



September 13, 2021

U.S. Department of Education
Office of the Secretary
400 Maryland Avenue SW
Washington, D.C. 20202

VIA ELECTRONIC SUBMISSION

Re: Federal Preemption and Joint Federal-State Regulation and Oversight of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers (Docket ID ED-2021-OS-0107)

Dear Secretary Cardona:

The undersigned organizations representing students, student loan borrowers, teachers, and consumers submit this comment in response to the U.S. Department of Education's (the "Department") interpretation on federal and joint federal-state regulation and oversight of the Department's federal student loan programs and federal student loan servicers (the "Interpretation").

As the Department details in the Interpretation, the ability of states and consumers to enforce state consumer protection laws is vitally important to protecting student loan borrowers and the integrity of the student loan system. The servicing industry has kept borrowers from accessing critical programs such as Income-Driven Repayment ("IDR") and Public Service Loan Forgiveness, which has resulted in borrowers paying more for longer or, worse, defaulting on their federal student loans. The enforcement of state action is critical to both hold servicers accountable and to ensure that borrowers have access to adequate and appropriate remedies.

Indeed, states have been at the forefront of addressing industry abuses.¹ State attorneys general continue to address systemic servicer misconduct, just as state legislators continue to pass laws empowering their regulators and citizens to respond to known shortcomings. States are responding to their resident borrowers' needs in ways that would be difficult for the Department to replicate. What the Department can do, and which the Interpretation does, is continue to support states' constitutional right to take action and coordinate whenever possible.

We applaud the Department's position that state action to protect borrowers should not be preempted except in the most limited instances of impossibility and irreconcilable conflict with federal law. The Department offers a well-supported and thoroughly researched legal analysis that respects federalism's balanced approach to federal and state interests and the need for partnership—"cooperative federalism"—in the oversight and regulation of student loan servicing and collection. It also acknowledges states' historical and unique contributions to this partnership. We welcome this position and look forward to continuing to support the Department in executing this policy nationwide.

To that end, we urge the Department to revise its Interpretation to include an analysis that is currently notably missing. A call for state partnership must include comprehensive support for states' ability to engage in particular regulatory and oversight activities. Though the Interpretation addresses some aspects of state laws that are not generally preempted, i.e., state UDAP laws and laws relating to misapplication of payments and refusal to communicate with borrowers, it does not sufficiently address other numerous student loan-specific state laws currently in effect and actively protecting borrowers. Particularly, the Interpretation's discussion of affirmative misrepresentations does not make it clear that other state protections are valued and permissible, such as licensure and specific business conduct requirements. Additionally, the Department should state its position that states are not preempted from regulating and overseeing the servicing and collection of the privately-owned Federal Family Education Loan ("FFEL") Program portfolio, so-called Commercial FFEL loans, including guaranty agencies' activities. Directly addressing these matters will benefit all stakeholders, including borrowers and industry. This comment addresses each of these topics briefly. A more detailed discussion of these topics is available in the memorandum appended to this comment.²

States' Role in Regulating and Overseeing the Student Loan Industry Is Not Preempted

¹For a more detailed discussion of state responses to industry abuses, see report from the Center for Responsible Lending, *Stepping Up: States Move to Hold Student Loan Servicers Accountable* (October 2019), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-steppingup-studentloans-0ct2019.pdf>.

²Memorandum from Student Borrower Protection Center to Interested Parties, *The Department of Education's Interpretation of Federal Preemption and State Regulation and Supervision of Federal Student Loan Servicers* (Aug. 27, 2021), <http://www.protectborrowers.org/preemptionmemo>.

A specific and powerful opportunity for the Department to support its state partners would be to clearly state its position that states' ongoing actions neither create irremediable conflicts with federal interests nor render it impossible for servicers to comply with both federal and state law, and therefore should not be preempted. This determination accords with the substantial body of federal case law already discussed in the Interpretation. It also adheres to the long-standing Constitutional presumption against preemption when federal law operates in a field which the States have traditionally occupied, such as consumer protection. However, this determination is noticeably missing from the Interpretation. Calling for state partnership must include a clear proclamation that the steps states must take to answer that call are not preempted under federal law.

These state actions include general protections against representations by omission and specific protections related to student loan servicing and collection, such as licensure and setting minimum business standards, all pegged to known industry abuses. In addition to affirmative misrepresentations, which the Interpretation does address, borrowers also experience a wide array of other abusive and deceptive practices, such as delays in processing paperwork or presenting forbearances as the only option for borrowers who would benefit from IDR.

The Department's call for joint federal-state regulation and oversight must include full-throated support for these acts: that federal interests are served by state partnership in overseeing the "far-flung [student loan] system"; that states are not federally preempted from enacting these common-sense protections, with which servicers can comply alongside federal requirements; and that all interests would be served by settling the matter and avoiding expensive and unnecessary litigation. This would also build on the Department's recent statements supporting states' authority to regulate and oversee the industry, including its comment to the Virginia State Corporation Commission in favor of the Commonwealth's new law regulating servicers.

In supporting these state actions—the very actions the Department calls for in the Interpretation—we also urge the Department to revise certain statements that unnecessarily risk clouding its otherwise clear and concise position on preemption.³ A revised Interpretation should reflect the state of federal preemption case law by making clear that the many known state actions protecting borrowers—with which industry can abide while also satisfying federal requirements—are permissible uses of states' sovereign police powers that support the Department's goal of protecting borrowers.

States Are Not Preempted From Regulating Commercial FFEL Servicers

³ See *id.* at 7-8.

The Department should also make clear that states may regulate, oversee, and enforce consumer protections against the private-sector companies that service and collect federal student loans held by banks and other private creditors in the Commercial FFEL portfolio. These companies regularly interact with borrowers, and engage in documented predatory and sub-standard servicing tactics that cause the very borrower harm the Department seeks to address with states' assistance.

This privately owned and privately serviced portfolio of federally insured loans lacks the elements that justify preemption of state law: the Department does not directly hold contracts with these private actors nor does state action impede the federal government's interests related to the FFEL program. Per the Department's own analysis in the Interpretation, there should be no grounds for preemption.

Despite this, servicers and guaranty agencies—the companies that insure Commercial FFEL loans—continue to engage in a broad and mostly unsuccessful campaign to avoid liability for their well-documented consumer abuses. For example, the guaranty agency industry trade association recently sued the Commonwealth of Virginia on these grounds to avoid oversight by its regulator.⁴ The federal District Court for the District of Columbia upheld the District of Columbia's student loan borrower protection law with respect to Commercial FFEL, however the Department has not explicitly adopted that position.⁵ Doing so would make clear that the objections raised by market participants in the FFEL program are nothing more than an effort to escape oversight and have no basis in law. It would also clarify its position for all jurisdictions and would save states, industry, and borrowers significant time and expense in litigating this question.

Conclusion

We applaud the position the Department takes in the Interpretation, and the many acts it has taken in support of borrowers and states over recent months. To fully realize the joint federal-state partnership that it seeks, however, we urge the Department to incorporate the changes discussed in this comment. Now is the time for cooperative federalism. The Department can pave the way for this coordination by explicitly and proactively taking the position that specific state protections are not preempted by federal law, and that federal law does not preempt the application of state law to Commercial FFEL loans.

⁴ Complaint, *Nat'l Assoc. of Student Loan Admin. v. Face et al.*, No. 3:21-cv-0440-MHL (E.D. Va. Jul 8, 2021), https://protectborrowers.org/wp-content/uploads/2021/07/Complaint_NASLA-v-VA-July-2021.pdf (Last viewed Aug. 20, 2021).

⁵ See *Student Loan Servicing All. v. District of Columbia*, 351 F. Supp.3d 26, 66 (D.D.C. 2018).

Sincerely,

Student Borrower Protection Center

American Federation of Teachers, AFL-CIO

Americans for Financial Reform Education Fund

Center for Responsible Lending

National Consumer Law Center (on behalf of its low-income clients)

APPENDIX A

Memorandum from Student Borrower Protection Center to Interested Parties
*The Department of Education's Interpretation of Federal Preemption and State Regulation and Supervision of
Federal Student Loan Servicers*
(Aug. 27, 2021)



MEMORANDUM

August 27, 2021

TO: Interested Parties
FROM: Student Borrower Protection Center
RE: The Department of Education’s Interpretation of Federal Preemption and State Regulation and Supervision of Federal Student Loan Servicers

On August 12, 2021, the U.S. Department of Education (the “Department”) published to the Federal Register a legal interpretation through which it seeks to “revise and clarify its position of the legality of State laws and regulations that govern various aspects of the servicing [and collection] of Federal student loans, such as preventing unfair or deceptive practices, correcting misapplied payments, or addressing refusals to communicate with borrowers.”¹ The Department is seeking comments on its recent legal interpretation through September 13, 2021.²

In its interpretation, the Department draws on a significant body of federal case law to support its position that federal law does not broadly preempt state laws that allow consumer protection officials and individual student loan borrowers to hold student loan companies accountable and that any preemption should be done “only in limited and discrete respects[.]”³ The Department also affirmatively revokes an earlier opinion issued in 2018 by then-Secretary of Education DeVos that asserted broad preemption, on the grounds that this prior opinion was “seriously flawed.”⁴

This is a well-supported, thoroughly researched legal interpretation that accurately describes federalism’s balanced approach to federal and state interests and the need for partnership—“cooperative federalism”⁵—in the oversight and regulation of student loan servicers. There are, however, ways in which the Department can strengthen the interpretation and advance its goals. In particular, there are internal inconsistencies that create unnecessary and potentially harmful confusion about an otherwise clear position. Further, the Department’s analysis falls short where it declines to apply its legal conclusions to known and extremely

¹ U.S. Dep’t of Educ., *Federal Preemption and Joint Federal-State Regulation and Oversight of the Department of Education’s Federal Student Loan Programs and Federal Student Loan Servicers*, 86 Fed. Reg. 44,277, 44,277 (Aug. 12, 2021) (“Department Notice”); *id.* at 44,278 (discussing preemption in the context of servicing and collection).

² *Id.* at 44,277.

³ *Id.*

⁴ *Id.* at 44,281.

⁵ *Id.* at 44,282.

relevant instances of state action within the opinion’s scope, particularly States’ important affirmative obligations on licensed loan servicers, the preemptive effect of federal law on so-called “automatic” licensing laws, and the largely unsuccessful attempts by guaranty agencies to claim preemption as a shield against accountability. The Department can support States in engaging in the partnership for which it calls by more fully supporting their legal authority to take action with respect to federal student loan servicing and collection. This memorandum discusses the interpretation and each of these points in turn.

BACKGROUND

Congress passed the Higher Education Act of 1965, 20 U.S.C. § 1001, et seq. (the “HEA”), to “strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education.”⁶ To that end, Title IV of the HEA provides for financial aid programs to assist students in paying for their education, including student loan programs. Two such programs, the Federal Family Education Loan (“FFEL”) Program and the Direct Loan Program,⁷ are relevant to the Department’s legal interpretation. Although the FFEL program ended in 2010, making the Direct Loan program the predominant loan program under the HEA,⁸ there are still approximately 11.5 million FFEL loans in repayment or collection.⁹

Whereas Direct Loans are originated by the Department directly to student borrowers, FFEL loans were originated by private lenders that participated in a federal guaranteed lending scheme.¹⁰ As an incentive to lend to students who may not have met traditional credit underwriting standards and in exchange for offering certain repayment benefits, FFEL loans are insured by private-sector companies called guaranty agencies, which reimburse FFEL creditors for any defaulted FFEL loans. These guaranty agencies in turn are eligible for reimbursement by the federal government when they pay out on these insured loans.¹¹

As the Department’s legal interpretation recognizes, both FFEL and Direct Loans are serviced and collected by private companies. In the case of FFEL loans owned by private creditors, these companies are contracted by the private creditors directly, whereas they contract with the Department for the servicing of Direct Loans.¹² Guaranty agencies, too, engage in a

⁶ Pub. L. No. 89-329, 79 Stat. 1219, 1219 (1965).

⁷ See 20 U.S.C. § 1071, et seq. (FFEL Program); 20 U.S.C. § 1087a, et seq. (Direct Loan Program).

⁸ See *Student Loan Servicing All. v. District of Columbia*, 351 F. Supp.3d 26, 58 (D.D.C. 2018) (discussing the end of the FFEL Program).

⁹ U.S. Dep’t of Educ., “Portfolio by Loan Status (DL, FFEL, ED-Held FFEL, ED-Owned),” *Federal Student Loan Portfolio*, <https://studentaid.gov/data-center/student/portfolio> (Last viewed on Aug. 25, 2021).

¹⁰ Compare 20 U.S.C. § 1087a, et seq., with 20 U.S.C. § 1071, et seq.

¹¹ 20 U.S.C. § 1078(c).

¹² Compare 20 U.S.C. § 1071, et seq., with 20 U.S.C. § 1087f. Also note that the Department of Education owns a substantial portfolio of FFEL loans, in addition to all outstanding Direct Loans. Where this memorandum refers to

specific subset of student loan servicing known as “default aversion”—the practice of contacting borrowers who are delinquent on these privately-held loans and advising them about repayment options¹³—as well as collecting on these loans. Students may also borrow on the private market to finance their education, and those loans are also serviced by many of the same private companies that contract directly with the private creditors to service FFEL program loans and with the federal government to service Direct Loans.

The student loan industry, in both the federal and private loan context, has been plagued by predatory and poor-quality servicing and collections. States have responded by suing particularly bad actors,¹⁴ and also by passing so-called Borrower Bill of Rights laws to license, regulate, oversee, and enforce protections with respect to this industry, as they do most other private financial services companies.¹⁵ In short order, however, these same industry actors began to challenge these laws on the grounds that they are preempted by federal law.¹⁶

The Constitution's Supremacy Clause empowers Congress to, in certain instances, preempt state laws.¹⁷ Essentially, where Congress had clear intent to override a state law or to accomplish a goal, state law may not stand in the way. Preemption can be “express” in statute or implied, either by the thoroughness of federal regulation or by a conflict between federal and state law.¹⁸ There is, however, a strong presumption against preemption of state laws short of

policies or practices that apply to Direct Loans, readers should also assume that these features also apply to the servicing or collection of this so-called “ED-held FFELP.”

¹³ Mike Pierce, *What it means to be a student loan servicer: Guaranty Agency edition*, Student Borrower Prot. Ctr. (Mar. 29, 2019), <https://protectborrowers.org/what-it-means-to-be-a-student-loan-servicer-guaranty-agency-edition/> (Last viewed Aug. 3, 2021).

¹⁴ See, e.g., *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 17-cv-00101, 2017 U.S. Dist. LEXIS 123825 (M.D. Pa. Aug. 4, 2017); Complaint, *Pa. v. Navient Corp.*, No. 3:17-cv-1814-RDM (M.D. Pa. June 19, 2019), <https://www.attorneygeneral.gov/wp-content/uploads/2018/01/PA-v.-Navient-Complaint-2017-10-6-StampedCopy.pdf> (Last viewed on Aug. 3, 2021); Complaint, *Cal. v. Navient Corp.*, No. CGC-18- 19 567732 (Cal. Oct. 16, 2018), https://oag.ca.gov/system/files/attachments/press_releases/CA%20AG%20First%20Amended%20Complaint%20-%20Navient.pdf (Last viewed on Aug. 3, 2021); Complaint, *Ill. v. Navient Corp.*, No. 2017-CH-00761 (Ill. July 10, 2018), https://illinoisattorneygeneral.gov/pressroom/2017_01/NavientFileComplaint11817.pdf (Last viewed on Aug. 3, 2021); Complaint, *Miss. v. Navient Corp.*, No. G2108-98203 (Miss. July 24, 2018), <https://www.scribd.com/document/384612507/Navient-ComplaintFiled> (Last viewed on Aug. 3, 2021); Complaint, *Wash. v. Navient Corp.*, No. 17-2- 01115-1 SEA (Wash. Jan. 18, 2017), <https://www.classaction.org/media/state-of-washington-v-navient-corporation-et-al.pdf> (Last viewed on Aug. 3, 2021).

¹⁵ See, e.g., N. Y. Banking Law, Art. 14-A; Cal. Fin. Code, § 28100 et seq.; Colo. Rev. Stat. § 5-20-101 et seq.; Sections 36a-846 et seq., of the Connecticut General Statutes; D.C. Code §31-106.02; 110 Ill. Comp. Stat. 992/ Art. 1 et seq.; Section 65 of Chapter 358 of the Acts of 2020 (Mass.); Me. Rev. Stat. Title 9-A, Art. 14; R.I. Gen. Laws § 19-33; Wash. Rev. Code § 31.04 et seq.

¹⁶ See, e.g., Am. Complaint, *Student Loan Servicing All. v. District of Columbia*, No. 1:18-cv-0640-PLF (D.D.C. Aug. 24, 2018); Complaint, *Pa. Higher Educ. Assist. Corp. v. Perez et al.*, No. 3:18-cv-01114-MPS (July 2, 2018).

¹⁷ See U.S. Const. Art. VI, cl. 2; *North Dakota v. United States*, 495 U.S. 423, 434 (1990).

¹⁸ *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 375-76 (2015).

such clear Congressional intent,¹⁹ which is especially true when federal law operates "in a field which the States have traditionally occupied,"²⁰ such as consumer protection laws.²¹

On March 12, 2018, the Department published to the Federal Register an interpretation that set forth its position at the time on federal preemption of state oversight of student loan servicers.²² The interpretation asserted a theory of broad preemption of state action that departed from the Department's historical approach to state partnership and to which federal courts have declined to give any authority or deference in their analyses. One court described the 2018 interpretation as "a retroactive, ex-post rationalization for [the Department's] policy changes."²³

With the new Presidential administration, the Department has re-adopted its historical approach to partnering with states in overseeing and regulating student loan servicing and collection.²⁴ On August 12, 2021, it published to the Federal Register a new interpretation of federal preemption in the context of student loan servicing, in which it explicitly revokes the 2018 interpretation and articulates a position that welcomes and allows for strong state action and partnership in protecting federal student loan borrowers.

DISCUSSION AND ANALYSIS

The Department's interpretation is strongly grounded in federal case law that describes the constitutional balancing of federal and state interests, and takes the position that state action is both necessary and permissible in overseeing the federal student loan servicing industry, in all but a few instances. The Department stresses that state action should only be preempted where there are actual conflicts with federal law that cannot be reconciled and that render compliance with both sovereigns' requirements by private actors impossible.

The Department can strengthen its interpretation, however, in several key ways. It can ensure that it faithfully adheres to its clearly articulated position that state laws should only be preempted under certain narrow circumstances throughout the opinion. It should extend its analysis upholding States' prohibitions against affirmative misrepresentations to include States' affirmative requirements for servicers, such as circumstances wherein States award automatic, irrevocable licenses to federal contractors. Finally, it should directly address preemption as it applies to aspects of the FFEL portfolio, especially to guaranty agencies' activities.

¹⁹ See *Arizona v. United States*, 567 U.S. 387, 400 (2012).

²⁰ See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

²¹ See *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990).

²² U.S. Dep't of Educ., *Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers*, 83 Fed. Reg. 10,619 (Mar. 12, 2018).

²³ *Student Loan Servicing All.*, 351 F. Supp.3d at 50.

²⁴ Department Notice, 86 Fed. Reg. at 44,281.

1. The Department Correctly Concludes That State Laws Are Preempted In Only Limited Instances Of Impossible And “Irremediable” Conflict.

The Department issued its interpretation to clarify its position on whether States are preempted from supervising federal student loan servicers, and if so, to what extent.²⁵ The Department concludes that States should only be preempted in instances of “irremediable” conflict where the supervised entity cannot possibly comply with both federal and state mandates, or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁶ This position relies on a significant body of case law and an analysis of federal interests, and respects States’ roles as sovereigns and custodians of their residents’ well-being.

- a. The Department asserts that neither field nor express preemption bars States from regulating Federal student loan servicers.

Before analyzing the applicability of conflict preemption, the Department joins virtually all federal circuit courts in determining that there is no “field preemption” in the context of the HEA: States are not categorically preempted from acting in the areas to which the HEA also applies.²⁷ The Department notes, too, that this has been its historical interpretation of the HEA and field preemption.²⁸

In support of its field preemption analysis, the Department also concludes that, although “the HEA does contain some specific provisions that explicitly preempt certain areas of State law, [] those provisions are limited and selective[,]” and that “Congress consciously opted to displace State authority only in these limited particulars and did not intend or provide for broad field preemption of State laws governing student loan servicing.”²⁹ The Department discusses the HEA’s few instances of express preemption, such as with respect to state usury laws, statutes of limitation, and wage garnishment laws, to reinforce that Congress acted with precision where it intended to preempt state action.³⁰ Importantly, the Department also supports the growing number of federal circuit courts that have held that the HEA’s preemption of state disclosure requirements does not preclude state protections against affirmative misrepresentations.³¹

²⁵ *Id.* at 44,277.

²⁶ *Id.* at 44,279 (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

²⁷ *Id.* at 44,278 (citing *Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908, 923 (11th Cir. 2020); *Nelson v. Great Lakes Educ. Loan Services, Inc.*, 928 F.3d 639, 652 (7th Cir. 2019); *Chae v. SLM Corp.*, 593 F.3d 936, 941-42 (9th Cir. 2010); *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125-26 (11th Cir. 2004); *Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.* 168 F.3d 1362, 1269 (D.C. Cir. 1999)).

²⁸ *Id.*

²⁹ *Id.* at 44,278-79.

³⁰ See *id.* at 44,279 (citing 20 U.S.C. 1078(d), 1091a(a)(2), 1095a(a)).

³¹ *Id.* (discussing 20 U.S.C. 1098g) (citing *Nelson*, 928 F.3d at 647-49; *Lawson-Ross*, 955 F.3d at 917-19).

Having taken the position that neither field nor express preemption bars States from protecting their residents by regulating and overseeing the federal student loan servicing and collections industry, the Department turns to conflict preemption and asserts that States should be permitted to act except for in certain narrow circumstances.

- b. The Department finds that state laws should not be preempted unless it is impossible for private actors to comply with both federal and state requirements and the laws cannot be reasonably reconciled.

The Department takes the position that “conflict preemption only nullifies State action if ‘it is impossible for a private party to comply with both state and federal law’ or if State law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”³² Put differently, where a private actor can comply with both state and federal law, or where the state law does not impede Congress’s legislative purpose or objectives, states are permitted to act. Importantly, the Department bases its conclusion on principles of both federalism and pragmatism.

It first notes that both the federal government and States have “legitimate interests” in the area of federal student loan servicer regulation and that courts typically “implement constitutional principles of federalism by seeking to balance and respect [federal and state] mutual interests as much as possible.”³³ The Department emphasizes courts’ caution against finding “false conflict[s]” and their instruction to “officials who are willing to take reasonable steps” to “accommodate” potential differences in law, and to subject only state laws with “irremediable conflict” to the extreme measure of preemption.³⁴ Essentially, where a state law governing servicers can be made to work, the Department’s position is that it should be permitted to.

In addition to stressing the importance of reconciling any potential conflicts before resorting to preemption, the Department addresses throughout its opinion the federal interests that could be impeded by state action. It joins numerous federal courts in swiftly determining that mere “uniformity in the Federal student loan servicing” industry is not a Congressional intent articulated in the HEA nor is it grounds for preemption of state regulation of that industry.³⁵ The Department acknowledges that preemption of its Direct Loan servicers would have the effect of “relieving Federal contractors of *any* exposure to liability . . . [which] would be a breathtakingly

³² *Id.* (quoting *Crosby*, 530 U.S. at 373).

³³ *Id.*

³⁴ *Id.* (citing *Student Loan Servicing All.*, 351 F. Supp.3d at 60-61).

³⁵ *Id.* (citing *Pa. v. Navient Corp.*, 967 F.3d 273, 292-94 (3d Cir. 2020); *Lawson-Ross*, 955 F.3d at 920-23; *Nelson*, 928 F.3d at 650-51).

broad assertion of preemption, given that even Federal contractors are routinely subject to liability for violating State tort laws.”³⁶

The Department also stresses that a narrow application of conflict preemption would actually serve two of its own important objectives with respect to federal student loan servicing and collection: “to ensure that borrowers receive exemplary customer service and are protected from substandard practices.”³⁷ States, the Department reasons, “are able to maintain a closer perspective on how [] servicers operate in their States,”³⁸ and that “many of the recently enacted State laws are designed to focus squarely on customer service issues[.]”³⁹ States’ abilities to effectively advance these federal goals underpins the call for “cooperative federalism” throughout the Department’s interpretation,⁴⁰ and the conclusion that state action should be upheld except for extreme instances of impossibility and irreconcilable differences with federal requirements or goals.

The thrust of the Department’s position is clear: States are necessary and desired partners in ensuring that the federal student loan industry is safe and works for borrowers, and state action toward those goals should only be preempted where there are irreconcilable conflicts.

2. The Department Can Improve Its Interpretation By Clarifying Or Expanding On Specific Topics.

Although the Department’s interpretation is clear and strong, it can strengthen its position and advance its stated goals further by revising the interpretation to ensure consistency throughout its analysis and to expand its analysis to address certain additional relevant topics. Specifically, the Department should ensure its position on conflict preemption is faithfully applied throughout the document, and it should apply that position to the additional state affirmative requirements on servicers, including licensing laws, and to the so-called Commercial FFEL portfolio of loans, including to guaranty agencies’ servicing of those loans.

- a. The Department should ensure its position on conflict preemption is consistently articulated throughout its interpretation.

Although it clearly articulates its standard for conflict preemption in its interpretation, at various points the Department also uses language that could inadvertently contribute to a less precise standard that centers on mere “inconsistency,” rather than the narrower instances of impossibility or irreconcilable impediments to federal interests. These references are unhelpful

³⁶ *Id.* at 44,280 (emphasis in original).

³⁷ *Id.* at 44,281.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 44,282.

and could create unnecessary confusion. The interpretation would be stronger and support the Department’s position better if it were revised to remove these references.

Specifically, when discussing state laws that are potentially inconsistent with federal measures, the Department determines that if “State laws are directly inconsistent with equally specific Federal law, they are preempted.”⁴¹ The same is true in the Department’s discussion of the FFEL program, in which it states that “some specific Federal laws and regulations preempt State laws that conflict squarely on matters such as timelines, dispute resolution procedures, and some particulars of debt collection and loan servicing.”⁴² Both are examples of requirements that occupy the same space (the mere *potential* for conflict), but without a thorough analysis it is not clear that any inconsistency or conflict cannot be reconciled. The Department’s earlier conclusion—that conflict preemption only nullifies state action in narrow instances of impossibility or obstacle—was not faithfully applied in these instances.

As the Department notes several times, federal and state law should be harmonized to the “greatest extent” possible, and as the Department recognizes, conflict preemption should only nullify state action if “it is impossible for a private party to comply with both state and federal law” or if “State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴³ This requires a fact-specific analysis of how a particular state law interacts with federal law. The Department acknowledges this in its discussion of *Student Loan Servicing Alliance v. District of Columbia*, in which it points out that the federal judge in that case concluded that the plaintiff’s bases for preemption were largely “false conflict[s],”⁴⁴ and that “[u]pon close inspection of the state and federal provisions, it [was] apparent that there [was] no actual conflict on the grounds of impossibility.”⁴⁵ State and federal laws that are merely inconsistent, even “directly” so, can be reconciled, and according to the Department’s own analysis, should be.⁴⁶ This is particularly true given the Department’s commitment to “cooperative federalism” and belief that States advance its federal interests, and given the Department’s rejection of the 2018 interpretation’s focus on preempting “contrary or inconsistent” State laws.⁴⁷ The Department’s new interpretation would be clearer and more effective if any inadvertent applications of other standards were removed.

⁴¹ *Id.* at 44,281.

⁴² *Id.* at 44,280.

⁴³ *Id.* at 44,279 (quoting *Crosby*, 530 U.S. at 373).

⁴⁴ *Id.*

⁴⁵ *Id.* (citing *Student Loan Servicing All.*, 351 F. Supp.3d at 60-61).

⁴⁶ See generally *id.*

⁴⁷ *Id.* at 44,280-81.



- b. The Department should expand its discussion of affirmative misrepresentations to make clear that the same analysis applies to affirmative requirements, including state licensing.

The Department joins numerous federal circuit courts in explicitly upholding States' authority to address servicers' affirmative misrepresentations to borrowers using traditional consumer protection laws.⁴⁸ It does not, however, conduct the same analysis for the many other affirmative actions by servicers that States currently require using those same police powers. Nor does it directly address the harm from material omissions to by servicers to borrowers, which, although not "affirmative" are generally actionable under States' consumer protection laws against misrepresentation and fraud. In light of the Department's emphasis on States as a partner in overseeing servicers' customer service conduct,⁴⁹ this is particularly relevant and noticeably missing from the interpretation: the Department calls on States as partners in executing specific and important consumer protections, but does not explicitly endorse the full suite of regulatory and enforcement tools that States employ to fulfill that role. Given that these additional protections are central to the state laws at issue in the interpretation and that these affirmative protections further the Department's stated interests, it should revise its interpretation to extend its analysis to include these state actions.

This would not represent a dramatic extension of the Department's current analysis. In fact, the Department is quite explicit that States can—and perhaps should⁵⁰—take action beyond just policing against affirmative misrepresentations:

this interpretation [that State measures that prohibit affirmative misrepresentations by loan servicers] should not be read to suggest that *only* State laws and regulations relating to affirmative misrepresentation are not preempted. States may consider and adopt additional measures which protect borrowers and do not conflict with Federal law.⁵¹

Even where it acknowledges that some state action may be preempted—such as the revocation of a federal contractor's license to operate—the Department takes care to note that such preemption “does not imply that a State cannot act to impose reasonable, generally applicable conditions on

⁴⁸ *Id.* at 44,280.

⁴⁹ *Id.* at 44,281 (“[T]he Department has concluded that close coordination with its State partners will further enhance both servicer accountability and borrower protections.”).

⁵⁰ *Id.* at 44,281-82 (discussing Department limitations and States' ability to fill gaps and closely monitor servicing industry for customer service concerns).

⁵¹ *Id.* at 44,281 (emphasis in original).

entities (including Federally licensed contractors) operating within the bounds of the State, as authorized under its police powers exercised on behalf of its citizens.”⁵²

Thus, the Department has already articulated its position (that additional state action is not preempted) and the rule to support that position (that those actions do not “conflict” with federal law, which the rest of the opinion defines as creating impossible requirements or irreconcilably obstructing federal interests) and all that is lacking is the application and analysis.

- i. The Department should include in its analysis illustrative examples of specific state requirements that are necessary to ensure high-quality customer service and that borrowers are protected.

The Department’s analysis of affirmative state requirements on servicers does not have to be hypothetical. Among the many States that oversee federal student loan servicers, most require servicers to engage in specific acts, such as responding to borrower complaints within specified timeframes,⁵³ having customer service representatives who are knowledgeable about student loan repayment options,⁵⁴ and administering account transfers in a specified manner.⁵⁵ These affirmative requirements on servicers represent powerful consumer protections that seek to address known industry failings, often with respect to the basic mechanics of account management and customer service.

Although the federal government has promulgated regulations to establish some servicing standards that may be facially inconsistent with these State requirements, the latter should only be preempted if it is impossible for a servicer to comply with both standards, or if the state standards irreconcilably impede federal interests. Analyzing a selection of these state affirmative obligations in detail would clarify for industry and States alike that they are not preempted, and would answer the call of the federal court in *Student Loan Servicing Alliance* to conduct a “closer inspection” of potential conflicts and to avoid instances of a “false conflict.”⁵⁶

For example, the Department’s regulations require responses to borrower inquiries within thirty days,⁵⁷ whereas New York requires servicers to acknowledge a borrower’s complaint within ten days and to respond within 30 days, or within fifteen days if the complaint was

⁵² *Id.* at 44,280. Readers should note, however, that although the Department references “Federally licensed contractors” in its interpretation, the Federal government does not issue licenses to companies. States issue licenses to permit certain activity within their jurisdiction. The Federal government may then contract with these State licensees.

⁵³ N.Y. Comp. Codes R. & Regs. tit. 3, § 409.8(j); 110 Ill. Comp. Stat. 992/5-65(c).

⁵⁴ N.Y. Comp. Codes R. & Regs. tit. 3, § 409.8(f)(2); 110 Ill. Comp. Stat. 992/5-30(a)

⁵⁵ N.Y. Comp. Codes R. & Regs. tit. 3, § 409.8(d); 110 Ill. Comp. Stat. 992/5-60

⁵⁶ Department Notice, 86 Fed. Reg. at 44,279.

⁵⁷ U.S. Dep’t of Educ. Due Diligence in Servicing a Loan, 34 C.F.R. § 682.208(c).

furnished through the State’s regulatory agency.⁵⁸ Similarly, the Department’s regulations require notice of account and ownership transfers no later than forty-five days from the date of assignment and prescribes certain information that must be provided in the notice,⁵⁹ whereas Illinois requires a similar notice within fifteen days and also prescribes the content of that notice.⁶⁰ Although in these examples the States’ timeframes are shorter than the Department’s, and the mechanics or substance may vary, they can be reconciled. A servicer that responds to a borrower inquiry within New York’s or Illinois’s timeframes also satisfies the Department’s regulations, and the same is true for any required notices that contain all required information. The Department’s regulations set a floor, and more protective provisions—such as faster responses or information that exceeds the Department’s requirements—can build on that floor without preemption concerns, particularly given the background of strong presumptions against preemption in the context of consumer protection.⁶¹

These affirmative obligations represent exactly the sort of state collaboration that the Department welcomes in its interpretation. Here, too, it is explicit:

[M]any of the recently enacted State laws are designed to focus squarely on customer service issues: servicers engaging in unfair, deceptive, or fraudulent acts or practices; servers misapplying payments; servicers reporting inaccurate information on borrowers performance to credit bureaus; and servicers refusing to communicate with borrowers’ authorized representatives. . . . Rather than viewing this activity by the States as inconvenient or detrimental to its objectives, the Department now recognizes that State regulators can be additive in helping to achieve [its] same objectives[.]⁶²

The Department’s explicit interest in coordinating with States to “secure better implementation of student aid programs as well as better service to borrowers and their families[.]”⁶³ suggests that these protections do not pose an irreconcilable impediment to federal interests, rather they advance them. Where there is no clear conflict or obstacle, there can be no preemption. This is all the more true given that courts “uphold state law if there is any ambiguity as to whether the [state] and federal laws can coexist.”⁶⁴

⁵⁸ See N.Y. Comp. Codes R. & Regs. tit. 3, § 409.8(j).

⁵⁹ 34 CFR § 682.208(e).

⁶⁰ 110 Ill. Comp. Stat. 992/5-60(a).

⁶¹ *Student Loan Servicing All.*, 351 F. Supp.3d at 58.

⁶² Department Notice, 86 Fed. Reg. at 44,281.

⁶³ *Id.* at 44,282.

⁶⁴ *Pa. Higher Educ. Assistance Agency v. Perez*, 457 F. Supp.3d 112, 122 (quoting *U.S. Smokeless Tobacco Mfg. Co., LLC v. City of N.Y.*, 708 F.3d 428, 433 (2d Cir. 2013))



For these reasons, the Department should incorporate a conflict preemption analysis of these affirmative state protections—which it can draw from current state laws—into its interpretation to clarify the status of and need for these laws.

- ii. The Department should state its position that licensing of federal student loan servicers, a particular type of affirmative requirement, is not preempted by federal law, particularly where such a license is automatic and irrevocable, or where a state has not otherwise threatened revocation.

One such affirmative protection, and a tool that States have historically employed when regulating a particular financial services industry, is to require servicers to obtain a license from the state regulator to operate in its jurisdiction. In 2015, Connecticut became the first State to require licensure for student loan servicing.⁶⁵ Soon after, other States followed suit, as did the legal challenges. Although, as discussed below, some courts have deemed certain aspects of these laws—so-called “Borrower Bill of Rights” laws—preempted, the grounds for preemption are specific and narrow. In response, many States have passed new licensing requirements that address the courts’ concerns by automatically issuing licenses where necessary.⁶⁶ Other States have operated successful licensing and oversight schemes consistent with these court rulings by refraining from revoking licenses issued to federal contractors or invoking license revocation as a potential remedy in the course of performing oversight. The Department should state its position that licensure of federal student loan servicers is not preempted where states either lack the authority to revoke them or decline to exercise this authority, and that licensure is an important example of the affirmative state partnership, in addition to policing affirmative misrepresentations.

The federal District Court for the District of Columbia in 2018 was the first court to address whether the HEA preempts States from regulating and overseeing federal student loan servicers through licensing. In *Student Loan Servicing Alliance v. District of Columbia*, the court held that the licensing of Direct Loan servicers was preempted, but that licensing of certain FFEL loan servicers was not, focusing on the obstacle created by a state licensing law should a State elect to revoke a license and bar a federal contractor from operating within a jurisdiction.⁶⁷ For Direct Loans, the court relied on the federal court case *Leslie Miller, Inc. v. Arkansas*⁶⁸ to hold that States may not use their discretion to grant or revoke a license, which would bar a potential licensee from operating in their jurisdiction, as a virtual ability to overrule federal contracting decisions, and that the District of Columbia’s licensure requirement for loan

⁶⁵ See 2015 Conn.Pub. Acts 15-162.

⁶⁶ See, e.g., Chapter 26 of Title 6.2, § 6.2-2600 et seq., of the Virginia Administrative Code.

⁶⁷ *Id.* at 75.

⁶⁸ 352 U.S. 187 (1956).

servicers is preempted as result with respect to the Department’s contractors for Direct Loan servicing.⁶⁹ For Commercial FFEL servicers, which are not Department contractors, the court found the presumption against preemption was not overcome and the licensing law remains in effect.⁷⁰

To navigate these narrow grounds on which courts have historically found state licensure requirements for federal contractors to be preempted—that the denial or revocation of a license would disqualify the contractor from working in that jurisdiction and thus create an irreconcilable conflict⁷¹—States are increasingly passing laws that automatically license these contractors on the basis of their work for the federal government and that removes States’ ability to second-guess Federal contracting decisions.⁷² By automatically issuing them a license, States are able to still regulate and oversee these companies and police for misconduct while avoiding conflict preemption triggers. The Department does not, however, explicitly take a position on automatic licensing (or, in the alternative, a state policy of non-denial and non-revocation), although its position on conflict preemption suggests that it would find no issue with this approach to state oversight.

Industry actors draw on *Leslie Miller, Inc. v. Arkansas* and its progeny to assert that state licensing requirements for servicers of federal student loans are preempted, but such reliance is misplaced. These cases turn on whether a state licensing regime affords the State "a virtual power of review" over federal contracting decisions, that allows States to "second guess" those decisions.⁷³ They hold that obstacle preemption, a form of conflict preemption, bars state action that prohibits a federal contractor from operating within its borders or impedes the federal government’s interests. In short, if the federal government cannot freely select a company with which to contract due to a state law that impedes that company's ability to obtain a license and operate in the state, that state law is preempted as an obstacle to federal interests. It is not licensing itself that creates a conflict, it is the State’s execution of this authority in a manner that denies or revokes a license that invites preemption.

Either automatic licensing or a policy of non-denial and non-revocation, however, removes any opportunity for such a conflict to arise. For example, in a growing number of jurisdictions, on the basis of their contract with the federal government, federal student loan servicers are deemed fit to operate in the state as a matter of law and are automatically granted a

⁶⁹ *Student Loan Servicing All.*, 351 F. Supp.3d at 62-65.

⁷⁰ *Id.* 71-72.

⁷¹ *See, e.g., id.* at 62 (discussing potential of State “virtual power of review over federal determination”) (*quoting Leslie Miller, Inc.*, 352 U.S. at 190); *Perez*, 457 F. Supp.3d at 123-24.

⁷² *See, e.g.*, N. Y. Banking Law § 711(2); Colo. Rev. Stat. § 5-20-106(1); Mass. Gen. Laws ch. 93L, § 2(f); Me. Rev. Stat. Title 9-A, § 14-107(9); Title 6.2 Va. Admin. Code § 6.2-2602.

⁷³ *See, e.g., Sperry v. State of Fla. ex rel. Florida Bar*, 373 U.S. 379, 385 (1963).

license.⁷⁴ These States are afforded no "power of review" or opportunity to "second guess" the Department's contracting decisions, and therefore there are no grounds for preemption of automatic licensing of servicers for federal student loans. Similarly, where a State has refrained from denying or revoking a license and has not used the threat of denial or revocation in its oversight of a federal contractor, no conflict has arisen.

Indeed, the Department appears to recognize that this strategy properly addresses conflict preemption concerns in two ways when it specifies that "an attempt by a State to revoke a license . . . would be invalid,"⁷⁵ rather than repeating industry's more general claim that preemption is triggered by "an attempt by a State to license" a contractor. The Department leaves space for licensure, albeit implicitly, and recognizes that it is specifically "an attempt" to revoke a license, not the mere ability to do so, that would require preemption. Here, the Department faithfully applies its preemption analysis and heeds the court's call in *Student Loan Servicing Alliance* to avoid "false conflicts" by drilling down on what would actually represent an irreconcilable conflict: the revocation of a license to do business. To assert preemption based on the mere ability to revoke, without the attempt to do so, would represent a failure to heed the court's call to "officials who are willing to take reasonable steps" to "accommodate" potential differences in law, and to find preemption only where there is "irremediable conflict."⁷⁶ Explicitly incorporating this analysis into its interpretation would further enable States to fully participate in the partnership the Department seeks, as they must be permitted to act accordingly. Revising the Department's interpretation to explicitly address automatic licensing would provide important clarity for States and industry and help pave the way for "cooperative federalism."

- c. The Department should explicitly address aspects of the Commercial FFEL portfolio, including guaranty agencies.

The Department's discussion of preemption and the FFEL program continues the interpretation's emphasis on State coordination and preemption only in narrow circumstances, but here, too, it does not address certain known and ongoing debates about preemption. Specifically, the Department does not clarify its position on the extent to which the licensure of either servicers of privately-owned FFEL loans, so-called Commercial FFEL loans, or the guaranty agencies that insure those loans and which regularly interact with borrowers. The Department's interpretation would be stronger if it addressed these topics.

⁷⁴ See, e.g., Title 6.2 Va. Admin. Code § 6.2-2602(B)(3) ("[T]he Commissioner shall [d]eem the [federal student loan servicer] to have met all the requirements [for licensure] set forth in subsections A and B of § 6.2-2603.").

⁷⁵ Department Notice, 86 Fed. Reg. at 44,280.

⁷⁶ Id. (citing *Student Loan Servicing All.*, 351 F. Supp.3d at 60-61).



- i. State regulation of Commercial FFEL loans poses no preemption concerns.

Despite having a section dedicated to the topic in its legal interpretation, the Department does not take a clear position on preemption with respect to state oversight of Commercial FFEL loan servicers. These loans are originated by private banks and serviced by private companies. For this reason, the federal court in *Student Loan Servicing Alliance* determined that, because Commercial FFEL servicers do not contract with the federal government, the *Leslie Miller* line of reasoning does not preempt licensure of those companies,⁷⁷ and also that the District of Columbia’s regulations were generally “not preempted as applied to the servicing of Commercial FFELP loans because [the regulations do] not conflict with the HEA under either impossibility or obstacle preemption.”⁷⁸

The HEA is explicit that it creates a floor, not a ceiling, for FFEL servicer oversight: the Secretary of Education “may prescribe such regulations as may be necessary to carry out the purpose of [the FFEL program], including regulation applicable to third party services . . . to establish minimum standards with respect to sound management and accountability[.]”⁷⁹ Because Congressional intent is the touchstone for any preemption analysis,⁸⁰ we must understand Federal regulations governing these servicers to be “minimum standards” that States may add to so long as they do not irreconcilably conflict with those regulations. Nor do most States’ common-sense regulation of these servicers conflict with anything in the Secretary’s regulations, irreconcilably or otherwise.

Explicitly concurring in its interpretation with the court’s ruling on Commercial FFEL loans in *Student Loan Servicing Alliance* would align with the Department’s existing analysis and stated goals, and would help clarify the state of preemption and Commercial FFEL loans for jurisdictions where courts have not yet ruled on the matter.

- ii. State regulation of guaranty agencies poses no preemption concerns.

A critical aspect of the Commercial FFEL portfolio that warrants its own discussion by the Department is that state consumer protections, including licensure, are not preempted with respect to guaranty agencies, either expressly or implicitly. These companies are engaged in a broad but largely unsuccessful campaign to style themselves as federal contractors that are not subject to State laws pursuant to *Leslie Miller*. For example, the guaranty agency industry trade

⁷⁷ *Student Loan Servicing All.*, 351 F. Supp.3d at 66.

⁷⁸ *Id.* at 72.

⁷⁹ 20 U.S.C. § 1082(a)(1).

⁸⁰ See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

association recently sued the Commonwealth of Virginia on these grounds to avoid oversight by its regulator.⁸¹

However, guaranty agencies are not federal contractors like the construction company in *Leslie Miller*. Instead, they are merely private-sector market participants that hold agreements with the Department pursuant to 20 U.S.C. § 1078(c) to insure loans and engage in related activities, as opposed to a contract pursuant to 20 U.S.C. § 1087f for servicing. The latter explicitly contemplates that the Department would engage in a competitive bidding and awarding process,⁸² whereas the former is a mere agreement to provide eligible reimbursements and related activities.⁸³ Nor are these guaranty agencies listed in the federal government's comprehensive database of contractors and contract awards.⁸⁴ This reinsurance program and guaranty agencies' roles are analogous to federally-backed mortgages, which are routinely serviced by state-licensed and -regulated private companies.

Nor are there aspects of State regulation and oversight that irreconcilably conflict with federal interests related to these guaranty agencies. These companies insure the loans as part of the FFEL program and they engage in default aversion servicing. Licensure and common-sense consumer protections do not prevent them from paying claims to private lenders on defaulted loans or communicating with at-risk borrowers, and the court in *Student Loan Servicing Alliance* has determined that mere economic impacts on private servicers from complying with State requirements do not frustrate federal goals under the HEA.⁸⁵ Despite its posturing, the guaranty agency industry has not articulated any actual conflicts that reasonably overcome the strong presumption against preemption of state consumer protections. Although federal regulations do contain some express preemptions of state law with respect to guaranty agencies, none relate to the conduct that States generally seek to supervise with their licensing regimes.⁸⁶

⁸¹ Complaint, *Nat'l Assoc. of Student Loan Admin. v. Face et al.*, No. 3:21-cv-0440-MHL (E.D. Va. Jul 8, 2021), https://protectborrowers.org/wp-content/uploads/2021/07/Complaint_NASLA-v-VA-July-2021.pdf (Last viewed Aug. 20, 2021).

⁸² See 20 U.S.C. § 1087f(a)(1).

⁸³ 20 U.S.C. § 1078(c)(1)(A) (“The Secretary may enter into a guaranty agreement with any guaranty agency, whereby the Secretary shall undertake to reimburse it[.]”).

⁸⁴ See SAM.gov, <https://sam.gov/content/home>.

⁸⁵ *Student Loan Servicing All.*, 351 F. Supp.3d at 70 n.28. (“SLSA also argues that the ‘add[ed] layer of regulations, fees, and disclosures requirements’ imposed by the District of Columbia’s licensing scheme would ‘increase the costs of servicing FFELP Loans,’ which would, in turn, undermine the stability of the FFELP program because it would ‘cause Servicers to . . . service fewer FFELP Loans.’ See Pl. Cr-MSJ at 55. This argument is more accurately characterized as an attempt to show how the D.C. licensing scheme obstructs the Congressional goal of operating the FFELP program cost-efficiently. And the Court has already declined to recognize that goal.”).

⁸⁶ See, e.g., 34 CFR 682.410(b)(8) (“The provisions of paragraphs (b)(2) [(collection charges)], (5) [(reports to consumer reporting agencies)], and (6) [(collection efforts on defaulted loans)] of this section preempt any State law, including State statutes, regulations, or rules, that would conflict with or hinder satisfaction of the requirements of these provisions.”).

Both the legal analysis and the spirit of the Department’s interpretation support a determination that States have the authority to regulate and oversee guaranty agencies as they do other student loan servicers. The Department can advance many of its stated goals to protect consumers by articulating its position on this topic.

CONCLUSION

The Department takes a clear and well-founded position that States are not preempted from supervising federal student loan servicers except in narrow and specific instances. It also takes the position that States are necessary and valued partners in fulfilling federal goals related to the HEA’s student loan programs. The Department should synthesize these two positions and strengthen its overall legal opinion by applying its preemption analysis to more of the known instances of state action in this area and to some of the most common industry arguments against state oversight. Doing so would pave the way for the “cooperative federalism” that the Department calls for.

For inquiries related to this memorandum, please contact Winston Berkman-Breen, Deputy Director of Advocacy and Policy Counsel with the Student Borrower Protection Center, at winston@protectborrowers.org.