representing beauty & wellness education since 1924

July 28, 2016

The Honorable John B. King, Jr.
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Attention: Jean-Dider Gaina, Room 6W232B

RE: Docket ID: ED-2015-OPE-0103

Dear Secretary King:

On behalf of the over 813 member institutions of the American Association of Cosmetology Schools (AACS), the students these institutions prepare to become licensed professionals in the thriving U.S. beauty and wellness industry, and the employers who rely on these trained professionals to meet ever increasing consumer demand for spa and salon services, we respectfully submit comments to the Borrower Defense to Repayment (BDTR) Notice of Proposed Rulemaking (NPRM) published on June 16, 2016.

Founded in 1924, AACS is a national, non-profit association. Our members offer courses of instruction in the beauty and wellness industry, including cosmetology, skin, nail, barbering and massage programs. Nearly all programs offered by AACS members result in a licensed outcome. Cosmetology and barbering programs are regulated by the states, with varying requirements governing the number of hours of instruction, curriculum, faculty, exam, and licensure prerequisites. AACS members include schools of all sizes, but the overwhelming majority are small, single location schools owned by individuals.

These comments are focused on significant aspects of the NPRM that we believe may impact AACS member schools, their students, their employers, and the beauty and wellness sector of the U.S. economy as a whole. These comments may not represent all of the issues that each AACS member school may have individually with the NPRM or the process by which it was developed. Further, AACS reserves the right to raise with the U.S. Department of Education (“Department”) and other stakeholders any other issue associated with this rulemaking deemed problematic even if not covered specifically in these comments.

I. Executive Summary

AACS supports the Department's objective of establishing a more uniform standard for determining when a borrower has a legitimate defense to loan repayment. We also agree that if a borrower has been provided false information by a school that is material to that student's decision to enroll, that student should have an effective means by which to assert a defense to repayment. The BDTR framework proposed in the NPRM to accomplish that goal, however, is vastly overbroad, severely flawed in numerous respects, and not well founded in law or public policy. As a result, AACS urges the Department to either abandon or significantly alter this proposed rule for several reasons.

First, the NPRM does not provide fair or due process to schools because it fails to provide a clearly defined procedure by which borrower defense proceedings will be conducted to ensure adequate fact finding on which to support a loan discharge and recoupment action against schools. As a result, the NPRM fails to protect the interests of the taxpayer by encouraging weak or even potentially fraudulent claims evaluated by a limited and one-sided process.

Second, the NPRM strays far from its original purpose, establishment of a more uniform BDTR rule, by setting forth a mechanism for the establishment of various automatic or discretionary "triggers" for the Department to mandate multiple, stackable Letters of Credit ("LOCs") in the interest of "insuring" the taxpayer against Title IV losses from financially weak schools. However, this scheme is ill-designed, as most of the triggers for establishment of an LOC are not reliable indicators of the financial responsibility of a school.

Third, the NPRM strays far afield from its original purpose once again in proposing to require institutions to calculate a Loan Repayment Rate (LRR). The Department has not only failed to adequately "notice" this aspect of the NPRM, but it is poorly constructed in that it fails to acknowledge the many loan repayment programs supported by the Administration yet not accounted for in the LRR proposal.

Fourth, the NPRM incorporates "misleading," not just false and erroneous, statements as a basis for a borrower defense, placing the Department in the precarious position of determining, as a matter of first impression, whether a statement, even if true, is nonetheless "misleading." Department staff has little to no experience with the evaluation of whether a statement is true but misleading and an inadequate process in the proposed BDTR to make those difficult and fact-specific decisions of such consequences for schools. The process also veers from Federal Trade Commission practice to evaluate misleading statements in the context of the entire transaction between a consumer and a business, not just a statement in isolation.

Finally, the ban on pre-dispute arbitration agreements, whether they permit or prohibit class arbitration, is contrary to federal law and is not narrowly tailored to address the Department's concerns about the use of arbitration agreements.

In preparing these comments, AACS notes that this proposed rule has been published in an accelerated manner not consistent with a thoughtful and deliberative rulemaking process. The proposed rule was published with an abbreviated public comment period of 45 days and a deadline to publish a final BDTR rule by the end of the current Administration. This was preceded by a negotiated rulemaking session that added several issues to the agenda without adequate opportunity for full evaluation by all stakeholders. The issues added include, but are not limited to, the amendments to the financial responsibility regulations and the ban on arbitration agreements. As a result, the NPRM has not been crafted with the care, thoroughness or legal grounding that normally supports broad deference to agency rulemaking. AACS finds this particularly troubling given that the proposed rule is likely to cause major disruption to our member institutions.

II. Discussion.

A. Borrower Defense to Repayment—34 C.F.R. § 685.222

The NPRM does not provide fair or due process to schools because it fails to provide a clearly defined procedure by which borrower defense proceedings will be conducted to ensure adequate fact finding on which to support a loan discharge and recoupment action against schools. As a result, the NPRM fails to protect the interests of the taxpayer by encouraging weak or even potentially fraudulent claims evaluated in a limited and one-sided process.

Current regulation permits borrowers to assert a defense to repayment of a Title IV Direct Loan for "any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law." 34 C.F.R § 685.206(c)(1). The NPRM proposes to expand this right so that borrowers can assert a defense where: (1) the borrower, whether as an individual or as a member of a class, or a governmental agency, has obtained against the school a nondefault, favorable contested judgment; (2) the school failed to perform its obligations under the terms of a contract with the student or (3) the school or any of its representatives, or any institution, organization, or person with whom the school has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services, made a substantial misrepresentation in accordance with 34 CFR part 668, subpart F, that the borrower reasonably relied on when the borrower decided to attend, or to continue attending, the school. *See* Proposed 34 C.F.R. § 685.222. The NPRM sets forth both a process for borrowers to assert a defense based on any of these new grounds, to obtain relief from all or part of a loan obligation, and for the Department to seek reimbursement from institutions when loans are discharged, but that process is inadequate to protect both school and taxpayer interests because it is not sufficiently defined as to the facts and evidence to be evaluated as well as the role of schools in responding to breach of contract and substantial misrepresentation claims. The NPRM also contains no statute of limitations on raising a borrower defense.

As a result, the NPRM will likely encourage weak or even potentially fraudulent claims resulting in potentially significant taxpayer cost due to a limited and one-sided BDTR process.

1. The procedures for borrowers to assert a defense to repayment are inadequate and unfair.

The current proposed rule sets forth three basic processes for adjudication of BDTR claims: closed schools, open schools: single student, and open schools: group claims. We address only the open school processes.

The procedure for single and group claims are nearly identical in that they provide for no meaningful participation by the institution. This, despite the fact that as a result of the BDTR process, the school is likely to face significant liability and/or penalty. The lack of involvement of the institution is troubling and constitutes fundamental unfairness and lack of due process.

To begin, the institution is likely to be in possession of documents or testimony that would be of assistance in evaluating the merits of a BDTR claim. The institution will have detailed attendance records, grades, progress reports, and other records relating to the student while he/she was in school. The school will also have access to witnesses—admissions personnel, teachers, counselors, placement officers, administrators, and others—who can assist the Department in assessing the validity of the borrower's claims. Yet, there is no provision that requires the Department to allow the school to present this information. Without the opportunity to participate, the school is denied due process and fundamental fairness. Also, without this evidence, the Department cannot adequately protect the interests of the taxpayer by denying weak or fraudulent claims.

In addition, the lack of involvement by the institution means that there is no check on the "fact finding process" conducted by the Department. Instead, it guarantees that the "Department Official" conducting the process will only hear one side of the story. This will lead to overwhelmingly, if not completely, one-sided results in favor of borrowers who file BDTR claims. This process guarantees that neither the interests of the institution or the taxpayer will be protected.

These concerns are exponentially more profound in group claims. That process seeks to adjudicate BDTR on a mass scale in the same way that class action lawsuits resolve legal claims for groups of persons. However, the analogy between class actions and group claims ends there. Class action procedures in state and federal courts contain lengthy, arduous, and difficult requirements before a class is recognized and certified. These procedures are difficult for a very good reason: the courts recognize that while there are efficiencies to be gained in group adjudications, there are also profound dangers to both those swept into the class as a plaintiff and those defending against the claims. To alleviate those concerns, parties to a class action lawsuit follow a lengthy, dual track process that first assesses the viability of the class action as a judicial vehicle. That process is adversarial (i.e. both sides have the right to be heard and to conduct discovery) to give the court the best opportunity to make a decision on whether to proceed as a class. Even then, depending on the jurisdiction and the type of claim, most forums require individuals to opt into a class (as opposed to requiring objectors to opt out). It is only once this process is complete, that the court will move on to the merits phase of the case. Unlike these class certification procedures, the NPRM lacks any process for properly assessing the merits of a group claim.

We respectfully request that the Department modify the proposed rule to ensure that there is fundamental due process and fairness afforded to the schools. This will also protect the taxpayer, as the school's interests in this process are in alignment with the taxpayer. Both will want to ensure that unmeritorious or fraudulent claims are not granted. We also respectfully suggest that the Department ensure that its processes conform with the adjudicative requirements of the Administrative Procedures Act, including the appointment of a neutral Administrative Law Judge to oversee claims and appeals. The appointment of a "department official", who reports to the Secretary, simply does not afford adequate protection to the institutions.

2. *The statute of limitations for borrowers in the NPRM should be clear and of reasonable length .*

The current NPRM is structured such that a borrower may assert a defense to repayment based on a court judgment at any time. A defense based on breach of contract or substantial misrepresentation may be raised at any time, as well, but there is a six year statute of limitations for seeking to recover amounts paid to the Secretary, which for substantial misrepresentation defenses means up to 6 years from the date the borrower "discovers" the misrepresentation.[1] Allowing a borrower to raise a defense to repayment at any time does not establish a reasonable window within which borrowers must act, which would shift some responsibility onto borrowers to be aware of and act on their rights, nor does it provide any certainty with regard to the time frame within which taxpayer funds may be utilized to provide relief or the time period for which institutions should be prepared to defend claims from individual borrowers. As a result, this process invites a continual and un-ending open floodgate of potentially stale, weak or fraudulent claims against the interests of both schools and taxpayers.

Borrowers should presumably know if they have a valid borrower defense immediately or shortly after completing a program. If a borrower was misled by a school, then they should know so within a reasonable period of time of completing the program. Similarly, if a borrower has sufficient knowledge and evidence to bring a lawsuit against a school, then at that time they would have sufficient knowledge and evidence to support a borrower defense claim with the Department.

In contrast, institutions and the Department (as the representative of the tax payers) are at a substantial disadvantage both in defending against and assessing untimely borrower defense claims, with regard to accessing records, staff, and other information necessary to demonstrate the falsity or inadequacy of a borrower claim.

We respectfully suggest that the Department establish a reasonable statute of limitations within which all borrowers must assert a borrower defense to repayment in order to provide necessary certainty to schools and taxpayers, and to support a stronger borrow defense evaluation process.

B. <u>The New Financial Responsibility Requirements Are Poor Measures of Financial Health and Will Unfairly Precipitate Financial Weakness</u>

The NPRM strays far from its original purpose, establishment of a more uniform BDTR rule, by setting forth a mechanism for the establishment of various automatic or discretionary "triggers" for the Department to mandate multiple, stackable Letters of Credit ("LOCs") in the interest of "insuring" the taxpayer against Title IV losses from financially weak schools. However, this scheme is ill-designed, as most of the triggers for establishment of an LOC are not reliable indicators of the financial responsibility of a school.

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1 Essentially, this means that a borrower may assert a defense at any time, since there is no practical way for the Department or an institution to effectively assess the truthfulness of a borrower's claim of when he/she "discovered" a substantial misrepresentation.

Specifically, the NPRM proposes to require schools to provide insurance in the form of irrevocable LOCs of at least 10% of the prior years' Title IV aid upon the event of certain discretionary and automatic "triggers". The LOCs are cumulative, and self-executing upon the occurrence of an automatic trigger, meaning that a school would be required to post one for each triggering event with nothing to prevent a school from being subject to LOCs up to 100% of the prior years' Title IV aid. Of course, no institution could withstand such situation, and many institutions will fail due to inability to secure sufficient cash to meet stackable LOC requirements. Worse, the triggers proposed are poor measures of an institution's financial health and will, in and of themselves, cause financial weakness. AACS urges the Department to abandon its attempt to use proposed trigger events as a proxy for financial institutional health due to the unsoundness of this approach and the sufficiency of the Department's current financial responsibility regulations to measure institutional financial responsibility as intended by HEA.

1. The current financial responsibility regulations authorized by HEA should solely govern the Department's measurement of financial responsibility.

The HEA provides that, "the Secretary shall determine [*inter alias*]… the financial responsibility of an institution in accordance with the requirements of this section." 20 U.S.C. §1099c. The statute further provides that the Secretary, "shall determine whether an institution has the financial responsibility required… on the basis of whether the institution is able (A) to provide the services described in its official publications and statements; (B) to provide the necessary administrative support; and (C) to meet all of its financial obligations, including refunds of institutional charges and repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary." 20 U.S.C. §1099c(c)(1). Current regulation allows the Department to determine financial responsibility based on (1) composite score; (2) cash reserves to cover refunds; (3) whether school is meeting financial obligations; and (4) if school is current on debt payments.

The triggers proposed by the Department are not authorized by the HEA including those that would require an LOC based on the filing of certain lawsuits, the existence of repayment obligations to the Department, certain accrediting agency actions, 90/10 rates and GE rule outcomes.

2. The automatic and discretionary triggers are ill-defined.

Many of the automatic and discretion triggers proposed in the NPRM are not sufficiently described and, as a result, leave broad discretion with the Department to determine when a trigger has been met.

Examples of such triggers include:

- "Significant fluctuation between consecutive award years" in the amount of Title IV funds received by an institution
- An institution being "cited" by a state licensing agency
- An institution failing a yet-to-be determined "financial stress test"
- An institution has "high" drop-out rates

The state agency citations are of particular concern to cosmetology schools. Typically, these schools are licensed or approved by the state board of cosmetology, either as the state approval agency or in addition to it. State boards of cosmetology conduct health and safety inspections of school clinics. These inspections include such non-financial items such as the cleanliness of shampoo bowls, work stations, and salon implements (scissors, perms rods, etc.), the marking of bottles of cleaning solutions, adequacy of bathroom facilities, fire extinguishers, and other items related to the operation of the student salon. Schools may be issued citations or even fines by these boards. In some states, such as Texas, the board may conduct inspections as often as every six months (Texas' enforcement agency is the Texas Department of Regulation and Licensing). Under the proposed rule, each time a school receives a citation, it would be at risk of having a 10% LOC imposed. Yet none of these citations bear on the school's financial responsibility. Further, these LOCs create cash restrictions that may in and of themselves create a financial responsibility score issues for institutions that would not exist without this new rule.
For these reasons, we respectfully request that the proposed rules be amended to require the Department review and determine whether the claims asserted are valid and result in the institution being unable to meet its financial obligations under the existing financial responsibility requirements.

3. The proposed rules fall outside the scope of the Department's August 20, 2015 notice of rulemaking.

The Department's August 20, 2015 notice of rulemaking stated its intent to develop new rules with respect to "the effect of borrower defenses on institutional capability assessments." This statement is too narrow to include the imposition of mandatory LOCs based on the triggers contained in the NPRM, and thus the LOC trigger scheme proposed by the Department has not been properly noticed.

C. <u>The Proposed LRR Is At Odds With Public Policy And Was Not Properly Noticed.</u>

1. The proposed LRR is inconsistent with the current Administration's promotion of a variety of loan repayment plans.

The NPRM strays far afield from its original purpose once again in proposing to require institutions to calculate a Loan Repayment Rate (LRR). The Department has not only failed to adequately notice this aspect of the NPRM, but it is poorly constructed in that it fails to acknowledge the many loan repayment programs supported by the Administration that are not accounted for in the LRR proposal.

Specifically, the proposed LRR compares the numbers of borrowers in a cohort who reduce the "original outstanding balance" on their loans against those who do not. If the LRR is less than or equal to zero, then the institution is required to provide certain warnings. The proposed rule runs contrary to public policy as set out in the HEA because it fails to account for borrowers participating in authorized repayment programs, actively promoted by the current Administration, that may not reduce their original outstanding balance.

2. *The proposed LRR falls outside the scope of the Department's August 20, 2015 notice of rulemaking.*

The Department's August 20, 2015 notice of rulemaking stated its intent to develop new rules with respect to "the effect of borrower defenses on institutional capability assessments." This statement is too narrow to include the imposition of mandatory warnings based on the calculation of the new LRR as discussed above.

D. The BDTR Process With Regard to Substantial Misrepresentation Exceeds HEA Authority and Should be Limited Only to False Claims

The NPRM states that for loans first disbursed on or after July 1, 2017, a borrower may establish a defense by claiming a substantial misrepresentation by the school on which the borrower reasonably relied to his or her detriment. *See* 81 Fed. Reg. 39,330, 39,338-39 (June 16, 2016). The NPRM incorporates the language of the current Title IV misrepresentation rule, which covers not just false and erroneous, but also "misleading" statements. *See* 34 C.F.R. 668 Subpart F. However, Section 487 of the HEA, on which this language is based, is clear in that the Department's authorized enforcement action with regard to a substantial misrepresentation is, after reasonable notice and opportunity for a hearing, a suspension, limitation, termination or fine action. *See* 20 U.S.C. § 1094(c)(3)(A). Nowhere in the HEA does it permit the Department to also to seek recoupment from an institution for all or part of a federal loan based on a substantial misrepresentation. Only Congress may provide that additional authority.

Further, a borrower defense based on substantial misrepresentation should be limited to false and erroneous, not true but misleading, statements. Otherwise, the Department is in danger of being placed in the precarious position of determining, as a matter of first impression, whether a claim asserted by a borrower refers to a statement that is true, yet nonetheless "misleading." Although the Title IV substantial misrepresentation rule that authorizes the Department to suspend, limit, terminate or fine an institution includes "misleading" statements, in practice the Department has asserted this rule in enforcement actions only with respect to false and erroneous statements, and has little or no expertise with the difficult evaluation of whether a statement is true but misleading, nor does it have, in the BDTR, an adequate process to gather sufficient evidence to make that fact-specific and situation-specific determination.

Further, the Federal Trade Commission's interpretation of Section 5(a) of the Federal Trade Commission Act, on which the Department's Title IV misrepresentation rule is based, provides that in determining whether an individual statement, representation, or omission is misleading, the statement, representation, or omission is not to be viewed in isolation. Rather, such statement is to be evaluated in the context of the entire advertisement, transaction, or course of dealing with the consumer to determine whether it constitutes deception. The BDTR process does not provide for such a contextualized analysis of whether a statement is misleading but the consequences to schools from that determination will be significant with respect to the effect of that determination on breeding additional misrepresentation claims in other state and federal forums. The Department, therefore, through this rulemaking threatens to undercut important FTC precedent regarding the proper evaluation of whether statements used in commerce are, or are not, misleading.

Even more troubling is the fact that in the case of the substantial misrepresentation basis in the BDTR, the Department proposes to create a rebuttable presumption that all students in the group relied on the misrepresentation when making educational decisions. Therefore, a true but misleading statement, determined to be such by a process that does not present the Department with robust factual information to substantiate that decision, could lead to a presumption of reliance by an entire group without a need to show actual reliance. The infirmities inherent in this proposed process and standard are likely to pose an existential threat to institutions of many types, not to mention astronomical costs to the taxpayer.

Finally, the NPRM contains authority for the Department official to consider "as evidence supporting the reasonableness of a borrower's reliance on a misrepresentation" whether the school or any of the other parties engaged in a variety of pressure tactics. None of those identified tactics have anything to do with establishing the false or misleading nature of a claim and are thus are unsupported by the HEA and the language of the current Title IV misrepresentation rule and should be struck from the rule.

E. <u>The Ban On Pre-dispute Arbitration Agreements Is Illegal And Unduly Broad.</u> The NPRM's ban on pre-dispute arbitration agreements, whether they permit or prohibit class arbitration, is contrary to federal law and is not narrowly tailored to address the Department's concerns about the use of arbitration agreements. The proposed rule would prohibit schools from entering into mandatory pre-dispute arbitration agreements with students. It would also prohibit schools from enforcing existing agreements. Among other things, it requires schools to provide certain notices to students who are a party to arbitration agreements with schools indicating that the school will not enforce the agreement. The proposed rule would also prohibit schools from using arbitration agreements that prohibit class arbitration and require similar statements from schools indicating they will not enforce such agreements.

1. The Department does not have the authority to ban arbitration agreements.

The Federal Arbitration Act ("FAA") provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The U.S. Supreme Court has repeatedly struck down regulations and statutes that are inconsistent with this principle. *See e.g.*, *DirectTV v. Imburgia*, 136 S.Ct. 463, 471 (2015).

The proposed rule violates this established federal public policy. Respectfully, the Department does not have the authority, through regulation, to prohibit private parties from entering into a contract that includes an arbitration agreement.[2] Moreover, even if it did have the power to do so prospectively, doing so retroactively creates serious constitutional questions under the Due Process and Takings Clauses.

[2] Where Congress has intended to give an agency the ability to ban arbitration, it has done so expressly through statute. *See, e.g.,* 12 U.S.C. § 5518 (granting such authority to the CFPB). No such authority exists in the HEA.

Moreover, state and federal courts already have the legal authority to review arbitration agreements and strike them if they violate the law. Courts routinely review claims by parties to arbitration agreements to ensure that the agreements are not unconscionable. If arbitration agreements are found to be either procedurally or substantively unconscionable, then courts will decline to enforce them. Current or former students who believe they have a claim against their school are always free to challenge the enforceability of their agreement in court. The proposed ban is unnecessary for this reason.

The proposed rule is also too broad. It is fatally defective because it sweeps aside all arbitration agreements without considering a more tailored approach to address the Department's concerns.[3] If not completely removed, the Department should adjust the proposed rule to deal with those concerns. For example, if the Department is concerned about confidentiality, mutuality, the availability of discovery, or other concerns, then it should design rules to prohibit those practices. One example of how to do this is under the so-called *Armendariz* rule in California.[4] That rule sets forth specific criteria for courts in California to assess whether a pre-dispute employment arbitration agreement is valid and not unconscionable. The requirements include: (1) a neutral arbitrator; (2) more than minimal discovery; (3) a written arbitration award; (4) all forms of relief available in court available in arbitration; and (5) a prohibition on imposing unreasonable costs on employees in arbitration. These same, or similar, restrictions could be employed in a revision to the proposed rule and would address all of the Department's stated concerns.

If the Department adopts this approach, it should consider the impact on current arbitration agreements. There is some danger that if the Department adopts a rule with specific requirements for arbitration agreements, that some might argue that existing agreements are not valid because they do not conform with the new requirements. This would result in confusion and inconsistent application of the law across jurisdictions. Therefore, AACS suggests that the Department clarify that existing agreements may be modified or "blue penciled" to be in conformance with the new requirements. This could be done by the schools giving notice of the changes or by the Department simply stating that schools will not be in violation of the new standards so long as they do not enforce the agreements in a manner inconsistent with the new rules.

Any narrower rule also should not restrict the schools' ability to prohibit class action arbitration. The Supreme Court has held that such restrictions are unlawful. *AT&T Mobility v. Concepcion,* 563 U.S. 333 (2011). More importantly, however, the Department should consider the benefits to borrowers, and the taxpayer, of not being grouped in a class action arbitration.

To begin, the arbitral forum is not well suited to class actions. The class form, by its nature, does not give individual consideration to the merits of each student's claims and damages. Instead, it lumps all of the claims into one action, potentially depriving some individuals of an award they

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3 AACS does not believe that the Department has the authority to dictate terms of the any arbitration agreement, but offers these suggestions as an alternative, constructive step in hopes that the Department will consider modifying the draft regulation.

4 The name of the rule stems from the California Supreme court case by the same name, *Armendariz v. Foundation Healthcare Services, Inc.* (2000) 24 Cal.4th 83.

are entitled to, while at the same time delivering an over-award to individuals who are not deserving. In short, individual arbitration gives each borrower the opportunity to have his or her claims considered on the merits.

In addition, individual arbitration eliminates the potential for hefty awards of attorneys' fees that reduce the amount of any award that would be available to an individual borrower.

2. The proposed ban on arbitration agreements fall outside the scope of the Department's August 20, 2015 notice of rulemaking.

The Department's August 20, 2015 notice of rulemaking stated its intent to develop new rules with respect to, "the effect of borrower defenses on institutional capability assessments." This statement is too narrow to include a ban on arbitration agreements.

III. <u>Conclusion.</u>

The NPRM's proposed BDTR framework, LRR proposal, amendments to the Title IV financial responsibility regulations, and proposed ban on arbitration agreements are severely flawed in numerous respects, and not well founded in law or public policy. Additionally, AACS is very concerned that the rush by the Department to finalize this rule, with an abbreviated public comment period of 45 days and deadline to publish a final BDTR rule by the end of the current Administration, has resulted in undermining the care, thoroughness and legal grounding that normally supports broad deference to agency rulemaking. As a result, AACS urges the Department to either abandon or significantly alter this proposed rule.

Thank you for the opportunity to submit these comments.
Sincerely,

Adam Nelson
Executive Director, AACS