ 1638(e)(1)(R), (e)(2)(P).
[92] *See* 20 U.S.C. § 1019a(a)(1)(A)(ii)(I); 20 U.S.C. § 1019b(c)(1)(A)(ii)(I); 15 U.S.C. §§ 1638(e)(5), (11); 34 C.F.R. § 601.10(a)(2)(i).
[93] 15 U.S.C. § 1638(e)(5)(A).
[94] *The False Claims Act*, U.S. DEP'T OF JUST. (Jan. 14, 2021), https://www.justice.gov/civil/false-claims-act.

. . . is liable to the United States Government for a civil penalty . . . plus 3 times the amount of damages which the Government sustains because of the act of that person."[95] If a school provides false or misleading material information to DOE either in its program participation agreement itself or in fulfilling its obligations under that agreement, without which a school would not be eligible for Title IV funds,[96] the school might be liable in a False Claim or *qui tam* suit. For example, the agreement must make eligibility contingent on a school creating a code of conduct that bans revenue-sharing arrangements with lenders, among other things,[97] and on a school with a preferred lender arrangement disclosing to attending students and their families a preferred lender list.[98] If, unbeknownst to DOE, a school breaches these conditions but continues to receive Title IV funds, this ongoing breach might constitute a false claim against the government. An individual could then seek relief for this unlawful conduct on the government's behalf.[99] One significant challenge to *qui tam* enforcement is the requirement that the agency paying the claim—in this case DOE paying Title IV funds—must conclude that the false or misleading information was material to its decision to pay.[100] That materiality can often be a high evidentiary bar when agencies like DOE rarely find a school ineligible for Title IV funds.

b. **State Consumer Protection Laws**: States have consumer protection laws, such as California's Consumer Legal Remedies Act ("CLRA"), through which student borrowers can recover for a school or lender's unfair, unlawful, or fraudulent conduct. For example, the CLRA includes in the definition of an "unfair method[] of competition and unfair or deceptive act[] or practice[]": "Misrepresenting the source, sponsorship, approval, or certification of goods or services."[101] Therefore, a student borrower can argue that the school or lender's activity is unlawful under the Act and that that activity is also deceptive because the student borrower did not (and could not) learn that the loan product did not stem from an arm's length negotiation. In addition, student borrowers could bring an action against a school or lender under California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof.

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[95] 31 U.S.C. § 3729(a)(1).
[96] *See* 20 U.S.C § 1094(a).
[97] *See* 20 U.S.C. §§ 1094(a)(25), (e)(1).
[98] *See* 20 U.S.C. § 1094(a)(27).
[99] 31 U.S.C. § 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.").
[100] *See* 31 U.S.C. § 3729(b)(4) ("the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property").
[101] Cal. Civ. Code §§ 1770(a), (a)(2).

Code § 17200 et seq.), which "provides a private cause of action for users who are harmed by unfair, unlawful, or fraudulent business practices."[102] Student borrowers can bring actions under the UCL's unfair or fraudulent practices prongs.[103] They can also bring claims under the UCL's unlawful prong by "alleg[ing] facts that, if proven, would demonstrate that [the] [d]efendant's conduct violated another, underlying law."[104] If a school or lender violates federal law, like the Lanham Act (discussed in item #4 below), the student could bring a UCL claim premised on that violation.

c. **Breach of Contract**: A student borrower may be able to recover through a breach of contract action as an intended third-party beneficiary of a school's program participation agreement with DOE. Program participation agreements must condition Title IV-eligibility on satisfaction of certain requirements, including the requirement that schools make preferred lender lists accessible to students and families.[105] These agreements are therefore, in part, designed to protect students who undertake private education loans, which makes students intended third-party beneficiaries of the agreements. Damages could include added fees charged in connection with the school's violation of the program participation agreement. For example, if a school fails to maintain a code of conduct that bans revenue-sharing arrangements between schools and lenders, as required by the program participation agreement,[106] this cause of action could be used to hold the school liable for any increase in fees charged to student borrowers that resulted from a school's revenue-sharing arrangement with a lender.

d. **False Advertising (Lanham Act)**: 15 U.S.C. § 1125 creates liability, in part, for anyone who "in connection with any goods or services . . . uses in commerce . . . any false designation of origin, false or misleading description of fact, or false or misleading representation of fact" that "is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."[107] Under this provision, a student borrower could therefore sue a lender for using a school's

[102] *In re Google, Inc. Priv. Pol'y Litig.*, 58 F. Supp. 3d 968, 984 (N.D. Cal. 2014).
[103] *See id.*
[104] *Id.* Also, "[i]f the unlawful conduct is part of a uniform course of fraudulent conduct, it must meet Rule 9(b)'s heightened pleading standards." *Id.*
[105] *See* 20 U.S.C. § 1094(a)(27).
[106] 20 U.S.C. §§ 1094(a)(25), (e)(1).
[107] 15 U.S.C. §§ 1125(a)(1), (a)(1)(A).

logo in its marketing of loan products in violation of 12 C.F.R. § 226.48(a)(1)[108] and/or could sue a school that participates in a preferred lending arrangement with respect to private education loans and that does not put the lender's name "in all information and documentation related to such loans" as required by 20 U.S.C. § 1019a(a)(3).[109] Either of these activities (or other conduct that violates the Act) could mislead student borrowers about the "association" between a school and lender.[110]

e. **Civil Liability Under 15 U.S.C. § 1640**: 15 U.S.C. § 1640 provides for civil liability through individual or class action litigation for lenders who breach certain statutory requirements, including 15 U.S.C. §§ 1638(e)(1), (2), and (4)—provisions that obligate lenders to make certain disclosures to borrowers who seek private education loans in the application or solicitation and at approval and consummation.[111] These obligations are summarized above. For example, "[i]n any application for a private education loan, or a solicitation . . . without requiring an application, the private educational lender" must disclose "clearly and conspicuously . . . whether the rate of interest applicable . . . is fixed or variable" and "fees or range of fees applicable" to the loan, among other things.[112] At approval, the lender must disclose in part "the maximum term under the private education loan program" and "payment deferral options applicable to the borrowers," among other disclosures.[113] And, at consummation, the lender must in part disclose "the applicable rate of interest in effect on the date of approval" and the right to cancel the loan "without penalty" within 3 days.[114] For the lender's non-compliance, an individual can pursue "any actual damage sustained . . . as a result of the failure," and in a class action "such amount as the court may allow" can be recovered with "no minimum recovery" per class member and recovery is limited to "the lesser of $1,000,000 or 1 per centum of the net worth of the creditor."[115] Those with viable claims against a lender under this provision should be aware of its restrictive statute of limitations: "Except as provided in the subsequent sentence, any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction . . . in the case of a violation involving a private education loan (as that term is defined in section 1650(a) of this

[108] *See* 12 C.F.R. § 226.48(a)(1).
[109] *See* 20 U.S.C. § 1019a(a)(3).
[110] *See* 15 U.S.C. § 1125(a)(1)(A).
[111] *See* 15 U.S.C. §§ 1638(e)(1), (2), (4).
[112] 15 U.S.C. §§ 1638(e)(1), (e)(1)(B), (F).
[113] 15 U.S.C. §§ 1638(e)(2), (e)(2)(G), (J).
[114] 15 U.S.C. §§ 1638(e)(4)(A), (C); *id.* at (e)(2)(A), (e)(7).
[115] 15 U.S.C. §§ 1640(a)(1), (a)(2)(B).

title), **1 year from the date on which the first regular payment of principal is due under the loan**."[116]

f. **Unjust Enrichment**: Some states recognize unjust enrichment as a standalone claim, by which a student borrower could argue (for example) that a school and lender in a revenue-sharing arrangement misled student borrowers about the legitimacy of fees or interest charged in connection with the loan. Under this theory, the student borrower could recover profits that the school and lender obtained as a result of the revenue-sharing arrangement.

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As you know, I specialize in False Claims Act and consumer fraud class litigation. Should you wish to discuss the contents of this memorandum, or if Tycko & Zavareei LLP can be of any assistance with these issues, please contact me at ssoneji@tzlegal.com.

[116] 15 U.S.C. § 1640(e) (emphasis added).