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The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Dear Secretary DeVos:

We, the undersigned attorneys general, write to urge you to reject an ongoing campaign by student loan servicers and debt collectors to secure immunity for themselves from state-level oversight and enforcement. Two student loan servicing industry associations recently submitted letters¹ (together, the “Industry Requests”) calling on the U.S. Department of Education (the “Department”) to issue “regulatory guidance” stating that the Department’s rules and regulations preempt states from enacting or enforcing state laws to quell student loan abuses. These requests defy the well-established role of states in protecting their residents from fraudulent and abusive practices, plainly exceed the scope of the Department’s lawful administrative authority, and would needlessly harm the students and borrowers at the core of the Department’s mission.

Fundamentally, as discussed in Section I, the Department cannot sweep away state laws that apply to student loan servicers and debt collectors by fiat. In fact, understanding that Congress intended for state laws to continue to apply to these companies except in limited circumstances, the Department narrowly drew its regulations to *avoid* such wide-ranging preemption—and has consistently interpreted its regulations accordingly. The guidance sought in the Industry Requests cannot expand the preemptive reach of Department rules and is

¹ See Letter to K. Smith, Acting Asst. Secretary of Education for Postsecondary Education, National Council of Higher Education Resources, July 17, 2017, available at: http://c.ymcdn.com/sites/www.ncher.us/resource/resmgr/images/letters-testimony/2017/07-18-17_NCHER_Letter_to_ED_.pdf (last viewed September 6, 2017); see also Letter of Education Finance Council to B. DeVos, Secretary of Education, June 29, 2017, available at: http://c.ymcdn.com/sites/www.efc.org/resource/resmgr/advocacy_comments_&_statements/06292017_servicing_ltr.pdf (last viewed September 6, 2017).

inconsistent with the Department's procedures. And as more fully explained in Section II below, now is the time for the Department to work with law enforcement and regulatory agencies at all levels of government to end fraudulent and abusive practices in connection with the servicing and collection of student loans, not to sideline state partners.

State enforcement agencies have long been at the frontlines in protecting their citizens from fraud, deceptive conduct, and unfair business practices, including by financial service companies, debt collectors, and others. Indeed, such actions reflect fundamental states' rights and fall squarely within the historic police powers reserved to the states. The Department should reject the Industry Requests in full—and resume the long tradition of federal-state cooperation in protecting students and borrowers from unfair and deceptive practices.

I. A Guidance Broadly Preempting State Law Exceeds the Authority of the Department and, in Any Event, Would Have No Preemptive Effect

Any effort by the Department to preempt state oversight in the area of student loan servicing would exceed the lawful authority of the Department. In empowering the Department to administer student loans, Congress never granted the Department the authority to broadly sweep away state consumer protections. Nor, lacking this power, has the Department ever promulgated student loan regulations that purport to do so.

Absent a “clear and manifest” indication that Congress intended to supersede state law, federal law cannot preempt “the historic police powers of states.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). “Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.” *General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990); *see also Castro v. Collecto, Inc.*, 634 F.3d 779, 784-785 (5th Cir. 2011) (Because “states have traditionally governed matters regarding contracts and consumer protections” there is no preemption “absent a showing that this was ‘the clear and manifest purpose of Congress.’”) Here, the overwhelming evidence supports the opposite conclusion: that Congress did not intend to displace state regulation in connection with student loans.

As you know, the Higher Education Act (“HEA”), 20 U.S.C. §§ 1001-1155, is the source of the Department's authority to administer student loans, notably through the Federal Family Education Loan Program (“FFELP”), 20 U.S.C. §§ 1071-1087-4, The William D. Ford Federal Direct Loan Program (“Direct Loan Program”), 20 U.S.C. §§ 1087a-j, and the Perkins Loan Program, 20 U.S.C. §§ 1087aa-ii. Tellingly, the Industry Requests neglect to identify the provision of the HEA or its implementing regulations that empower the Department to broadly sweep away state laws that regulate student loan servicers or debt collectors. This is for good reason: no such provision exists.

There is no indication in the legislative history of HEA that Congress sought to bar states from enforcing laws against student loan servicers or debt collectors. To the contrary, in enacting the HEA, Congress was careful to preempt state law only in “narrow and precise” respects. *See Keams v. Tempe Tech. Inst.*, 39 F.3d 222, 225 (9th Cir. 1994). Thus, every federal Circuit Court to consider the question has rejected preemption based on the very theory the Industry Requests

apparently advance: that the HEA occupied the “field” of student loan regulation and oversight, and left no room for state regulation. *See, e.g., Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1126 (11th Cir. 2004) (“enactment of the HEA does not ‘occupy the field’ of debt collection practices . . .”); *Chae v. SLM Corp.*, 593 F.3d 936, 941-42 (9th Cir. 2010) (“[F]ield preemption does not apply to the HEA.”); *Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.*, 168 F.3d 1362, 1369 (D.C. Cir. 1999) (“Federal education policy regarding [FFELP] lending is not so extensive as to occupy the field”).

Nor do the Department’s regulations support the view that the Department itself ever proposed to abolish state rules or oversight of student loan servicers and other regulated parties. In the limited circumstances where Department regulations do preempt state law, they say so expressly. *See, e.g.*, 34 C.F.R. § 682.410 (identifying three specific provisions relating to student debt collection that preempt inconsistent state laws); 34 C.F.R. § 682.411 (preempting state law inconsistent with lender due diligence rules). Entirely absent from those regulations is the slightest indication that they constitute the exclusive source of oversight for the student loan servicing industry. In fact, they anticipate that state laws will function alongside federal rules. *See, e.g.*, 34 C.F.R. § 682.401 (“The [student loan] guaranty agency shall ensure that all program materials meet the requirements of Federal *and State law*” (emphasis added)). While establishing minimum requirements for loan servicers and debt collectors, Department regulations provide no support for the view that they seek to prohibit states from imposing additional requirements for student loans, let alone to render student loan servicers and debt collectors exempt from state regulation.²

This is not only the states’ conclusion, but the reasoned view of the U.S. Department of Justice (“DOJ”). The DOJ filed a Statement of Interest on behalf of the U.S. Government concluding that neither the HEA nor its implementing regulations reflect an intent to preempt state law fraud actions against companies subject to the HEA. In relevant part, the DOJ found that:

Nothing in the text of the HEA even suggests that Congress expressly or impliedly intended to curb state laws from regulating any alleged fraud committed by HEA participants. Nor is there such evidence in the legislative history of the HEA or in [the Department]’s implementing regulations.³

In keeping with the text of the HEA, its implementing regulations, and longstanding government policy, the Department has consistently understood state licensing requirements and other state laws not in direct conflict with departmental regulations to properly apply to student loan servicers and debt collectors. As the Department asserted in response to an inquiry from a state regulator:

² As the CFPB has recognized in connection with its oversight of student loan servicers, “[f]or student loan borrowers, there is no existing, comprehensive federal statutory or regulatory framework providing uniform standards for the servicing of all student loans.” *See* Federal Register, 80 Fed. Reg. 98, 29302, 29305 (May 21, 2015).

³ Statement of Interest of the United States of America, *Karilin Frica Sanchez, et al. v. Asa College, Inc., et al.*, 14 Civ. 5006 (JMF) (S.D.N.Y. January 23, 2015) at 7.

[T]he Department does not believe the State's regulation of [student loan servicers] would be preempted by Federal law. Further, such regulation would not conflict with the Department's contracts with those entities, which provide generally that loan servicers and [private collection agencies] must comply with State and Federal law.⁴

As the Department explained in its response, the expectation that student loan servicers will comply with state laws is spelled out in Department contracts. These contracts expressly require student loan servicers to abide by all "state laws and regulations . . . ensuring that all aspects of the service continue to remain in compliance as changes occur."⁵ Thus, the Department's contracts accord with the text of the HEA, federal student loan regulations, and the longstanding conclusion of the Department and DOJ: except in narrowly defined circumstances, state law properly applies to federal student loan servicers and debt collectors.

The "regulatory guidance" sought by the Industry Requests could not alter this settled law or comport with the authority conferred upon the Department by Congress. As a threshold matter, unlike other agencies, the Department has not established a protocol for issuing interpretative guidance in connection with the student loan program, let alone one intended to have binding effect. *Cf.* 21 C.F.R. § 10.115 (discussing "non-binding" FDA guidance practices). More fundamentally, it is well-settled that an agency determination without formal notice-and-comment rulemaking procedures or other procedural safeguards can have no preemptive effect whatsoever. *Good v. Altria Group, Inc.*, 501 F.3d 29, 51 (1st Cir. 2007) ("Limiting the preemptive power of federal agencies to exercises of formal rulemaking authority, then, ensures that the states will have enjoyed these protections before suffering the displacement of their laws."); *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 245 (3d Cir. 2008) ("We decline to afford preemptive effect to less formal measures lacking the 'fairness and deliberation' which would suggest that Congress intended the agency's action to be a binding and exclusive application of federal law.").

⁴ Letter from the Department to J. Bellman, January 21, 2016, available at: https://na-production.s3.amazonaws.com/documents/Dept_of_Ed_Response.1.21.2016_dORyoLm.pdf (Last viewed September 7, 2017).

⁵ E.g., Department Contract with PHEAA, June 17, 2009, available at: <https://www2.ed.gov/policy/gen/leg/foia/contract/pheaa-061709.pdf> (Last viewed September 7, 2017).

II. The Student Loan Crisis Demands Sustained and Cooperative Action at All Levels of Government, Especially State Regulators

As record numbers of Americans struggle to make their student loan payments each month, student loans in the United States are in a state of crisis. Just as in the Global Financial Crisis, when millions of Americans lost or were at risk of losing their homes, we need energetic leadership and oversight at all levels of government to protect students and borrowers from abusive practices. You have called for states to take on a greater responsibility for overseeing and administering our education system. But when it comes to protecting the financial well-being of students, borrowers, and other consumers from abuse, states have long been at the forefront. This is a core part of the traditional police power of states. Indeed, every state has well-established laws prohibiting companies—many of which are also regulated federally—from engaging in unfair and deceptive practices targeting state residents.⁶ The Industry Requests, however, seek to enlist the Department in an industry gambit to evade state policing. There is no principled reason for this result, especially in the middle of a crisis demanding cooperation across government.

Given the states' experience and history in protecting their residents from all manner of fraudulent and unfair conduct, they play an essential role in consumer protection in student loans and education. States are uniquely situated to hear of, understand, confront, and, ultimately, resolve the abuses their residents face in the consumer marketplace. Abuses in connection with schools or student loans are no different. As with other issues facing their residents, state regulators bring a focus to, and appreciation for, the daily challenges experienced by students and borrowers that is unmatched. Far from interfering with the Department and other federal efforts to rein in abuses, the record well demonstrates that state laws and state enforcement complement and amplify this important work.

The statistics on student loans should be quite familiar to you. As of the second quarter of 2017, U.S. borrowers owed an estimated \$1.34 trillion in federal and private student loans—more than for auto loans, credit cards, or any other non-mortgage loan category.⁷ Standing at 12%, the rate of delinquency and default for student loans exceeds that of any other loan category.⁸ These numbers are particularly troubling given that many students became indebted paying tuition at certain for-profit schools that were found to be deficient or deceptive. Indeed, state successes in reining in certain underlying abuses by some for-profit education companies show just how effective state-level action can be. By working individually and in cooperation with the federal government, state attorneys general have successfully taken action to end widespread deceptive practices, like misrepresenting prospective jobs and falsifying job placement rates.⁹ State attorneys general have also successfully obtained millions of dollars in

⁶ https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf (“Every state has a consumer protection law that prohibits deceptive practices, and many prohibit unfair or unconscionable practices as well.”)

⁷ https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2017Q2.pdf

⁸ Strikingly, this figure *understates* the true student loan delinquency rate, excluding loans in deferment, in grace periods, or in forbearance.

⁹ These include enforcement actions against American Career Institute; Ashford University/Bridgepoint Education, Inc.; Corinthian Colleges, Inc.; Career Education Corporation; Education Management Corporation; DeVry University; ITT Tech, among others.

restitution and loan forgiveness. For example, state attorneys general obtained over \$100 million in loan forgiveness as part of a multi-state settlement with Education Management Corporation stemming from allegations that the school misled students about program costs, graduation rates, and job placement rates. The FTC, the New York state attorney general, and other state regulators obtained over \$100 million in refunds and debt relief for former students of DeVry University.¹⁰ In 2015, the Department worked with the California state attorney general to make findings entitling former Corinthian Colleges student borrowers to federal student loan relief.¹¹ Just recently, a coalition of state and federal agencies reached a nationwide settlement with Aequitas Capital Management, a firm which had provided loans to the now defunct Corinthian Colleges.¹²

Over the past several years, the practices of student loan servicers and debt collectors have come under increased scrutiny from consumer advocates and government agencies. In 2014, the National Consumer Law Center reported on potential abuses by student debt collectors reminiscent of the robo-signing frauds seen earlier in the mortgage sector, including seeking to collect on student debt they may not own.¹³ The 2015 and 2016 Government Accountability Office reports on student loan servicing later identified various deficiencies in loan servicing practices, including failures to provide information to borrowers about their repayment options and difficulties in contacting servicers through the servicer call centers.¹⁴ And, in its annual reports, the Student Loan Ombudsman at the Consumer Financial Protection Bureau (“CFPB”) has tracked a phenomenon we have seen in our own offices: an increasing number of students and borrowers complaining of potentially illegal practices by the companies servicing their student loans or collecting student debts, including improper steering of borrowers away from options like income-based repayment that could help them make their monthly payments.

Cooperation at the state and federal level enhances enforcement and better protects the millions of Americans with outstanding student loans. One notable example is the complementary enforcement actions filed by the CFPB and the attorneys general of Illinois and Washington State on January 18, 2017 against the largest servicer of federal student loans, Navient Corporation, and certain subsidiaries (collectively, “Navient”).¹⁵ These actions allege that Navient wrongfully increased the debt burden weighing on borrowers, including by

¹⁰ <https://www.ftc.gov/enforcement/cases-proceedings/refunds/devry-refunds-debt-forgiveness>;

<https://ag.ny.gov/press-release/ag-schneiderman-announces-restitution-hundreds-students-duped-devry-university>

¹¹ <https://www.ed.gov/news/press-releases/department-education-and-attorney-general-kamala-harris-announce-findings-investigation-wyotech-and-everest-programs>

¹² <https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-will-provide-24-million-loan-forgiveness-and-debt>

¹³ NCLC Report, *Going to School on Robo-signing: How to Help Borrowers and Stop the Abuses in Private Student Loan Collection Cases*, April 2014, available at www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/robo-signing-2014.pdf (Last viewed: September 10, 2017).

¹⁴ Government Accountability Office Report, *Federal Student Loans: Education Could Do More to Help Ensure Borrowers Are Aware of Repayment and Forgiveness Options*, available at <https://www.gao.gov/assets/680/672136.pdf>; Government Accountability Office Report, *Federal Student Loans: Education Could Improve Direct Loan Program Customer Service and Oversight*, available at <http://www.gao.gov/assets/680/677159.pdf> (Last viewed: September 6, 2017).

¹⁵ The Illinois complaint also alleges various misdeeds in connection with the origination of those loans by Sallie Mae.

improperly steering them into inappropriate forbearances, not income-driven repayment, and neglecting to properly advise borrowers how to release co-signers or re-enroll in income-driven repayment plans. These efforts seek restitution on behalf of borrowers harmed by Navient's practices. But Navient is not the only company whose student loan servicing and collection practices have raised serious questions; there are active state investigations or pending lawsuits concerning the student loan servicing and debt collection practices of other key players in this area, including the Pennsylvania Higher Education Assistance Agency ("PHEAA") and the National Collegiate Student Loan Trusts.¹⁶

These state law enforcement efforts have been joined with legislative reforms that seek to bolster oversight of student loan servicers and debt collectors, including through licensing programs. *See, e.g.*, Conn. Gen. Stat. §§ 36a-846-854; Cal. Fin. Code §§ 28100-28182. Just as with state licensing of other industries, including mortgage brokers and debt collectors more broadly, these state rules seek to prevent issues before they emerge and to set basic ground rules. The Connecticut Student Loan Service Standards require, for example, that student loan borrowers are "conspicuously and timely notified" when their loan servicer changes and that servicers maintain "records that clearly identify amounts and dates of payments received from borrowers"¹⁷ These are common-sense requirements that neither conflict with federal rules nor place any undue burden on loan servicers. Instead, these initiatives seek to establish the type of safeguards for borrowers we should reasonably expect from the Department and at every level of government.

There is no principled reason for the Department to weaken or box out states just as our combined federal-state efforts against abusive practices in the student loan servicing industry have begun to bear fruit. Nor is there any justification to seek to interfere with the traditional police power of states to protect their own residents from abuses in the marketplace.

* * *

For all these reasons, we urge you to formally decline the Industry Requests.

¹⁶ <https://www.nytimes.com/2017/07/19/business/dealbook/new-york-inquiry-national-collegiate-student-loan-trusts.html>

¹⁷ State of Connecticut, Department of Banking, Student Loan Service Standards, available at http://www.ct.gov/dob/lib/dob/consumer_credit_nonhtml/student_loan_standards_7-1-17.pdf (Last viewed: September 13, 2017).

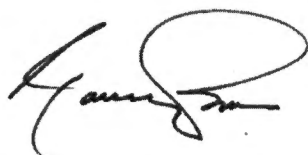
Respectfully submitted,



Eric T. Schneiderman
New York Attorney General



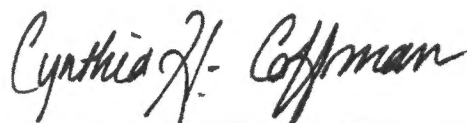
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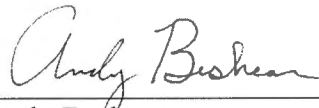
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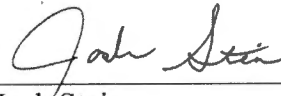
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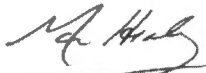
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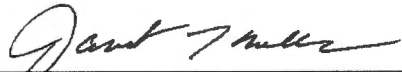
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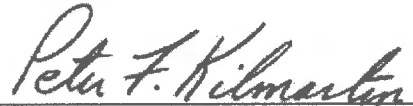
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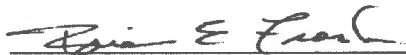
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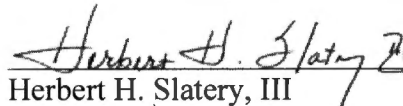
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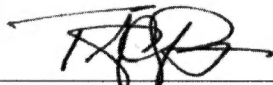
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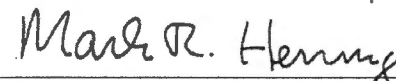
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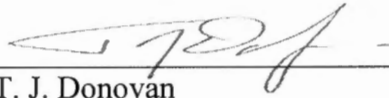
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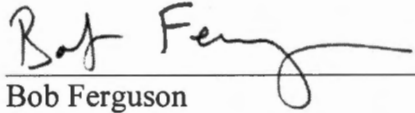
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