STUDENT BORROWER PROTECTION CENTER

UNC SCHOOL OF LAW

MEMORANDUM

May 7, 2021

TO: Student Borrower Protection Center

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RE: **Campus Debit and Prepaid Cards and the Best Financial Interest Standard**

I. Introduction

Students may take out federal student loans in excess of tuition costs to cover essentials like books, housing, and other costs of living.[1] These student loan borrowers are then eligible to have the surplus Title IV funds disbursed either by paper check, direct deposit into a personal bank account, or, as is becoming increasingly common, school-sponsored prepaid cards and debit cards linked to deposit accounts.[2] By permitting disbursement of funds via prepaid or debit cards ("campus cards"), the Department of Education ("Department") sought to ensure that borrowers had "convenient access" to their loan funds, did not incur "unreasonable and uncommon financial account fees," and were not otherwise driven to "particular financial account[s]."[3]

[1] Collectively, this amount is referred to as the cost of attendance. 20 U.S.C. § 1087ll. *See also 2018-2019 Federal Student Aid Handbook*, 3 Fed. Student Aid 41, 41-54 (Aug. 2019), https://fsapartners.ed.gov/sites/default/files/attachments/2019-10/1920FSAHbkVol3Ch2.pdf.
[2] 34 C.F.R. § 164.
[3] Program Integrity and Improvement, 80 Fed. Reg. 67,126, 67,126 (Oct. 30, 2015) (codified at 34 C.F.R. pt. 668).

Unfortunately, many of the unscrupulous practices that permeated the credit card and student loan markets—and ultimately gave rise to federal reforms via the CARD Act[4] and the Student Loan Sunshine Act[5]—have migrated to the campus card space.[6] For example, profit-driven partnerships between financial institutions and colleges often led to student aid recipients being charged "onerous, confusing, or unavoidable fees in order to access their student aid funds or otherwise use the account."[7] After numerous investigations, audits, and legal actions by federal officials,[8] the Department promulgated regulations in 2015 to outline standards for companies partnering with schools operating in the cash management space.[9] However, as ongoing consumer harm in the campus card market illustrates, unclear standards and definitions including in subregulatory guidance regarding the obligations of institutions of higher education

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[4] Pub. L. No. 111-24, 123 Stat. 1734 (2009); *see also The State of Lending in America and Its Impact on U.S. Households*, Center for Responsible Lending (Dec. 12, 2012), https://www.responsiblelending.org/sites/default/files/uploads/5-credit-cards.pdf.

[5] *See* Higher Education Opportunity Act, Pub. L. No. 110-315, pt. G, 122 Stat. 3078, 3271–324 (2008) (codified as amended in scattered sections of 20 U.S.C.). In 2008, Congress enacted the Higher Education Opportunity Act, which incorporated the primary elements of the Student Loan Sunshine Act, establishing requirements for schools and for student lenders to address improper financial arrangements related to student lending and financial aid. For further discussion see Matthew Keenan, *Student Loan Sunshine Act Comes to the Floor*, NANCY PELOSI SPEAKER HOUSE, https://www.speaker.gov/newsroom/student-loan-sunshine-act-comes-to-the-floor (May 9, 2007).

[6] *See* Seth Frotman, Assistant Dir. and Student Loan Ombudsman, Consumer Fin. Prot. Bureau, Remarks to the National Summit on College Financial Wellness at The Ohio State University (June 17, 2016) (text available at https://files.consumerfinance.gov/f/documents/20160617_cfpb_Frotman-OSU-Wellness-Summit-Remarks.pdf) [hereinafter Frotman, Remarks].

[7] Program Integrity and Improvement, 80 Fed. Reg. at 67,126; *see also* Michael Stratford, *Wells Fargo Drops Some Fees on Campus Debit Cards After Criticism*, POLITICO (Apr. 4, 2019), https://www.politico.com/story/2019/04/04/wells-fargo-campus-debit-cards-1322573.

[8] Press Release, FDIC, FDIC Announces Settlement with WEX Bank and Higher One for Deceptive Practices Related to Debit Cards for College Students (Dec. 23, 2015) (on file with author); Jason Lange & Sarah N. Lynch, *Higher One Must Repay Millions to Students Over 'Deceptive' Financial Aid Practices*, THE HUFFINGTON POST (Dec. 27, 2015), https://www.huffpost.com/entry/higher-one-repay-millions_n_56802738e4b06fa688805b43; *College Credit Card Agreements*, CFPB Ann. Rep. to Congress (Dec. 2014); *see also* Rich Williams & Edmund Mierzwinski, *The Campus Debit Card Trap: Are Bank Partnerships Fair to Students?*, U.S. PIRG EDUC. FUND (May 2012), https://uspirg.org/sites/pirg/files/reports/thecampusdebitcardtrap_may2012_uspef.pdf; Meryl Compton & Kaitlyn Vitez, *Debit Cards on Campus: Putting Students' Financial Well-Being at Risk*, U.S. PIRG EDUC. FUND & FRONTIER GROUP (Apr. 2019), https://uspirg.org/sites/pirg/files/reports/USP_Debit-Cards-On-Campus_040419-v2.pdf.

[9] *See infra* pp. 4–5.

are holding back the Department's rules from realizing their goal of protecting student borrowers.

This memorandum reviews the history and details of the Department's 2015 rulemaking, surveys the contemporary status of industry conduct in the campus card market, and proposes clear steps that the Department can take to protect students with campus cards. In particular, the memorandum outlines a more protective interpretation of the "best financial interest" standard—the standard by which colleges are meant to negotiate agreements with third-party financial institutions—which is currently too ambiguous to adequately protect borrowers. A model "Dear Colleague Letter," attached as an exhibit to this memorandum, illustrates a path by which the Department may more fully implement these proposed updates to its 2015 rulemaking.

II. Students Harmed: Abuses in Student Campus Cards

In its notice of proposed rulemaking, the Department outlined the abuses that led to the promulgation of the current regulatory framework governing campus cards.[10] In an effort to generate new revenue streams and bolster profits, colleges were entering into agreements with financial institutions to offer accounts that were often not in the best financial interest of the student.[11] These agreements involved campus cards, at times branded with a college's or university's logo, that were marketed as a way for students to conveniently receive financial aid

[10] Program Integrity and Improvement, 80 Fed. Reg. 28,484, 28,484 (proposed May 18, 2015) (codified at 34 C.F.R. pt. 668).

[11] Doug Lederman, *'Deceptive Practices' in Loan Industry*, Inside Higher Ed (Mar. 16, 2007), https://www.insidehighered.com/news/2007/03/16/deceptive-practices-loan-industry; Frotman, Remarks, *supra* note 6. Colleges have financially exploited students to attempt to bring in profits through preferred lender lists, kickbacks, and high-cost loans to students. *See* Nancy Solomon, *Probe Targets College Financial Aid Kickbacks*, NAT'L PUB. RADIO (Apr. 5, 2007), https://www.npr.org/templates/story/story.php?storyId=9396739. Credit card companies would pay colleges to market their campus cards to students in exchange for a share of the profits based on how much debt the students accumulated. *See Problem Credit Card Practices Affecting Students: Hearing Before the S. Comm. on Fin. Inst. and Consumer Credit of the H. Comm. on Fin. Servs.* 110th Cong. (2008); Erica Williams, *Students Need Help Combating Credit Card Debt*, Center for American Progress (June 26, 2008), https://www.americanprogress.org/issues/economy/news/2008/06/26/4483/students-need-help-combating-credit-card-debt/.

disbursements.[12] While these agreements provided financial gains for the school, it was often at great cost to the students in the form of excessive account fees.[13] These agreements, and many of their resulting harms, still exist today.[14]

A number of reports by federal regulators and federal and state law enforcement officials identify several concerning practices surrounding agreements between schools and financial parties.[15] First, some providers and schools strongly signaled to students that signing up for providers' accounts was required to receive federal student aid.[16] Second, providers gained access to private student information unrelated to the receipt of financial aid before recipients even opened accounts.[17] Third, and most directly harmful to students, aid recipients were charged "onerous, confusing, or unavoidable fees in order to access their student aid funds or to otherwise use the account."[18] In response, the Department updated its regulations in 2015 to address these concerns.[19] However, lackluster implementation has allowed these harms to continue, especially in the form of abusive fee practices.[20]

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[12] *Student Banking*, CFPB Ann. Report to Cong. (Dec. 2016).
[13] *Id*. ("[T]he Consumer Financial Protection Bureau's research has found that some young consumers spend hundreds of dollars a year in overdraft fees on student accounts. . .").
[14] *See generally* Letter from Cheryl Parker Rose, Assistant Dir., Office of Intergovernmental Affs., to Wayne Johnson, Chief Strategy and Transformation Officer, U.S. Dep't of Educ. (Feb. 5, 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcfp_foia_letter-to-department-education_record_2018-02.pdf (summarizing harmful practices in campus card arrangements after studying almost 600 agreements at the beginning of the 2017 academic school year).
[15] See, e.g., *Perspectives on Financial Products Marketed to College Students*, CFPB (Mar. 26, 2014), https://www2.ed.gov/policy/highered/reg/hearulemaking/2014/pii2-cfpb-presentation.pdf; Frotman, *supra* note 6; *Student Banking*, CFPB Ann. Report to Cong. (Dec. 2016); Press Release, CFPB, CFPB Releases Safe Student Account Scorecard (Jan. 14, 2015) (on file with author); Press Release, CFPB, CFPB Warns Colleges About Secret Campus Credit Card Contracts (Dec. 16, 2015) (on file with author); *Safe Student Account Toolkit*, CFPB (Dec. 2015), https://files.consumerfinance.gov/f/201512_cfpb_safe-student-account-toolkit.pdf; Kathy Chu, *Cuomo examining pacts between colleges, banks,* ABC News (Mar. 18, 2008), https://abcnews.go.com/Business/story?id=4462186&page=1.
[16] Program Integrity and Improvement, 80 Fed. Reg. at 67,126.
[17] *Id.*
[18] *Id.*
[19] *See infra* pp. 5-6.
[20] *See infra* Part IV.

III. Legal Authority

The Higher Education Act of 1965 ("HEA") governs higher education institutions that participate in student financial assistance programs.[21] Title IV of the HEA provides financial assistance to students attending higher education institutions through programs and services designed to benefit them in their postsecondary education.[22] The Secretary of Education is responsible for the "development and promulgation of policy and regulations to the programs of student financial assistance under subchapter IV [of HEA]."[23] Further, under 34 C.F.R. § 668, the Secretary of Education "establishes general rules that apply to an institution that participates in any student financial assistance program authorized by Title IV . . . ."[24]

More generally, the Department is responsible for overseeing federal student aid, which annually disburses billions of dollars intended to benefit students, to ensure that the program operates as effectively and efficiently as possible.[25] Multiple statutory provisions vest the Department with broad rulemaking authority to effectuate the purposes of the program.[26] As the statute makes clear, foremost among those purposes is ensuring that students actually receive the awards Congress authorized.[27] Given that these provisions and many more demonstrate an overriding purpose of ensuring that students receive their Title IV funds, it is the Department's responsibility to use its rulemaking authority to ensure Title IV does not operate as a means to benefit third parties while inhibiting students' access to the full amounts of their awards.[28]

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[21] 20 U.S.C. § 1002(a).
[22] *Id.* § 1070(a).
[23] *Id.* § 1018(b)(1).
[24] 34 C.F.R. § 668.1.
[25] Program Integrity and Improvement, 80 Fed. Reg. at 67,128.
[26] *See, e.g.,* 20 U.S.C. §§ 1094(c)(1)(B); 1221e-3; 3474.
[27] Program Integrity and Improvement, 80 Fed. Reg. at 67,128.
[28] *Id.* at 67,128–29. The Department consistently interprets that it has broad discretion to regulate any entity that engages with Title IV funds, not only colleges and student loan companies. *Id.* at 67,145.

Through these authorities, the Department can regulate campus cards and the higher education institutions that facilitate them.[29]

In 2015, in response to growing outrage over the industry practices for campus card accounts, the Department promulgated a "Cash Management" rule to provide greater protections for students.[30] The rule addressed campus cards that distribute Title IV funds to students, including accounts used by schools to directly distribute funds to students, and school-sponsored accounts marketed to students outside of the financial aid process. Specifically, the Department established that institutions that permit third party financial companies to offer accounts to students must ensure that the terms of these accounts "are not inconsistent with the best financial interests of the students opening them."[31] The "best financial interests" rule applies to both institutions that contract with third parties to distribute Title IV student assistance funds via accounts ("T1 arrangements") and institutions that contract with third parties to market school-sponsored accounts directly to students ("T2 arrangements").[32]

Higher education institutions in both T1 and T2 arrangements can satisfy the "best financial interests" rule if: (1) the institution provides documentation that it "conducts reasonable due diligence reviews" at least biannually to determine whether the arrangement's fees are, "considered as a whole, consistent with or below prevailing market rates;" and (2) contracts between institutions and third parties to market or offer accounts have provisions that allow for termination of the contract based on poor student feedback or information provided in the above

[29] *See also id.* at 67,128 ("We disagree with the commenters who argued that these regulations are outside of our purview under title IV of the HEA. . . . Multiple statutory provisions vest the Department with broad rulemaking authority to effectuate the purposes of the [federal student aid] program.") (citing 20 U.S.C. §§ 1094(c)(1)(B); 1221e–3; 3474).
[30] *See id.* at 67,126–27.
[31] 34 C.F.R. § 668.164(e)(2)(ix), (f)(4)(viii).
[32] *Id.* § 668.164(e)(2), (f)(2).

referenced review that the arrangement's fees are "not consistent with or are above prevailing market rates."[33]

The Department has also distributed several Dear Colleague Letters to offer guidance and clarification on specific technical and reporting issues that arose related to the Cash Management rules.[34] For example, in 2016, the Department issued guidance on bank fee reporting and cost disclosure requirements related to institutions with T1 and T2 arrangements.[35] Specifically, the Department detailed how institutions should "comply with the disclosure provisions under 34 C.F.R. § 668.164(e)(2)(vii), (e)(2)(viii), (e)(3), (f)(4)(iv), (f)(4)(v), and (f)(5) that require an institution to publicly post information on its website related to the number of student accountholders and the costs they incur."[36] Furthermore, the Department makes "Electronic Announcements" that offer guidance on Cash Management.[37] These Electronic Announcements address issues ranging from a series of questions and answers regarding Cash Management to T1 and T2 contract data reporting formatting.[38] Despite extensive communications with institutions to ensure robust implementation of the reporting and disclosure requirements, the Department

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[33] *Id.* § 668.164(e)(2)(ix), f(4)(viii). In 2016, the Department issued technical corrections to amend the cash management rulemaking. *See* Program Integrity and Improvement; Corrections, 81 Fed. Reg. 20,250, 20,250–51 (Apr. 7, 2016) (codified at 34 C.F.R. pt. 668). In the original rule, for example, institutions could only share students' personally identifiable information with T1 account providers to support direct payments of Title IV funds; The 2016 the corrections permitted institutions and third parties to share this information to make any payment to a student. *ED Corrects Cash Management Rules*, NACUBO (Apr. 15, 2016), https://www.nacubo.org/News/2016/4/ED-Corrects-Cash-Management-Rules (citing 34 C.F.R. § 668.164(e)(2)). The technical corrections also required that institutions under T1 arrangements submit the contract data to the Department, as well as publish it on its own website. These measures were designed to account for technical oversight in the original rulemaking and to increase transparency for these transactions.

[34] *Cash Management Information – Dear Colleague Letters and Electronic Announcements*, FEDERAL STUDENT AID, https://ifap.ed.gov/cash-management-information-dear-colleague-letters-and-electronic-announcements.

[35] U.S. Dep't of Education, Institutional Reporting of Fee Information under the New Cash Management Regulations (Sept. 7, 2016).

[36] *Id.*

[37] *Cash Management Information*, *supra* note 34.

[38] *See id.*

has not articulated the underlying requirements that schools must follow to comply with the "best financial interest" standard.

IV. Current Implementation Efforts Have Left Students Susceptible to Harm

The Department of Education has made strides in fostering a more equitable environment for student financial accounts, especially in its 2015 rulemaking.[39] Since then, however, banks and colleges have evolved their approach to student financing in ways that appear to violate the requirements established in 2015, often at the expense of students.[40] Thus, a comprehensive examination of the drivers of this harm is warranted, particularly if the Department wishes to realize the full potential of its own 2015 cash management rule and truly protect the "best financial interests" of student account holders.

The current implementation of the "best financial interests" standard has left widespread and costly gaps for students. The current approach does not sufficiently address fee consistency,[41] or whether fees are charged for appropriate services.[42] Nor does it meaningfully address Paid Marketing Agreements, which are often the root-cause of abuses in student finances.

Moreover, the current understanding of "best financial interests" has left the Department unwilling to provide adequate oversight and enforcement measures to address abusive practices

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[39] *See generally* 34 C.F.R. § 668.

[40] *See, e.g.* CFPB *infra,* note 49 at 8 (finding that Wells Fargo unlawfully charged fees averaging $46.99 in the surveyed period, which is above the market rate). Colleges are required to charge fees "at or below the prevailing market rate" of $35. 34 C.F.R. § 668.164(e)(2)(ix)(a).

[41] *See, e.g. Student Banking at a Glance*, BB&T https://www.bbt.com/content/dam/bbt/bbtcom/pdf/personal/banking/at-a-glance/personal/student-checking-al-dc-fl-ga-md-sc-tn-va-wv.pdf. BB&T's student banking terms allow up to six $36 overdraft fees per month, which can result in a potential spike of $216 in monthly fees.

[42] *See, e.g., Account Summary for TCF Campus Checking,* TCF Bank https://www.tcfbank.com/-/media/project/dotcom/tcfbank/files/personal/campus-connections/campus-account-summary.pdf (assessing $2 per balance inquiry at out of network ATMs, $3 for paper account statements, and $37 for instances of insufficient funds, when the bank does not pay for the item).

between colleges and banks. The Department's approach to implementing the "best financial interests" standard has allowed schools to permit banks to limit their data records to aggregate and vague information.[43] Thus, banks fail to provide specific data regarding the bank fees actually charged to student accounts—data that the Department can use to ensure such accounts are in the best financial interest of the student in practice. The Department could, under its current regulatory authority, compel schools to produce this specific fee data to the government and share it with students and the public, much like it already compels other contractual disclosures.[44]

a. Implementation Has Been Insufficient to Enforce Consistent, Reasonable Fees Levied on Student Accounts

The Department can do more to ensure that, pursuant to the "best financial interests" standard, banks charge students consistent fees and only for reasonable services. The current regulations require that fees charged to students are, "as a whole," at or below prevailing market rates.[45] Significantly, this gap allows banks to charge fees that sharply vary on a month-to-month basis, provided that they "as a whole" stay below market rates.[46] This can be especially harmful to students, because as the CFPB has noted, even "[s]mall, unexpected expenses like account fees can cause problems for some students."[47] Additionally, the gap allows banks to

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[43] *See, e.g*. Banking Account Agreement, FLORIDA STATE UNIV., https://studentbusiness.fsu.edu/student-accounts/banking-account-agreement (displaying only the number of accounts held, and information on mean and median account fees without further detail).
[44] *See* 34 C.F.R. § 668.164(e)(2)(vii), (e)(2)(viii), (e)(3), (f)(4)(iv), (f)(4)(v), and (f)(5) (detailing disclosure requirements concerning the terms and conditions of the proffered student accounts and the underlying contract that the school forms with banks to offer those accounts).
[45] *Id.* § 668(e)(2)(ix)(A).
[46] *See, e.g., Checking Account Disclosures*, SUNTRUST https://studentbusiness.fsu.edu/sites/g/files/upcbnu1241/files/Forms/Checking%20Account%20Disclosures%20-%20FSUCard.pdf (allowing for fee fluctuations without providing a corresponding limit or range for monthly fees).
[47] Seth Frotman & Rich Williams, *Does Your College Sponsor an Affordable Bank Account?* CFPB https://www.consumerfinance.gov/about-us/blog/does-your-college-sponsor-affordable-bank-account (Sep. 22, 2017). *See also* CHRISTINE BAKER SMITH, #REALCOLLEGE 2020: FIVE YEARS OF EVIDENCE ON CAMPUS BASIC

unreasonably levy fees for services that should arguably be free, such as non-client check cashing[48] or balance inquiries.[49] The Department can and should take action to effectively address the types of service fees banks charge students and the rates at which they charge them.

The current imperative to merely conduct "reasonable due diligence reviews" fails to meaningfully address abusive fee structures in agreements between schools and third-party companies. A 2019 US PIRG report explored these regulatory gaps, uncovering fees that rose into the hundreds of dollars.[50] When account fees spike to that level, students can experience "financial shocks." Former Consumer Financial Protection Bureau ("CFPB") Student Loan Ombudsman Seth Frotman noted that these shocks could "be the difference between staying in school or being forced to drop out for financial concerns."[51] Typically, market rate overdraft fees are roughly $35 per charge.[52] In a 2016 survey of 573 agreements, however, the CFPB found that some banks charged well above average rates despite the school's duty to conduct reasonable due diligence reviews into fee arrangements.[53] For example, in this 2016 analysis, Wells Fargo, across 304,227 active campus card accounts, charged an average fee of $46.99 over the surveyed 12-month period between 2016 and 2017.[54]

NEEDS INSECURITY THE HOPE CTR. https://hope4college.com/wp-content/uploads/2020/02/2019_RealCollege_Survey_Report.pdf.

[48] *PNC Virtual Wallet Student Features and Fees*, PNC BANK http://pnc.com/content/dam/pnc-com/pdf/personal/Checking/summary-virtual-wallet-student.pdf (noting a fee for 2% of the check's value will be charged when cashing a check greater than $25 for a payee who does not have a PNC Bank account).

[49] *See, e.g., TD Student Check Account Guide,* TD BANK https://www.tdbank.com/accountguides/Student.pdf (explaining that there is a $3.00 fee "[f]or each withdrawal, transfer, and balance inquiry conducted at a non-TD ATM").

[50] *See Compton & Vitez*, *supra* note 6, at 25.

[51] *Id.* (quoting Jillian Berman, "*Wells Fargo and Other Banks Charged College Students $27 Million in Fees, Buried CFPB Report Reveals*," MARKETWATCH (12 December 2018), https://www.marketwatch.com/story/after-controversy-trump-administration-releases-report-showing-deals-between-bankscolleges-cost-students-27-million-2018-12-10.

[52] *See, e.g., TD Bank Overdraft Services,* TD BANK https://www.td.com/us/en/personal-banking/overdraft-services; *Overdraft Services,* WELLS FARGO https://www.wellsfargo.com/checking/quickstart/overdraft-services.

[53] Letter from Cheryl Parker Rose, *supra* note 14, at 15.

[54] *Id.* at 8.

b. Implementation of the Regulation has Failed to Provide Colleges Enough Control Over Future Changes to Agreements with Banks

The current "best financial interests" standard, as implemented, is insufficient in its coverage of T1 and T2 agreements between schools and third-party financial companies. For instance, despite the Department's broad discretion to regulate and oversee the management of Title IV funds,[55] banks are not currently required to notify or seek approval from schools for fee increases levied upon students after those banks reach agreements with colleges. Even with the Department's requirements mandating that colleges conduct "reasonable due diligence reviews" to ensure rates offered are at or below the prevailing market rate,[56] vendors do not have to provide notice to universities that they are changing their terms and conditions.[57] This omission frustrates schools' reasonable due diligence responsibilities because they cannot comprehensively assess fee rates. And even in the face of this information imbalance, schools are not required to include express contractual provisions that require fee-increase notice, nor do they proactively implement a cap on fee increases.

c. The Department Has Not Required Colleges to Build Robust Data Reporting Requirements Regarding Student Account Fees into Their Agreements with Banks

To date, the Department has not articulated specific data reporting requirements concerning the bank fees actually assessed to students.[58] Currently, third parties are only

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[55] 34 C.F.R § 668.162(a) ("The Secretary has sole discretion to determine the method under which the Secretary provides title IV, HEA program funds to an institution.").
[56] *Id.* § 668.164(e)(2)(ix)(a).
[57] *See id.* § 668.164(e)(2)(iii) (requiring only that colleges inform students of the terms and conditions of their financial accounts "before the account is opened").
[58] In addition to the lack of quantitative data detailed in this section, the current regulation only states that campus card agreements contain a "provision for termination of the arrangement by the institution based on complaints received from students," but takes no further steps to incorporate this qualitative information in reasonable due

required to provide schools with information regarding the "mean and median of actual costs" incurred by accountholders.[59] While these disclosures give institutions a broad, general view of the fees their student population may face, data regarding means and medians do not paint a complete picture. The current reporting requirements do not require a list of the exact number of students who pay fees above or below the median rate, or the exact fees they pay. Nor do they require data about the most common fee types assessed. Put simply, the current reporting requirements "do not permit a detailed analysis of the distribution of fees across student accountholders."[60] More detailed data would include information about students' account utilization, which would allow colleges to better understand how account fees will affect students.[61] This shortcoming deprives schools and students of valuable information they could use to better understand and ultimately avoid burdensome fees in the future.

Indeed, more specific data would enable colleges to address marginal cases where students are charged disproportionately high fees. The CFPB report reviewing the 2016-2017 academic year found that "a majority of students paid no fees when using sponsored accounts."[62] However, the report went on to note that "the data also indicates that a subset of student accountholders pays a disproportionate share of the total fees paid by accountholders at a given college."[63] This lack of information obscures the reality felt by many students who fall outside of the fee-free majority and end up paying "the vast majority of account fees."[64]

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diligence reviews. *See id.* § 668.164(e)(2)(ix), f(4)(viii). Such student complaints are a vital source of individual account-level data.

[59] *See id.* § 668.164(e)(2)(vii)(B), (f)(2)(ii), (f)(4)(iv)(B).

[60] Letter from Cheryl Parker Rose, *supra* note 14, at 5–6.

[61] *See* U.S. Dep't of Education, *Title IV Institutions Reporting Cash Management Contracts* (accessed Sept. 30, 2016), https://studentaid.ed.gov/sa/about/data-center/school/cash-management-contracts.

[62] Letter from Cheryl Parker Rose, *supra* note 14, at 9.

[63] *Id.* at 10.

[64] *Id.*

d. The Department Has Not Sufficiently Addressed the Harms Associated with Paid Marketing Agreements

Last but certainly not least, the Department's efforts to date have been insufficient to protect students' "best financial interests" against the pecuniary interests of the colleges they attend. As presently defined, "best financial interests" allows schools to enter into Paid Marketing Agreements ("PMAs") with third-party financial companies, which in practice are almost unilaterally against the best interests of students. In PMAs, third-party companies pay schools for the opportunity to market directly to their students, which results in notably higher student fees than the fees assessed against students at schools that do not have PMAs.[65] For instance, students at schools with a PMA paid 2.3 times as much in fees as students at schools without a one ($15 on average vs. $34.34 on average).[66] Wells Fargo is perhaps one of the most flagrant offenders regarding PMAs; in a 2019 survey, the U.S. PIRG found that out of 95 surveyed schools with paid marketing agreements, students at schools that had PMAs with Wells Fargo paid fees averaging $44.84 across those schools.[67] At the least, PMAs represent the root-cause of many abuses in student financing, and as such warrant further targeted regulatory attention.

V. Proposed Implementation Solutions

a. Alternative Interpretations Regarding Paid Marketing Agreements

A regulatory implementation that is mindful of students' "best financial interests" would categorically proscribe PMAs and would be a significant step that the Department could take to ensure that 2015 Cash Management goals are met.

[65] *See Compton & Vitez*, *supra* note 6, at 4.
[66] *Id.* at 18.
[67] *Id.*

In lieu of outright proscription, an implementation of "best financial interests" that more closely enforces extant rules which require reporting of "[t]he total consideration . . . monetary and non-monetary, paid or received by the parties" in PMAs would better inform students of conflicts of interests that may run counter to their financial wellbeing. Moreover, the Department could interpret "best financial interests" as meaning that "total consideration . . . paid or received" cannot mean excessive compensation, or that the school has a fiduciary duty to its students. In the alternative, the Department could interpret this standard to set a benchmark based on the typical fee-free structure offered to most students nationwide and penalize schools for non-compliance when entering into an agreement that leaves students on a specific campus financially worse-off than the average student using a typical fee-free product.

Indeed, reading in such an implementation would be consistent with duties created for financial advisors in the Securities and Exchange Commission's "Regulation Best Interest." Financial advisors have a fiduciary duty to their clients and, among other things, must disclose any potential conflicts of interest to their clients. Here, student debt is a financial instrument, similar to those facilitated by financial advisors. Colleges entering into PMAs, as demonstrated above, create a direct conflict of interest between the college's monetary stake in those agreements and the financial wellbeing of their students. At the very least, that conflict should be liberally disclosed.

An implementation of the "best financial interest" standard that compels bold, clear disclosures of how much money colleges receive from banks under PMAs would at least notify students that colleges have a clear profit motive in promoting certain banks. Regardless of which avenue is taken, the Department must implement the "best financial interest" standard more boldly in the area of PMAs.

b. Issue a Dear Colleague Letter with the Following Recommendations

For the foregoing reasons, the Department should issue the following guidance in a Dear Colleague Letter. A model draft Dear Colleague is attached to this memorandum. The below guidance discusses primarily fees, but also models outright proscription of PMAs. Other solutions concerning PMAs discussed in Section V.A could be used in the alternative.

Reasonable Due Diligence: Annual Summary of Fees

When conducting "reasonable due diligence reviews," higher education institutions should request annual summaries of fees from third-party companies. Schools are reminded that they already must publish several of the below data points. 668.164(e)(2)(vii)(B), (f)(2)(ii), (f)(4)(iv)(B). These reports will document the amount of fees actually assessed to students in the previous academic year, including the following annual metrics:

- Number of student account holders
- Average and median fees paid (annual total) by a student account holder
- All fee types assessed in descending order of assessment frequency
- Average and median fees paid by a student for each fee imposed
- Number of student accounts assessed any fee
- Number of student accounts assessed any fee, where fees total up to $15, between $15 and $35, and $50 or greater

Best Financial Interest: Fee Evaluation

When conducting "reasonable due diligence reviews," higher education institutions should consider both fee rates and fee types. For example, the Department considers that the following safe account features are in the "best financial interest" of student loan borrowers, and thus should be provided free of charge:

- Card-based electronic account
- Deposit insurance
- Direct deposit
- Online and mobile banking / bill pay
- Electronic statements

- Fee-free overdraft protection or, alternatively, no charge for declined authorizations due to insufficient funds ("NSF")
- Money orders / e-checks (two free per month)
- Use of in-network and out-of-network ATMs (at least three free per month for the latter)

Additionally, the Department does not view monthly maintenance fees favorably and encourages higher education institutions to seek out account terms with no monthly maintenance fees or easily obtainable fee waivers. For example, many financial companies offer free checking accounts provided that the account holder maintain a low minimum balance.

Similarly, the "best financial interests" of students dictate that fees never be assessed for the following student account holder activities:

- Point-of-sale purchases
- Declined authorizations due to NSF, or, alternatively, fee-free overdraft protection (if overdraft protection is offered)
- Account termination
- Prepaid card reload
- Account inactivity while enrolled as a student and for a sufficient grace period thereafter
- Check cashing
- Balance inquiries
- Accessing customer services

Finally, the Department considers "reasonable due diligence reviews" to include a forward-looking analysis. As such, third-party companies must provide forecasts of possible or planned fee increases and provide notice to institutions so that they may have adequate time to assess how the increases will affect their student population. Institutions should also actively solicit and consider any student feedback or complaints regarding the campus card arrangements during "reasonable due diligence reviews."

Best Financial Interest: Fee Structure Transparency

Higher education institutions must require third-party companies to disclose the terms of their T1 and T2 account arrangements. 34 C.F.R. § 668.164(d)(4)(i)(B)(2). To make sure that these disclosures meet the "best financial interests," schools should require that third-party companies provide a single, simplified fee table that lists all fees that a student could possibly incur in a T1 or T2 arrangement. The fee table should display the fee amount, code term for the fee as it appears on the student's statement (e.g., NSF), and a short, plain statement explaining what conditions trigger the fee.

Best Financial Interest: Eliminate Paid Marketing Agreements

Higher education institutions must already publish their contracts with third-party companies that provide T1 and T2 arrangements, including any form of compensation received by the school. 34 C.F.R. § 668.164(e)(2)(ii)(C)(2)(ix), (f)(4)(iii)-(iv). These compensated arrangements and revenue-sharing provisions present an inherent conflict of interest or "inconsistenc[cy]" between the school's own pecuniary interest and the students' "best financial interests." *Id.* Accordingly, the Department views these paid agreements as incompatible with the "best financial interests" of students.

VI. Conclusion

By implementing "best financial interests," along with its related "reasonable due diligence" requirement, to better address the issues discussed herein, the Department would better serve its aim "to promote student achievement."[68] By clarifying its expectations around the implementation and effectuation of key language in current regulations, the Department and schools alike will be able to address the ways third-party companies use fees to take advantage of students. An interpretation that provides for guaranteed free account services and requires more reporting and transparency around fee assessment will help higher education institutions ensure that their students have access to financial products that are in their "best financial interests."

[68] *About ED*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/landing.jhtml (last visited Apr. 17, 2021).

Colleges and regulators will be able to better review and monitor banking agreements for financial abuses. Students will be able to anticipate and plan around fees associated with their accounts. And further, core account features will be available free of charge. Finally, eliminating paid T1 and T2 arrangements will fundamentally reposition the students' "best financial interests" as the center of third-party contract negotiations. At the very least, the Department should clarify that it expects schools to act as the fiduciary agent of its students when entering Paid Marketing Agreements with banks.

The Department need not monitor these deals alone. Prior to 2017, the CFPB, which regulates the banks and other financial services firms that cut deals with schools, published an annual "Student Banking" report that examined the prevalence of these deals and the fees charged to students.[69] The CFPB should resume this annual analysis and coordinate closely with the Department to ensure that both schools and financial firms are closely monitored when providing student financial products and services.

In 2015, the Department made meaningful strides towards improving the state of student campus cards. Today, by re-examining the most abusive bank practices, regulators can intelligently implement existing regulations in a way that truly serves the "best financial interests" of students.

[69] *Student Banking*, CFPB Ann. Report to Cong. (Dec. 2016); *see also* Berman, *supra* note 50.