

TO: Negotiators

FR: Christine Lindstrom, USPIRG; Suzanne Martindale, Consumers Union

RE: Issue 4 – Cash Management: Aligning Institutional and Student Interests in Campus Banking

DATE: April 2, 2014

We appreciated the Department's strong first draft of cash management rules for the purposes of negotiation last week. The draft contains provisions that would create a neutral forum in which students can make their banking choices on campus by banning specific push marketing practices. We believe these marketing restrictions are essential for any draft moving forward. We have done little to substantively change these "neutrality" provisions in the proposed amendments we are submitting in addition this memo.

However, we suggest one language change that we believe warrants separate explanation and discussion here:

**"§668.164 (e)(1): the institution must disclose conspicuously on its website, and otherwise make public, that contract or arrangement in its entirety, **together with an annual summary of the contract's terms and conditions in a format provided by the Secretary.**"**

The inclusion of this clause is important to us. That's because we strongly believe that the new rule must, at minimum, do one of two things: (1) create positive incentives for colleges to act in the best interests of their students when entering into campus banking arrangements, or (2) remove any perverse incentives that could lead colleges to enter into campus banking arrangements that are not good for the students. In other words, the final rule should align student and college interests through one of these two approaches. The above approach would, we believe, achieve goal (1) by shining a light on sponsored account arrangements and allowing students, as well as schools, to see how the arrangements compare with other options. An alternative approach, discussed briefly below, would achieve goal (2): by banning revenue-sharing, to ensure that schools don't have a financial interest in an arrangement that could work against the best interests of students.

As we discussed at the table last week, there is precedent for such controls in other contexts, such as credit cards and private student loans. We believe such precedent is instructive as the Committee considers appropriate safeguards for sponsored accounts.

#### GOAL 1: CREATE POSITIVE INCENTIVES FOR COLLEGES TO ACT IN THE BEST INTERESTS OF THEIR STUDENTS

The CARD Act of 2009 promotes greater transparency to the college and university credit card market by requiring credit card issuers to annually submit to the Consumer Financial Protection Bureau the terms and conditions of any college credit card agreement that was in effect at any time during the preceding calendar year between the issuer and an institution of higher education. Issuers are required to submit the following information with respect to each agreement: (1) the number of credit card accounts covered by the agreement ("college credit card accounts") that were open at year end (regardless of when the account was opened); (2) the amount of payments made by the issuer to the institution or organization during the year; (3) the number of new college credit card accounts covered by the agreement that were opened during the year; and (4) any Memorandum of Understanding (MOU) between the issuer and institution or affiliated organization that directly or indirectly relates to any aspect of the agreement. Since 2010, these agreements have been analyzed and published by the CFPB.

These changes have benefited student consumers who were previously steered into credit card products that gave a financial windfall to some schools while burdening students with unnecessary debts. Fewer college credit card agreements are in effect, institutions of higher education are paid less by credit card issuers, and fewer new college accounts are being opened.

We envision a similar system at work to bring transparency to campus banking arrangements. Ideally, the college submits its campus banking contract annually to the Department of Education, which then provides the annual analysis using this same data and more. The Department should collect additional data points regarding fees in particular, such as ATM fees incurred by student account holders, overdraft fees, and any other fees that the college is allowing in the fee schedules for students. It may make sense for the Department of Education to work with the Consumer Financial Bureau on the annual analysis given its relevant expertise.

In publishing the "annual summary form," and in updating the format of the form over time, we want the Department to include in the summary form the fees imposed on sponsored accounts, the actual payments made in connection with the agreement, and the value of in-kind services provided to schools by third-party providers. Where applicable, the form should include banking industry average fees for comparison purposes. In addition, the schools indicate whether or not payments and in-kind services are variable based on the number of sponsored accounts opened, or based on student use of the accounts.

We believe this approach would not only help students compare their options but would also educate schools on the arrangements other schools have made and provide useful information for future contract negotiations with providers.

#### OPTION 2: REMOVE PERVERSE INCENTIVES THAT COULD CAUSE COLLEGES TO ACT AGAINST STUDENT INTERESTS

An alternate approach to institutional accountability was also discussed at last week's meetings, specifically the question of whether or not to ban revenue sharing between colleges and third party vendors. This approach has precedent in the private student lending arena. As the New York and Massachusetts AG negotiators have pointed out in a memo sent to this committee on March 5, 2014, the risks to students arising from campus banking arrangements mirror those identified in arrangements between schools and preferred lenders. New provisions were added to the Higher Education Opportunity Act in 2008, which removed the incentives a college had to act against its student interests in private student lending.

HEOA and its implementing regulations currently ban co-branding in the marketing of private loans, establish a code of conduct around 'preferred lender' arrangements which prohibits an institution for entering into either direct or indirect revenue sharing agreements with third-party lenders, and increases disclosure to students at the "point of sale" and beyond when they are presented with a college's preferred lender list.

While we do not take this approach in our suggested language, we are fully supportive of it, and will draft language reflecting this approach if we cannot implement the previous approach in a way that would benefit students.

TO: Fellow Negotiators  
FROM: Christine Lindstrom, USPIRG; Suzanne Martindale, Consumers Union  
RE: Cash Management – Proposed Amendments to Draft Language  
DATE: April 2, 2014

We submit the following proposed amendments to the Department's draft regulations regarding cash management (34 CFR part 668, subpart K). We were generally pleased with the Department's first draft, which contained many important consumer protections. In response to the concerns and suggestions raised by our fellow negotiators at last week's session, and in the interest of making progress in the next session, we offer amendments below, underlined and in bold, which would safeguard those consumer protections while purporting to provide a more workable standard for sponsored accounts. We also suggest several technical or clarifying amendments.

Thank you for your consideration.

## §668.161 Scope

(a) **General.** (1) This subpart establishes the rules under which a participating institution requests, maintains, disburses, and otherwise manages title IV, HEA program funds.

(2) As used in this subpart—

(i) The title IV, HEA programs include the Federal Pell Grant, Iraq-Afghanistan Service Grant, TEACH Grant, FSEOG, Federal Perkins Loan, FWS, and Direct Loan programs, and any other program designated by the Secretary;

(ii) A day is a calendar day, unless otherwise specified;

(iii) The term “parent” refers to the parent borrower of a Direct PLUS Loan;

(iv) An “institution” includes a foreign institution as defined in 34 CFR 600.52, unless otherwise specified;

(v) The term “student ledger account” refers to a bookkeeping account maintained and used by an institution to record the financial transactions pertaining to a student’s enrollment at the institution.

(vi) The term “financial account” refers to a student’s or parent’s checking or savings account, or other consumer asset account, including a debit card account or prepaid card account, held by a financial institution;

(vii) The term “financial institution” means a bank, savings association, or credit union that is insured by the Federal Deposit Insurance Corporation (FDIC) or National Credit Union Administration (NCUA); and

(viii) The term “pass-through deposit or share insurance” means that FDIC or NCUA deposit insurance coverage applies to the beneficiaries (students and parents) of a custodial account held at a financial institution.

**(ix) The term “electronic fund transfer” (EFT) means a transfer of funds as defined in the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), and any regulations thereunder, as amended.**

(b) Federal interest in title IV, HEA program funds. Except for funds provided by the Secretary for administrative expenses, and for funds used for the Job Location and Development Program under subpart B of the FWS regulations, funds received by an institution under the title IV, HEA programs are held in trust for the intended beneficiaries or the Secretary. The institution, as a trustee of those funds, may not—

(1) Use or hypothecate (i.e., use as collateral) the funds for any other purpose; or

(2) Transfer or maintain the funds in a sweep account, or otherwise engage in any practice that risks the loss of those funds.

(c) Standard of conduct. An institution must exercise the level of care and diligence required of a fiduciary with regard to managing title IV, HEA program funds under this subpart.

#### **§668.162 Requesting funds.**

(a) General. The Secretary has sole discretion to determine the method under which the Secretary provides title IV, HEA program funds to an institution. In accordance with procedures established by the Secretary, the Secretary may provide funds to an institution under the advance, reimbursement, or cash monitoring payment method.

(b) Advance payment method. (1) Under the advance payment method, an institution submits a request for funds to the Secretary. The institution's request may not exceed the amount of funds the institution needs immediately for disbursements the institution has made or will make to eligible students and parents;

(2) If the Secretary accepts that request, the Secretary initiates an electronic funds transfer (EFT) of that amount to the Federal bank account designated by the institution; and

(3) The institution must disburse the funds requested as soon as administratively feasible but no later than three business days following the date the institution received those funds.

(c) Reimbursement payment method. (1) Under the reimbursement payment method, an institution must credit a student's ledger account, or pay the student or parent directly, for the amount of title IV, HEA program funds that the student or parent is eligible to receive, including the amount of any credit balance due under §668.164(f), before the institution seeks reimbursement from the Secretary for those disbursements;

(2) An institution seeks reimbursement by submitting to the Secretary a request for funds that does not exceed the amount of the disbursements the institution made to students included in that request;

(3) As part of its reimbursement request, the institution must—

(i) Identify the students or parents for whom reimbursement is sought; and

(ii) Submit to the Secretary, or entity approved by the Secretary, documentation that shows that each student or parent included in the request was—

(A) Eligible to receive and has received the title IV, HEA program funds for which reimbursement is sought; and

(B) Paid directly any credit balance due under §668.164(f).

(4) The Secretary approves the amount of the institution's reimbursement request for a student or parent and initiates an EFT of that amount to the Federal bank account designated by the institution, if the Secretary determines with regard to that student or parent that the institution—

(i) Accurately determined the student's or parent's eligibility for title IV, HEA program funds;

(ii) Accurately determined the amount of title IV, HEA program funds disbursed, including the amount paid directly to the student or parent; and

(iii) Submitted the documentation required under paragraph (c)(3).

(d) Heightened cash monitoring (HCM) payment method. Under the heightened cash monitoring payment method, an institution must credit a student's ledger account, or pay the student or parent directly, for the amount of title IV, HEA program funds that the student or parent is eligible to receive, including the amount of any credit balance due under §668.164(f), before the institution—

(1) Submits a request for funds under the provisions of the advance payment method described in paragraphs (b)(1) and (b)(2), except that the institution's request may not exceed the amount of the disbursements the institution made to the students included in that request; or

(2) Seeks reimbursement for those disbursements under the provisions of the reimbursement payment method described in paragraph (c), except that the Secretary may modify the documentation requirements and review procedures used to approve the reimbursement request.

#### **§668.163 Maintaining and accounting for funds.**

(a)(1) Federal bank account. An institution must maintain title IV, HEA program funds in a bank account that is in its name, under its control, and federally insured. For an institution located in a State, the bank account must be insured by the FDIC or NCUA. For a foreign institution, the bank account may be insured by the FDIC or NCUA, or by an equivalent agency of the federal or central government of the country in which the institution is located. If there is no equivalent agency, the Secretary may approve a bank account designated by the foreign institution.

(2) For each bank account that includes title IV, HEA program funds, an institution must clearly identify that title IV, HEA program funds are maintained in that account by—

(i) Including in the name of each bank account the phrase “Federal Funds”; or

(ii)(A) Notifying the financial institution that the bank account contains title IV, HEA program funds that are held in trust and retaining a record of that notice; and

(B) Except for a public institution located in a State or a foreign institution, filing with the appropriate State or municipal government entity a UCC-1 statement disclosing that the bank account contains Federal funds and maintaining a copy of that statement.

(b) Separate bank account. An institution must maintain title IV, HEA program funds in a separate Federal bank account that contains no other funds.

(c) Interest-bearing bank account. Except for Federal Perkins Loan Program funds, an institution is not required to maintain title IV, HEA program funds in an interest-bearing bank account.

(1) Any interest earned on Federal Perkins Loan Program funds is retained by the institution as provided under 34 CFR 674.8(a).

(2) If an institution maintains other title IV, HEA program funds in an interest-bearing account, the institution may keep the initial \$250 it earns on those funds during an award year. By June 30 of that award year, the institution must remit to the Secretary any earnings over \$250.

#### **§668.164 Disbursing funds.**

(a) Disbursement. (1) Except as provided under paragraph (a)(2), a disbursement of title IV, HEA program funds occurs on the date that—

(i) The institution credits the student's ledger account or pays the student or parent directly with—

(A) Funds received from the Secretary; or

(B) Institutional funds used in advance of receiving title IV, HEA program funds; or

(ii) As provided under paragraph (d)(3), the Secretary pays a student or parent directly.

(2)(i) For a Direct Loan where the student is subject to the delayed disbursement requirements under 34 CFR 685.303(b)(4), if an institution credits a student's ledger account with institutional funds earlier than 30 days after the beginning of a payment period, the Secretary considers that the institution makes that disbursement on the 30th day after the beginning of the payment period; or

(ii) If an institution credits a student's ledger account with institutional funds earlier than 10 days before the first day of classes of a payment period, the Secretary considers that the institution makes that disbursement on the 10th day before the first day of classes of a payment period.

(b) Disbursements by payment period. Except for paying a student FWS wages at least once a month, as provided under 34 CFR 675.16(a)(2), or for making early, late, or retroactive disbursements, as provided under paragraphs (g), (h), and (i) respectively, an institution must disburse during each payment period the amount of title IV, HEA program funds that an enrolled student or parent is eligible to receive for that payment period.

(c) Crediting a student's ledger account. (1) An institution may credit a student's ledger account with Direct PLUS Loan funds the parent authorizes a student to receive, and other title IV, HEA program funds, to pay for allowable charges associated with the current payment period. Allowable charges include—

(i) The amount of tuition, fees, and institutionally provided room and board assessed the student for the payment period, or as provided under paragraph (c)(5), the prorated amount of those charges if the institution debits the student's ledger account for more than the charges associated with the payment period; and

(ii) The costs incurred by the student for the payment period for purchasing books, supplies, and other educationally related goods and services provided by the institution for which the institution obtains the student's or parent's authorization under §668.165(b).

(2) An institution may not include the cost of books and supplies as part of tuition and fees under paragraph (c)(1)(i).

(3) For allowable charges stemming from a previous payment period in the current award year, an institution may associate those charges with the current payment period.

(4) For charges stemming from a prior award year, an institution may associate those charges with the current payment period if those charges are not more than \$200 for—

(i) Tuition, fees, and institutionally-provided room and board; and

(ii) As provided in paragraph (c)(1)(ii), educationally related goods and services provided by the institution for which the institution obtains the student's or parent's authorization.

(5) For purposes of this section, an institution determines the prorated amount of charges associated with the current payment period by—

(i) For a program with equal payment periods, dividing the total institutional charges for the program by the number of payment periods in the program; or

(ii) For other programs, dividing the number of credit or clock hours the student enrolls in, or is expected to complete, in the current payment period, by the total number of credit or clock hours in the program and multiplying that result by the total institutional charges for the program.

(d) Direct payments. (1) Except as provided under paragraph (d)(3), an institution makes a direct payment—

(i) To a student, for the amount of the title IV, HEA program funds that a student is eligible to receive, including Direct PLUS Loan funds that the student's parent authorized the student to receive, by—

(A) Initiating an EFT of that amount to the student's financial account;

(B) Issuing a check for that amount payable to the student; or

(C) Dispensing cash for which the institution obtains a receipt signed by the student.

(ii) To a parent, for the amount of the Direct PLUS Loan funds that a parent does not authorize the student to receive, by—

(A) Initiating an EFT of that amount to the parent's financial account;

(B) Issuing a check for that amount payable to the parent; or

(C) Dispensing cash for which the institution obtains a receipt signed by the parent.

(2) Issuing a check. An institution issues a check on the date that it -

(i) Mails the check to the student or parent; or

(ii) Notifies the student or parent that the check is available for immediate pick-up at a specified location at the institution. The institution may hold the check for no longer than 21 days after the date it notifies the student or parent. If the student or parent does not pick up the check, the institution must immediately mail the check to the student or parent, pay the student or parent directly by other means, or return the funds to the appropriate title IV, HEA program.

(3) Payments by the Secretary. The Secretary may pay, or require an institution to pay, title IV, HEA program funds directly to a student or parent using a method established or authorized by the Secretary.

(4) Conditions for making a direct payment. In making a direct payment, the institution—

(i) May not require any student or parent to open or use a financial account at a specific financial institution; and

(ii)(A) Must request each student or parent to provide the information needed to make an EFT to the financial account the student or parent opened without assistance from the institution and use that financial account if the student or parent provides that information. **If the institution cannot provide EFT as a method of disbursement, the institution can apply with the Secretary for an exemption;** or

(B) If the student or parent does not have, or provide information about, a financial account, the institution may assist the student or parent in opening a financial account under paragraph (e).

(5) Student choice. If an institution establishes a process under which a student or parent is offered options for receiving a direct payment, the institution must ensure that—

(i) The options are described clearly and presented in a neutral manner, e.g., the student or parent is not steered to, or compelled to select, a particular option; and

(ii) The process for **the student or parent to direct payment instructions** electronically to a financial account designated by the student or parent under paragraph (4)(ii)(A), or otherwise selected by the student or parent, is as timely and no more onerous than **directing payment instructions** to a sponsored account under paragraph (e). **The processing of payment instructions for making direct payments electronically to a financial account designated by the student or parent under paragraph (4)(ii)(A), or otherwise selected by the student or parent, shall be as timely, so that the only variance in the speed of processing instructions and crediting payments to one financial account versus another is solely attributable to underlying differences in the EFT functionality or practices of a financial institution holding the financial account.**

(e) Sponsored account. If an institution located in any State, as defined in 600.2, establishes a process that a student or parent follows to open a financial account, either through a contract

with a third-party servicer or through any arrangement with an entity under which any party to the arrangement exercises any control over the financial account into which the student's title IV, HEA program funds are transferred or deposited, the institution—

(1) Must disclose conspicuously on its website, and otherwise make public, that contract or arrangement in its entirety, **together with an annual summary of the contract's terms and conditions in a format provided by the Secretary;**

(2) Before the student's or parent's financial account is opened and before the student or parent may activate a debit card, prepaid card, or access device associated with the account, must—

(i) Inform the student or parent of the terms and conditions of the account; and

(ii) Obtain in writing affirmative consent from the student or parent to open the account;

(3) Must review any information that is provided to the student or parent about the account, and the debit card, prepaid card, or access device associated with the account, to ensure that the information is presented to the student in an objective and neutral manner;

(4) May not send a debit card, prepaid card, or access device associated with the account to a student or parent unless the student or parent specifically requests it **upon** providing consent as required in paragraph (e)(2);

(5) May not **use the name, emblem, mascot or logo of the institution in the marketing of a sponsored account in any way that implies that the institution endorses or favors that account compared with other methods of disbursement;**

**(6) May not offer any tangible item to induce the student or parent into opening a sponsored account, if that offer is made on or near campus, as defined by the Secretary, or at an event sponsored by the institution;**

(7) May not provide to the servicer or entity any information about the student or parent until after the student or parent consents affirmatively to open the account under paragraph (e)(2);

(8) 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;

(9) Must ensure **at a minimum** that the student does not incur any cost in—

(i) Opening the financial account or initially receiving the debit card, prepaid card, or access device associated with the account;

(ii) Maintaining the account;

**(iii) Conducting point-of-sale transactions;** or

(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;**

(10) Must ensure that the debit card, prepaid card, or access device associated with the account can be used at multiple unaffiliated merchants;

(11) May not market or portray the financial account, debit card, prepaid card, or access device as a credit card or credit instrument, or subsequently convert the account, card, or device to a credit card or credit instrument;

**(12) May not assess the student or parent an overdraft fee for ATM or one-time debit card transactions. An overdraft fee may be assessed for insufficient funds (NSF) resulting from checks or for preauthorized debit transactions, but must limit such fees to no more than one overdraft fee per day;**

(13) Regardless of the debit card, prepaid card, or access device associated with the financial account, must ensure that—

(i) The provider of the card or device provides the student or parent with pass-through deposit or share insurance;

(ii) The card or device does not have an attached line of credit or loan feature under which repayment from the account is triggered upon the delivery of a Federal payment, including a deposit or transfer of title IV, HEA program funds into the account; and

(iii) The account provides the student or parent with all the consumer protections that apply to a payroll card account under the Electronic Fund Transfer Act (**15 U.S.C. 1693 et seq.**), and **any regulations thereunder**, as amended; and

(14) Ensure that the financial account is in the student's or parent's name, or for a financial account that is a pooled custodial account, the subaccount (or card or device) is in the student's or parent's name. The custodial bank account must be established in the name of the institution or the institution's third party servicer, and must be set up to ensure that any title IV, HEA program funds that become the pooled funds of the custodial account are credited immediately to the student's or parent's subaccount (or card or device).

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