

Date: April 24, 2014
TO: Negotiated Rule Making Committee
From: Negotiators Paul Kundert & Tom Levandowski
RE: Issue 4 - Cash Management

We have reviewed the draft regulations the Department issues on April 16, 2014. We continue to dialog with members of our community of interest. While we may have additional comments to present during our scheduled meetings, at his time we would like to submit the following suggestions to the Rule Making Committee:

Section 4 - Student Choice

(4)(iii)(b) The Department has proposed the following:

- (iii) After the student or parent provides information about an existing financial account—
 - (A) The student or parent may choose the sponsored account or another option under the process the institution has established for making direct payments in paragraph (d)(4)(ii) of this section; and
 - (B) The institution or the financial institution offering the account may not directly solicit the student or parent to choose the sponsored account.

We believe the Department intends to make clear that a student or parent providing information about an existing financial account, should not within such process be solicited. The Department has proposed elsewhere the manner, and timing in which the sponsored account may be presented. We propose the following clarification:

- (iii) After the student or parent provides information about an existing financial account—
 - (A) The student or parent may choose the sponsored account or another option under the process the institution has established for making direct payments in paragraph (d)(4)(ii) of this section; and
 - (B) The institution or the financial institution offering the account may not directly solicit, within the process the institution has established for making direct payments in paragraph (d)(4)(ii) of this section, the student or parent to choose the sponsored account.

Section E Sponsored Accounts

(e) The Department has proposed the following:

- (e) Sponsored account. (1) If an institution located in a State enters into a contract or arrangement with any entity (e.g., a third-party servicer, financial institution, or other person) under which a student or parent opens, or is referred to open, a financial account offered by the entity, or has the option of using a card or device issued for institutional purposes to activate or access a financial account into which title IV, HEA program funds may be transferred or deposited, the institution or entity responsible under that contract or arrangement—

We believe the Department intends the provisions of paragraph (e) to apply when Title IV credit balances are deposited into financial accounts that are opened with assistance from the educational institution. The Department clarified during Session 2 negotiations that it did not intend its regulation to apply to on-campus branches, on-campus ATMs, or on-campus tabling events (i.e., financial accounts opened as a result of these activities would not constitute "sponsored accounts"). The Department recognized that even though such activities resulted from contracts or arrangements between financial and educational institutions, accounts opened in connection with such activities are not opened with assistance from educational institutions. We believe that the type of "assistance from educational institutions" that the Department is concerned about is assistance involving a closer nexus between opening an account and the school's duties when making direct payments under paragraph (d). Formal or informal agreements between financial and educational institutions that locate the account opening choice as part of the direct payment process reflect the type of nexus that constitutes "assistance from the educational institution". We would propose the following clarification:

(e) Sponsored account. (1) If an institution located in a State enters into a ~~contract or arrangement~~ formal or informal agreement with any entity (e.g., a third-party servicer, financial institution, or other person) under which a student or parent opens, or is referred to open, as part of the institution's direct payment process, a financial account offered by the entity, or has the option of using a card or device issued for institutional purposes to activate or access a financial account opened with the assistance of the institution, into which title IV, HEA program funds may be transferred or deposited, the institution or entity responsible under that contract or arrangement—

(e)(1)(i) The Department has proposed the following:

(i) Must inform the student or parent about the terms and conditions of the financial account and obtain the student's or parent's written affirmative consent to open or use the account before the institution or entity may either—

We believe the Department intends to make certain that student or parent agreement is affirmatively provided, and documented. However, we don't believe it should be limited to a written form. We would propose the following clarification:

(i) Must inform the student or parent about the terms and conditions of the financial account and obtain the student's or parent's ~~written~~ documented affirmative consent to open or use the account before the institution or entity may either—

(e)(1)(ii) The Department has proposed the following:

(ii) May not make any claims against the funds in the account without the written permission of the student or parent, except for correcting an error in transferring the funds in accordance with banking protocols;

We believe the Department wishes to make sure that institutions do not retain control over Title IV funds after they have been disbursed to students. We would like to understand the Department's intentions with the current placement of this provision in the proposed regulation, which may or may not lead us to offer drafting suggestions for consideration.

The Department has proposed the following:

(e)(1)(iii) Must ensure that the student or parent does not incur any cost associated with—
(e)(1)(iii)(C) Using the debit card, prepaid card, or access device to conduct up to four cash withdrawals per month or statement cycle at any out-of-network ATM located in a State; and
(e)(1)(vi) Must ensure that the student or parent is not assessed any fee or charge to cover an ATM transaction, or one-time debit card transaction, when the financial account has insufficient or unavailable funds, or when the entity declines a transaction;

As we have expressed at our in person meetings and written submissions to the Committee, we do not believe it will be commercially possible to offer sponsored accounts in a manner which meets this mandate. That is because students or parents may choose to make use of the account in a manner which subjects them to fees and charges not imposed by the institution or entity responsible for the account or arrangement. These are some of the fees a student or parent may encounter in the use of the financial account:

- Merchant imposed point-of-sale fees now permitted by merchants Dodd-Frank Wall Street Reform and Consumer Protection Act
- Currency conversion charges imposed in the use of the account in a foreign country
- Cash advance fees paid to receive an over-the-counter cash advances
- Terminal ATM Fees imposed by owners of a particular ATM

In each of these instances the student or parent holder of the Sponsored Financial Account would understand the costs they will incur prior to consummating the transaction.

We believe the Department intends to ensure that student and parent holders of a Sponsored Financial Account are provided with reasonable account terms, and the Department does not intend to eliminate the availability of Sponsored Accounts by requiring terms that are not commercially viable. We believe the Department is concerned that Institutions or entities responsible for the account or arrangement may not provide reasonable access to Title IV cash. However, we addressed this concern in proposed language we submitted in our letter dated April 4, 2014. Here is that proposal:

(iii) Using the debit card, prepaid card, or access device to conduct any transaction at any automated teller machine (ATM) located in any state as defined in 600.2 within provider's network of nationwide ATMs. Institutions should also disclose whether cards issued through its contracted financial institution's ATM are part of a surcharge-free network, indicate the name of the network, and indicate the approximate number of available ATMs in that network both nationally and locally. Institutions should also disclose how many surcharge-free ATMs are on

their campus, their location, the hours they are accessible to patrons, and provide a hyperlink to an ATM locator for the affiliated networks;

In their letter to the Committee dated April 2, 2014 primary negotiators Christine Lindstrom, representing students, and Suzanne Martindale representing consumer advocacy organizations made a proposal which appeared to recognize the impracticability of a requirement that Institutions or entities responsible for the arrangement make unlimited reimbursements to students based on the student or parents use of ATMs that impose fees:

iv) Using the debit card, prepaid card, or access device for the first two completed or attempted transactions per month at any automated teller machine (ATM) located in any State as defined in 600.2. Unless provided with reasonable access to a national network of fee-free ATMs, the institutions shall ensure that the student is reimbursed for up to \$10 per month in ATM owner surcharges incurred in connection with such minimum free transactions. The institution shall disclose the network of fee-free ATMs available, indicating any and all names associated with the network, and the approximate number of available ATMs in that network both nationally and locally. Institutions must also disclose the number and location of fee-free ATMs on campus and their hours of accessibility. The institution shall direct the financial institution or third-party servicer to provide a publicly accessible online ATM locator to search for in-network ATMs;
[Lindstrom, and Martindale]

We would recommend building on the Lindstrom and Martindale proposal, and propose the following language:

(iii) Must ensure that the student or parent does not incur any cost initiated or imposed by the institution or entities responsible for the arrangement associated with--

(A) ...

(B) ...

(C) Using the debit card, prepaid card, or access device for the first two completed or attempted transactions per month at any automated teller machine (ATM) located in any State as defined in 600.2 to conduct up to four cash withdrawals per month or statement cycle at any out-of-network ATM located in a State; and Unless provided with reasonable access to a national network of fee-free ATMs, the institutions shall ensure that the student is reimbursed for up to \$10 per month in ATM owner surcharges incurred in connection with such minimum free transactions. The institution shall disclose the network of fee-free ATMs available, indicating any and all names associated with the network, and the approximate number of available ATMs in that network both nationally and locally. Institutions must also disclose the number and location of fee-free ATMs on campus and their hours of accessibility. The institution shall direct the financial institution or third-party servicer to provide a publicly accessible online ATM locator to search for in-network ATMs.

(iv) Must ensure that the debit card, prepaid card, or access device associated with the account belongs to a surcharge-free national or regional ATM network that has ATMs on or near each campus;

(E)(1)(vi) The Department has Proposed the Following:

(vi) Must ensure that the student or parent is not assessed any fee or charge to cover an ATM transaction, or one-time debit card transaction, when the financial account has insufficient or unavailable funds, or when the entity declines a transaction,

It appears that the Department's proposed paragraph (e)(vi) conflicts with the current structure of Regulation E which provides consumers the clear choice of opting-in to an overdraft feature and financial institutions a very clear basis for assessing fees for providing that feature. The opt-in with a fee structure in Regulation E reflects a careful balancing of interests, through a comprehensive process conducted by the Federal Reserve, between consumer choice/protection and legitimate costs borne by financial institutions. We note that the Department's proposed provision wades into the balancing of interest that the Federal Reserve resolved when it addressed this matter in the context of Reg. E. The Federal Board summarized their actions as follows:

"Consumer advocates, members of Congress, federal and state regulators, and the overwhelming majority of individual consumers who commented urged the Board to adopt the proposed opt-in alternative that would require institutions to obtain a consumer's affirmative consent before fees could be charged for paying an overdraft." Federal Reserve Board of Governors *Federal Register* / Vol. 74, No. 220 / Tuesday, November 17, 2009 / Rules and Regulations

(e)(2) The Department has proposed the following:

(2) The institution must base its decision to enter into or continue the contract or arrangement on achieving the best possible financial terms for the students and parents who choose to open the sponsored account. The institution must also—

We believe the Department's intent is to make clear that the institution in entering into a contact or arrangement has a clear duty to ensure the sponsored account provides a reasonable value to students and parents, and is not inferior to the value students or parents would have commonly obtained in the marketplace. However, we believe the Department may have proposed a standard, under which an institution cannot reasonably demonstrate compliance. We would propose this clarification which we believe can be demonstrably achieved, while preserving the Department's intent.

(2) The institution must base its decision to enter into or continue the contract or arrangement on achieving ~~the best possible~~ financial terms for the students and parents who choose to open the sponsored account, which are as good as or more favorable than common alternatives in the marketplace. The institution must also—

(e)(3) The Department has proposed the following:

(3) May not share with the entity any information about the student or parent until the student or parent makes a selection under paragraph (d) (4) of this section;

We believe the Department intends to prevent the creation of any special or favored marketing advantage. However, the proposed rule does not achieve this goal. That is because institutions are permitted to disclose directory information in compliance with current federal and state statutes and regulations, and such disclosure is critical to the ability for schools to outsource administrative functions, such as payment preference capture, to third party service providers. As written, the current language may impede the schools' ability to use third party services, yet the creation of favored marketing advantages might still exist. We propose the following change to achieve the Department's intent:

(3) May not share with the entity responsible under such contact or arrangement, any information about the student or parent until the student or parent makes a selection under paragraph (d) (4) of this section, except directory information, as otherwise permitted, and made available under the same terms and conditions to individuals or organizations other than the entity responsible under such contact or arrangement.