



State of California  
Office of the Attorney General

XAVIER BECERRA  
ATTORNEY GENERAL

August 8, 2018

*Via Federal eRulemaking Portal*

The Honorable Elisabeth DeVos  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

RE: Notice of Proposed Rulemaking on Borrower Defense, Docket ID ED-2018-OPE-0027

Dear Secretary DeVos:

On July 25, 2018, the U.S. Department of Education (the Department) proposed a new set of regulations (the Proposed Rule) to modify existing rules on borrower defense and financial responsibility, regulations that affect the Department's obligations regarding over a trillion dollars in outstanding loans. The Proposed Rule, published in the Federal Register on July 31, 2018, upends many protections for borrowers who have been defrauded by their schools and provides the public with only 30 days to comment. For a regulatory change of this magnitude, the Department must engage with stakeholders and the public to ensure the alterations serve the common good. Furthermore, as highlighted by Legal Services Center of Harvard Law School, the Notice of Proposed Rulemaking also grossly misstates the Department's long-standing interpretation of allowing borrowers to submit "affirmative" borrower-defense claims.<sup>1</sup> I urge the Department to withdraw the Proposed Rule immediately, or, at a minimum, to extend the comment period to at least 60 days in order to allow the public sufficient time to submit thorough feedback.

As the Attorney General of California, I have the responsibility to protect the rights of defrauded students. My office has worked alongside the Department to secure debt relief for students of Corinthian Colleges, and has undertaken numerous investigations and enforcement actions against schools and lenders that have cheated student loan borrowers. Along with our

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<sup>1</sup> Press Release: Department of Education's Borrower Defense Includes Fundamental Lie, Documents Show. Aug. 3, 2018. Available at <https://predatorystudentlending.org/press-releases/departments-education-borrower-defense-includes-fundamental-lie-documents-show-press-release/>.



partner states, we have sent letters to the Department to guide its rulemaking process.<sup>2</sup> Nevertheless, the Proposed Rule seeks to destroy our working relationship by imposing a federal standard for judging borrower defense claims and limiting the role of state attorneys general. The Proposed Rule fails to protect the interests of student loan borrowers who have been swindled by unscrupulous schools and lenders. The new regulations limit borrower defense to “defensive claims,” made after a loan has entered collections, eliminating the possibility of relief for those borrowers who manage to repay their loans despite having been defrauded by their schools. For this, the Department relies on repeated misstatements that until 2015, the Department accepted only “defensive” claims. This is patently inaccurate and alone requires immediate withdrawal of the Proposed Rule. The Proposed Rule also omits any process for the Department to discharge the loans for groups of students who were similarly defrauded by a predatory school—a process that the collapse of Corinthian Colleges made clear is critically needed. Additionally, the Proposed Rule removes bans on mandatory arbitration provisions and class action waivers. These are just a few of the numerous troubling aspects of the Department’s proposal.

Compounding the harm that the Proposed Rule will do to borrowers, the Department is following a hastened review schedule and allowing only a 30-day comment period with a Notice of Proposed Rulemaking riddled with inaccurate statements. During the rulemaking for the 2016 regulations, the public had 45 days to comment. 81 FR 39329. While the Administrative Procedure Act requires a minimum of 30 days for public comment during rulemaking (5 U.S.C. § 553(d)), a longer period is needed in this instance to allow affected parties to provide information to the Department. For example, the Department has specifically requested substantial, detailed input from the public about whether to accept “affirmative” claims and, if so, the “alternatives and the conditions that would apply in each case, including elements of adjudication, such as the evidentiary standard and time limitations on a borrower to submit a borrower defense.” To meaningfully respond, the public should have more than 30 days and accurate statements from the Department regarding its long-standing policy of accepting “affirmative” claims.

Furthermore, when a rule is economically significant, as the Department asserts this Proposed Rule will be, the formal recommendation of the U.S. Administrative Conference is for a 60-day comment period.<sup>3</sup> For this Proposed Rule, a 60-day comment period is appropriate. Recent proposed rules on finance and loans from other agencies have employed 60-day comment periods.<sup>4</sup> A 60-day comment period is even more appropriate for this Proposed Rule due to the vast number of individuals who will be affected by a rule that modifies the Department’s responsibilities regarding over a trillion dollars in outstanding loans.

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<sup>2</sup> Letter from Xavier Becerra, et al., to Secretary Elisabeth DeVos, March 5, 2018. Available at [https://oag.ca.gov/system/files/attachments/press\\_releases/2018%20AG%20Comment%20Letter%202018-03-05.pdf](https://oag.ca.gov/system/files/attachments/press_releases/2018%20AG%20Comment%20Letter%202018-03-05.pdf); letter from Maura Healey, et al., to Secretary Elisabeth DeVos and Ms. Wendy Macias, July 12, 2017. Available

at [https://oag.ca.gov/system/files/attachments/press\\_releases/Multistate%20Comments%20on%20Proposed%20Borrower%20Defense%20and%20Gainful%20Employment%20Negotiated%20Rulemaking.pdf](https://oag.ca.gov/system/files/attachments/press_releases/Multistate%20Comments%20on%20Proposed%20Borrower%20Defense%20and%20Gainful%20Employment%20Negotiated%20Rulemaking.pdf).

<sup>3</sup> Administrative Conference of the United States, Administrative Conference Recommendation 2011-2, June 16, 2011. Available at <https://www.acus.gov/sites/default/files/documents/Recommendation%202011-2%20%28Rulemaking%20Comments%29.pdf>.

<sup>4</sup> See, e.g., “Payday Alternative Loans,” June 4, 2018, 83 FR 25583 and “Auditor Independence with Respect to Certain Loans or Debtor-Creditor Relationships,” May 8, 2018, 83 FR 20753.

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I therefore urge the Department to withdraw this Proposed Rule immediately. If the Department decides to proceed with this flawed, harmful, and erroneously justified regulation, it should extend the comment period to a minimum of 60 days to allow for the submission of detailed comments from the public.

Sincerely,

A handwritten signature in blue ink, appearing to read "Xavier Becerra", with a large, stylized loop at the end.

XAVIER BECERRA  
California Attorney General