UNITED STATES OF AMERICA
BEFORE THE CONSUMER FINANCIAL PROTECTION BUREAU

IN THE MATTER OF ASCENDIUM EDUCATION SOLUTIONS, INC.

PETITION TO SET ASIDE OR, IN THE ALTERNATIVE, MODIFY THE CIVIL INVESTIGATIVE DEMAND

Pursuant to section 1052(f) of the Consumer Financial Protection Act ("CFPA"), 12 U.S.C. § 5562(f) and 12 C.F.R. § 1080.6(e), Ascendium Education Solutions, Inc. ("Ascendium") respectfully petitions the Consumer Financial Protection Bureau ("CFPB" or "Bureau") to set aside the September 14, 2020 Civil Investigative Demand ("CID")[1] served on Ascendium or, in the alternative, to modify the CID by staying enforcement pending resolution of litigation that is certain to impact the core issue.

SUMMARY OF ARGUMENT

While the CFPB is accorded wide discretion to investigate potential violations of the CFPA, its jurisdiction is circumscribed by statute and cannot be exceeded. The Notification of Purpose required by 12 U.S.C. § 5562(c)(2) and 12 C.F.R. § 1080.5 cannot confer jurisdiction to conduct investigations of persons, or into matters, over which the Bureau otherwise has no jurisdiction. In this case, the Notification of Purpose states that the investigation has two purposes. The first is to determine whether "debt collectors, guaranty agencies, or associated persons, in connection with the collection of student loans, have improperly caused borrowers to

[1] Attached as Ex. A.

incur costs or fees or have improperly charged or collected costs or fees in a manner that is unfair, deceptive, or abusive in violation of §§ 1031 and 1036" of the CFPA. The second is to determine "whether Bureau action to obtain legal or equitable relief would be in the public interest."

With respect to the first, the Bureau lacks jurisdiction over Ascendium. Ascendium is not a "covered person" or a "service provider" under the CPFA because it does not provide a *consumer* financial product or service. Ascendium is a non-profit guaranty agency that provides a *commercial* service to the United States Department of Education ("DOE") in the capacity of a Federal Family Education Loan Program ("FFELP" or "FFEL Program") guarantor. The Bureau has suggested that although Ascendium itself is not a student loan servicer, it may be deemed a servicer because it has entered into contracts with servicers, but the CFPA does not confer jurisdiction by contractual association. The Bureau also has suggested that Ascendium may be deemed a debt collector notwithstanding that the Fair Debt Collection Practices Act ("FDCPA") excludes bona fide fiduciaries from the definition of debt collectors because the CFPA does not expressly provide for the same exception. But there also is no basis to assert that silence in the CFPA supplants explicit language in the FDCPA—or in any of the other statutes that Congress gave the Bureau power to supervise and enforce in the CFPA.

In addition to this clear jurisdictional limitation, the Bureau's authority is limited prudentially by Ascendium's fiduciary relationship with the DOE and the DOE's oversight of Ascendium's activities, as reflected in the February 2020 Memorandum of Understanding ("MOU") between the CFPB and the DOE. The MOU gives the DOE authority to address complaints related to FFELP loans, which are guaranteed under Title IV of the Higher Education Act of 1965 ("HEA"). Other than those related to servicing, the CFPB does not even have

authority to resolve consumer complaints relating to Title IV loans, much less to conduct wholesale investigations of DOE fiduciaries. The Bureau has suggested that the MOU is irrelevant because it allows for the CFPB to address complaints relating to the servicing of Title IV loans—but, again, Ascendium is not a servicer, and just as being a party to a contract with a servicer does not make it one for jurisdictional purposes, it does not make it one for any other purpose.

With respect to the second purpose identified in the Notification of Purpose, the investigation would be futile because any action to obtain legal or equitable relief related to the focus of the investigation—the assessment of fees when borrowers have entered rehabilitation or other repayment plans within 60 days of receiving a notice of default letter ("Pre-65 Collection Costs")—would be time-barred. The CFPB's investigatory powers are dependent on pursuing alleged violations of the CFPA, and 12 U.S.C. § 5564(g) imposes a three-year statute of limitations on such claims. Ascendium has not assessed the Pre-65 Collection Costs at the heart of the CID since the DOE issued guidance prohibiting them more than five years ago. This is not a case where there is ongoing conduct that could make past conduct relevant, nor can the CFPB assert application of the discovery rule because the statutory framework and the DOE's positions on these fees have been well-publicized since at least 2015. [redacted], but the CID itself belies that suggestion. That this investigation is about Pre-65 Collection Costs [redacted]

Pre-65 Collection Costs are also the subject of a challenge pursuant to the Administrative Procedure Act, which is fully briefed and awaiting a decision from the District Court for the District of Columbia. Even if the Director disagrees with Ascendium's positions as to jurisdiction and futility, and declines to set aside the CID in its entirety, the Director should stay the obligation to comply pending the court's resolution of whether the DOE's rulemaking relating to the assessment of Pre-65 Collection Costs is impermissible because the HEA explicitly requires them. If the court rules that Pre-65 Collection Costs properly were assessed under the plain language of the HEA—as Ascendium expects it will because the language could not be more plain—the CID's Notification of Purpose will be moot. While the Bureau has asserted that the litigation is not dispositive of all issues in the investigation, it also has acknowledged that the outcome may be relevant. That is enough to warrant restraint.

DISCUSSION

I. BACKGROUND.

Ascendium is a non-profit entity that not only is the nation's largest federal student loan guarantor, but also is one of its most active and respected postsecondary education philanthropies. Ascendium has served as a fiduciary of the federal government in the capacity of a FFELP guarantor for more than 50 years. FFELP loans are guaranteed under Title IV of the HEA. *See* 20 U.S.C. §§ 1071, *et seq.* Under the FFEL Program, private lenders could issue loans without regard to traditional underwriting requirements because FFELP loans are insured by state or non-profit entities, like Ascendium, which are reinsured by the DOE. *See* 34 C.F.R. §§ 682.100, 682.404. In order to become a FFELP guarantor, entities must be designated, enter into an agreement with the DOE, and satisfy statutory program requirements. *See* 34 C.F.R. § 682.401. FFELP ensured that students, or parents of students, were able to access student

loans even if they were credit-challenged or lacked collateral. From 1965, when the HEA was enacted, until 2010, when the FFELP program was terminated, FFELP loans constituted the federal government's principal student loan program. *See* 20 U.S.C. §§ 1087a *et seq.*

As a guarantor, Ascendium is not involved in the lenders' decisions to extend credit, nor does Ascendium service the loans it guarantees. Under the HEA's statutory scheme, a FFELP loan goes into default following 270 days of nonpayment. *See* 20 U.S.C. § 1085(l). Upon default, Ascendium pays the lender using money from a Federal Student Loan Reserve Fund ("Federal Fund") that is the "property of the United States" and that Ascendium holds in trust as a fiduciary. *See* 34 C.F.R.§§ 682.419(a), (c)(1). After it pays the lender, Ascendium is assigned the defaulted loan and is required to engage in various "due diligence" activities relating to the loan.[2] 20 U.S.C. §§ 1078(c)(2)(A), (G). Ascendium conducts these efforts on behalf of and as a fiduciary of the DOE, and the funds go to the DOE. *Id.* § 1078(c)(2)(D). If Ascendium is unable to get the loan reinstated and performing, it obtains reinsurance from, and transfers the loan to, the DOE. *See* 34 C.F.R. § 682.404.

In the event of a first default, Ascendium is required by statute to provide an opportunity for the borrower to "rehabilitate" the loan. 20 U.S.C § 1078-6(a). To qualify for rehabilitation, the borrower must enter into a written agreement, the terms of which are dictated by the HEA and implementing regulations. 34 C.F.R. § 682.405(b)(1)(vi). Under the agreement, a borrower must make "9 payments…within 20 days of the due date during 10 consecutive months" in an amount that is no "more than is reasonable and affordable based on the borrower's total financial

[2] Among other things, the guarantor is required to send notice to defaulted borrowers informing them of their obligations, options, and rights; provide a 60-day debt substantiation period to verify and challenge the amount owed, undertake efforts to locate the borrower, including by skip-tracing, and, if necessary, engage in credit reporting and initiate tax-offsets and wage garnishment. 34 C.F.R. §§ 682.410(b)(5)(vi)(D), 682.410(b)(6)(ii), 682.410(b)(5)(ii)-(iv).

circumstances." 20 U.S.C. §§ 1078-6(a)(1)(A), (B). If a borrower makes the required payments, Ascendium is required to sell the loan to a FFELP lender or, if no lender can be found, assign the loan to the DOE Secretary, in order for the loan to be considered "rehabilitated." 20 U.S.C. § 1078-6(a)(1)(A); 34 C.F.R. § 682.405(a)(2)(i)(ii) ("A loan is considered to be rehabilitated only after" timely payments are made and "[t]he loan has been sold to an eligible lender or assigned to the Secretary").

To offset taxpayer collection costs, Congress provided in the HEA that borrowers "*shall* be required to pay . . . reasonable collection costs" on defaulted FFELP loans. 20 U.S.C. § 1091a(b)(1) (emphasis added). Congress did not create any carve-outs or exceptions for borrowers who enter into rehabilitation or other payment agreements within 60 days of receiving notice of default. *Id.* The CID centers on Pre-65 Collection Costs assessed to these borrowers.

[redacted]. *Id.*

Taken as a whole, the HEA's collection-cost provisions reflect Congress's judgment that certain costs of collecting federally-guaranteed loans should fall on the defaulted borrower, whose failure to pay precipitated rehabilitation efforts—and associated costs. Congress could have created a statutory scheme that did not include guarantors at all, and the DOE would have been required to undertake these same efforts with the same set of FFELP lenders and borrowers using its own systems and personnel. Congress could have made the DOE the initial source of payment to fund these efforts rather than placing this cost, at least initially, on the borrower. But

Congress did not, and guarantors—which are required by statute to be either a state government agency or a non-profit entity (like Ascendium)—were created to fulfill their roles in the statutory scheme and to derive their funding, in part, from collection costs as opposed to Congressionally-appropriated funds or some other mechanism that would shift these costs away from defaulted borrowers.

In conflict with the plain language of the HEA, the DOE promulgated the Guaranty Agency Collections Fee Rule (the "Rule") in 2019, which prohibits guarantors from assessing Pre-65 Collection Costs—*i.e.*, assessing the statutorily provided costs—with respect to defaulted borrowers who (i) obtain a rehabilitation agreement or other acceptable repayment plan within 60 days of receiving a notice of default letter, and (ii) subsequently comply with the rehabilitation agreement or other repayment plan. *See* 84 Fed. Reg. 49788, 49926. The Rule took effect on July 1, 2020. *Id.* at 49788. The DOE had issued a "Dear Colleague Letter" on July 10, 2015[3] reflecting the same guidance ("DCL"), but withdrew the guidance on March 16, 2017, noting that the "DCL would have benefitted from public input."[4]

On December 27, 2019, Ascendium filed a complaint against Betsy Devos, in her official capacity as Secretary of Education, and the DOE in the United States District Court for the District of Columbia, requesting the Rule be declared unlawful and set aside. *Ascendium Ed. Sols., Inc. v. Devos, et al.*, No. 19-CV-3831-CJN (D.D.C. filed Dec. 27, 2019). Ascendium challenges the Rule under the Administrative Procedure Act on the basis that it was promulgated without statutory authority within the meaning of 5 U.S.C. § 706(2)(C), and is arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A). *Id.* As of June 9, 2020, Ascendium's

[3] Dear Colleague Letter, GEN-15-14, Lynn B. Mahaffie, Acting Assistant Secretary, Office of Postsecondary Education, U.S. Dep't of Education (July 10, 2015), attached as Ex. D.
[4] Dear Colleague Letter, GEN-17-02, Lynn B. Mahaffie, Acting Assistant Secretary, Office of Postsecondary Education, U.S. Dep't of Education (Mar. 16, 2017), attached as Ex. E.

motion for summary judgment is fully briefed and submitted for decision, and Ascendium expects that the court will vacate the Rule.

Notwithstanding Ascendium's disagreement with the DCL and the Rule, it has complied with the DOE's directive not to impose Pre-65 Collection Costs since the issuance of the DCL on July 10, 2015.[5] *See* Ex. C, Declaration of Jacqueline Fairbairn in Support of Ascendium's Petition to Set Aside or, in the Alternative, Modify the Civil Investigative Demand ("Fairbairn Decl."), at ¶¶ 5-6. Indeed, even when the DOE withdrew the DCL on March 16, 2017, Ascendium did not resume assessing Pre-65 Collection Costs. *See id.* On March 21, 2017, shortly after the DOE withdrew the DCL, Ascendium[6] issued a press release stating that it had not assessed Pre-65 Collection Costs since July 10, 2015, and that it did not intend to change its practices despite the withdrawal of the guidance. Ex. F. The Fairbairn Declaration confirms that Ascendium has not charged Pre-65 Collection Costs through the date of this Petition and does not intend to change that practice until the Rule is vacated. Ex. C, Fairbairn Decl. at ¶ 6.

II. PROCEDURAL HISTORY.

On September 14, 2020, the Bureau issued a CID to Ascendium, which was not received until September 23, 2020 due to Ascendium's work-from-home practices in response to the COVID-19 pandemic. *See* Ex. A. Due to the delay in receiving the CID, Ascendium requested and received extensions of time until October 14, 2020 to meet and confer with the Bureau

[5] As explained in the concurrently filed Fairbairn Declaration, Ascendium consists of three guarantors: Great Lakes Higher Education Guaranty Corporation (GLHEGC), Northwest Education Loan Association (NELA), and United Student Aid Funds (USAF). GLHEGC acquired NELA and USAF as of January 1, 2017. *See* Ex. C., Fairbairn Decl. ¶ 3. None of the Ascendium guarantors (GLHEGC, NELA, USAF) have assessed Pre-65 Collection Costs on loans of borrowers who entered into acceptable repayment or rehabilitation plans within 60 days of receiving a notice of default since the issuance of the DCL. *Id.* ¶ 5.

[6] Great Lakes Higher Education Corporation & Affiliates changed its name to Ascendium in November 2018 after Great Lakes Education Services, Inc.—a separate corporate entity—was acquired by Nelnet. The press release also covered NELA and USAF as those entities were acquired by GLHEGC as of January 1, 2017. *See supra* n. 5; Ex. C, Fairbairn Decl. at ¶ 3.

regarding the CID and to file this Petition. Thus, the Petition is timely. 12 U.S.C. § 5562(f)(1); 12 C.F.R. § 1080.6(e)(2).

The CID's Notification of Purpose states that the purpose of the CID is to:

> Determine whether debt collectors, guaranty agencies, or associated persons, in connection with the collection of student loans, have improperly caused borrowers to incur costs or fees or have improperly charged or collected costs of fees in a manner that is unfair, deceptive, or abusive violation of §§ 1031 and 1036 of the [CFPA], 12 U.S.C. §§ 5531, 5536. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

Ex. A. [redacted]

On October 12, 2020, Ascendium provided counsel with the Office of Enforcement ("Enforcement") with a letter setting forth its view that the CID may be predicated on certain misunderstandings and requesting that it be withdrawn. Enforcement counsel and Ascendium's outside counsel met and conferred telephonically on October 13 and October 14, 2020. Enforcement counsel stated that [redacted] Enforcement counsel also asserted that the Bureau may not require jurisdiction over Ascendium to investigate other entities, and that, in any event, Ascendium is either a debt collector not subject to an exception or a servicer and therefore falls within the Bureau's jurisdiction. In particular, Enforcement counsel contended that cases excluding FFELP guarantors from the definition of debt collector are inapplicable because they were decided under the FDCPA rather than the CFPA, which does not have a similar exception. Enforcement counsel further asserted that Ascendium's contracts with servicers effectively make it a

"servicer." Finally, Enforcement counsel asserted that Ascendium's action to vacate the Rule under the APA is not dispositive, but acknowledged that Ascendium could make arguments that it is relevant—just not relevant enough to warrant staying or withdrawing the CID.[7]

III. THE DIRECTOR SHOULD SET ASIDE THE CID.

The Director should set aside the CID for two reasons. First, the Bureau lacks jurisdiction over Ascendium, and the fact that Ascendium touches a student loan originated by an unrelated third party for a discrete period of time—not as a lender, servicer, or debt collector, but in its capacity as a fiduciary to the DOE—does not change that fact. This is dispositive and requires that the CID be set aside. Second, even if the Bureau had jurisdiction, the investigation would be futile because any action based on allegations that Ascendium violated the CFPA in connection with the assessment of Pre-65 Collection Costs would be time-barred. Therefore, an investigation focused on Pre-65 Collection Costs—as this one is—is not an appropriate use of either Bureau's or Ascendium's resources, and it would be a rare court that would enforce a CID to investigate fully time-barred claims.

A. The CID Exceeds the Scope of the CFPB's Authority.

Ascendium is neither a covered person nor a service provider within the meaning of the CFPA. The CFPA grants the CFPB authority to take action against any "covered person" or "service provider" that engages in an unfair, deceptive, or abusive act or practice in connection with "any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." 12 U.S.C. § 5531(a). A "covered person" is "(a) any person that engages in offering or providing a consumer financial product or service; and (b) any affiliate of a person described in subparagraph (a) if such affiliate acts as a service

[7] Attached as Exhibit B is Ascendium's certification that it met and conferred with Enforcement counsel prior to filing this petition.

provider to such person." 12 U.S.C. § 5481(6). A service provider is "any person that provides a material service to a covered person in connection with the offering or provision…of a consumer financial product or service." 12 U.S.C § 5481(26). "Financial products or services" are defined to include a variety of activities relating to consumer finance, including "extending credit and servicing loans," "engaging in deposit-taking activities," and "collecting debt related to any consumer financial product." *See* 12 U.S.C. §§ 5481(15)(A)(i), (x).

Ascendium is not a "covered person" within the meaning of the CFPA because it does not offer or provide material services in connection with offering *consumers* any product or service at all. To the contrary, as a non-profit guarantor, it provides a *commercial* service, prescribed by statute, to the federal government. Ascendium is not an "affiliate" of a covered person. It does not "control" and is not "controlled by" the FFELP lenders from whom it acquires defaulted loans on behalf of the DOE or those to whom it sells rehabilitated loans on behalf of the DOE. 12 U.S.C. § 5481(15)(A)(viii). Ascendium also is not a "service provider" within the meaning of the CFPA, which the illustrative examples of material services in the statute make clear. A service provider "(i) participates in designing, operating, or maintaining the consumer financial product or service; or (ii) processes transactions relating to the consumer financial product or service." 12 U.S.C § 5481(26). This language does not encompass any touch whatsoever, and Ascendium had nothing to do with any aspect of a FFELP lender's extension of credit.

Given its fiduciary obligations to the DOE relating to loans in default, the closest resemblance to an enumerated product or service in the CFPA may be to debt collection subject to the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*. However, courts uniformly have found that guaranty agencies like Ascendium are not debt collectors precisely because those

efforts are "incidental to a bona fide fiduciary obligation" to the United States government. 15 U.S.C. § 1692a(6)(F)(i); s*ee, e.g. Lima v. U.S. Dept. of Ed.*, 947 F.3d 1122, 1126-27 (9th Cir. 2020); *Pelfrey v. Educational Credit Management Corp*., 71 F. Supp. 2d 1161 (N.D. Ala. 1999); *Murungi v. Texas Guaranteed*, 402 Fed. Appx. 849, 851 (5th Cir. 2010); *Franklin v. Navient Corp.*, 2019 WL 4222681 at *4 (D. Del. Sept. 5, 2019); *Neiman v. Navient Solutions, LLC*, 2019 WL 5105449 at *4 (S.D. Iowa Jan. 8, 2019); *Tucker v. Pennsylvania Higher Education Agency*, 2018 WL 3458714 at *4-5 (W.D. Mich. May 10, 2018); *Whalen v. Navient Solutions, LLC*, 2018 WL 1242020 at *2, *4 (S.D. Ind. Mar. 9, 2018).

While Enforcement counsel has pointed out that the CFPA does not explicitly adopt the FDCPA exception for bona fide fiduciaries, it also does not define "debt collector" at all. It stands to reason that because the FDCPA is one of the specifically enumerated consumer laws that the CFPB has authority to enforce, 12 U.S.C. § 5481(12), and is the principal federal statute governing debt collection activities, Congress did not intend for a different definition of "debt collector" to apply under the CFPA. *Cf. PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 51 (D.C. Cir. 2016) (rev'd on other grounds) (holding that general provisions of the CFPA do not "trump" explicit provisions in the "underlying statutes enforced by the CFPB").

Ascendium also does not "extend[] credit" or "servic[e] loans." 12 U.S.C. § 5481(15)(A)(i). While, under certain circumstances, Ascendium "acquir[es]" or "purchas[es]" a loan originated by a covered person for the rehabilitation period, it does so with Federal Fund money (*i.e.* a DOE-funded account that Ascendium holds in trust) on behalf of the DOE. *See supra* at 4-5. Accordingly, the holding of the obligation for a discrete period does not constitute the extension of credit, and it does not operate like a typical loan purchaser that acquires or sells loans as part of a financing scheme. Enforcement counsel has suggested that Ascendium's

contracts with servicers effectively make it a servicer, but not only is there no authority for that proposition (and a review of this issue has identified no cases in which the Bureau previously has expanded the definition of servicer in this way), but the very statutory regime in which Ascendium operates clearly delineates which entities are—and are not—servicers. *See, e.g.*, 34 C.F.R § 682.200.

The Supreme Court has recognized that "statutory limits on agencies' authority" need to be "tak[en] seriously, and appl[ied] rigorously, in all cases." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 307 (2013). The CFPB is "not afforded 'unfettered authority to cast about for potential wrongdoing…'" *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Sch.*, 854 F.3d 683, 689 (D.C. Cir. 2017) ("*ACICS*") (quoting *In re Sealed Case (Admin. Subpoena)*, 310 U.S. App. D.C. 22 (D.C. Cir. 1994)). A CID should be set aside when the subject matter, or served entity, is outside the agency's jurisdiction. *See ACICS*, 854 F.3d at 689 ("[C]ourts will not enforce a CID when the investigation's subject matter is outside the agency's jurisdiction"); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 386 (D.C. Cir. 2001) (a prerequisite is that "the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency"). Because Ascendium is neither a covered person nor a service provider, the Bureau has no jurisdiction over it and must set aside the CID.

B. The Bureau's February 2020 MOU with the DOE directs that any concerns about Pre-65 Collection Costs or any other fees should be directed to DOE.

Even if the Bureau could exercise jurisdiction over Ascendium, it should not do so in light of the DOE's oversight responsibility for Title IV loans. The DOE requires all guaranty agencies that participate in the FFEL Program to undergo annual financial and compliance audits. 34 C.F.R. § 682.410(b)(1). Those audits are conducted in accordance with guidelines

issued by the Office of Management and Budget ("OMB").[8] During each audit, the DOE is required to "audit the records to determine the extent to which they, at a minimum, comply with Federal statutes and rules and regulations prescribed by the Secretary[.]" *Id.* §§ 1082(f)(1)(A), (f)(4). Among other things, OMB has specified that guaranty agency audits must "determine whether the guaranty agency charged appropriate costs for its default collection activities to borrowers on defaulted loans . . . ."[9] The DOE has the authority to assess civil penalties on Ascendium if it determines that Ascendium violated the applicable statute or governing regulations. *Id.* § 1082(g). Ms. Fairbairn has been with the Company for 32 years and she does not recall the DOE raising concerns in any audit over that period regarding the assessment of Pre-65 Collection Costs or outreach activities, including in the 60 days after borrowers receive the notice of default letter. Ex. C, Fairbairn Decl. ¶ 7.

While the DOE and the Bureau have certain concurrent oversight functions with respect to lenders, servicers, and debt collectors in the private student lending market, the Bureau should be particularly sensitive to issues of comity here given Ascendium's role as a Title IV guarantor and its relationship with the DOE. Pursuant to the January 2020 Memorandum of Understanding ("MOU"), the CFPB and the DOE agreed that, other than with respect to servicing, the DOE—not the CFPB—alone is responsible for resolving even consumer complaints regarding Title IV loans. Memorandum of Understanding Between The Bureau of Consumer Financial Protection

[8] DOE's regulations require guaranty agencies to be audited in accordance with OMB Circular A-133. *See* 34 C.F.R. § 682.410(b)(1)(ii); 2 C.F.R. Pt. 200, App. XI. OMB has issued and annually updates Compliance Supplements to its Circular A-133. *See* OMB Circular A-133 Compliance Supplement 2015, https://obamawhitehouse.archives.gov/omb/circulars/a133_compliance_supplement_2015 (follow "Part 4 – Department of Education (ED)" hyperlink under "Compliance Supplement sections") (last visited October 14, 2020). Those OMB Circular A-133 Compliance Supplements contain a separate section governing audits of guaranty agencies in the FFEL Program. *Id.* at 84, CFDA 84.032-G-1.

[9] OMB Circular A-133 Compliance Supplement 2015, at 99, 4-84.032-G-16. *See also id.* at 97-99, 4-84.032-G-14–16 ("[t]he guaranty agency must charge each defaulted borrower reasonable costs incurred by the agency for its default collection)

and The U.S. Department of Education Concerning Coordination in Resolving Borrower Complaints (Jan. 31, 2020), attached as Ex. G. While the MOU does not specifically address the CFPB's investigatory powers, it is important to note that the prior MOU between the CFPB and the DOE was terminated by the DOE in light of the CFPB's "overreaching" and improper "intervention" in the area of Title IV. Letter from Acting Assistant Secretary Kathleen Smith and Chief Operating Officer Dr. A. Wayne Johnson to Director Richard Cordray (Aug. 31, 2017) ("DOE, Letter to Richard Cordray"), attached as Ex. H. Among other things, although the CFPB had "agreed to direct to the [DOE] all complaints related to Title IV federal student loans within 10 day of receipt . . . the CFPB [] failed to direct such complaints to the [DOE] and [] instead handled such complaints itself." *Id.* Insofar as the DOE explicitly has reserved to itself even the simple authority to investigate Title IV consumer complaints, it is difficult to imagine that a wholesale investigation of a Title IV guaranty agency and DOE fiduciary would not "violat[e] the intent of the MOU[]." *Id.*

Enforcement counsel's suggestion that the Bureau's authority to accept complaints relating to the *servicing* of Title IV loans may justify an investigation into the *guaranty* services Ascendium provides to the federal government is unfounded. Even setting aside that the cited text relates to the servicing of loans, not guaranty services, that provision permits the Bureau to take only limited actions like "providing the complaints to the servicers and providing the servicers' response to the borrower[.]" Ex. G. The "Responsibilities by issue type" subparagraph of the cited language is explicit; while the Bureau can provide input on Federal Loans regarding Federal consumer financial laws, the DOE is "responsible for attempting to resolve informally such complaints." *Id.*

C. Ascendium Has Not Assessed Pre-65 Collection Costs Within the Statute of Limitations.

The Bureau's investigatory powers are limited not only by the jurisdiction conferred by Congress in the CFPA, but also by whether the information requested in a CID is "relevant to conduct for which liability can be imposed." *Consumer Fin. Prot. Bureau v. Harbour Portfolio Advisors, LLC*, No. 16-14183, 2017 U.S. Dist. LEXIS 21576, at *14 (E.D. Mich. Feb. 15, 2017); *see also CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961, 969 (C.D. Cal 2017), *vacated in part on other grounds* 2018 U.S. Dist. LEXIS 222227. While courts may enforce a subpoena that extends beyond the statute of limitations where that information is linked to a timely, actionable claim, the Bureau does not have authority to initiate an investigation into wholly time-barred claims. *Id.* The CID plainly is focused on Pre-65 Collection Costs. [redacted] Notwithstanding [redacted] there is nothing in either the Notification of Purpose [redacted] to suggest that the investigation relates to conduct during the Pre-65 Period. *See generally* Ex. A.

Claims under §§ 1031 and 1036 of the CFPA claims are subject to a three-year statute of limitations. *See* 12 U.S.C. § 5564(g). As discussed above, Ascendium has not charged, collected, or otherwise caused borrowers to incur Pre-65 Collection Costs since the DOE issued the DCL. In other words, Ascendium has assessed no Pre-65 Collection Costs on or after July 10, 2015. Ex. C, Fairbairn Decl. ¶¶ 5-6. Even if the CFPB were to conclude after an investigation that Ascendium had assessed Pre-65 Collection Costs in a manner that was unfair, deceptive, or abusive in violation of §§ 1031 and 1036, any action to obtain legal or equitable relief relating to Pre-65 Collection Costs would have been required to be filed before July 11,

2018. *Consumer Fin. Prot. Bureau v. Howard*, No. 8:17-cv-00161-JLS-JEM, 2018 U.S. Dist. LEXIS 221956, at *5 (C.D. Cal. May 3, 2018).

In addition, any suggestion that the CFPB only recently discovered that Ascendium assessed Pre-65 Collection Costs prior to the issuance of the DCL would not make such an action timely because "the fraud discovery rule has not been extended to Government civil penalty enforcement actions." *Gabelli v. SEC*, 568 U.S. 442, 450 (2013); *see also Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017) (holding that statute of limitations on government enforcement action for disgorgement begins running when the misconduct occurs). Even if there were a "discovery rule" in this context, the question whether guarantors may—or must—assess Pre-65 Collection Costs has been well-publicized since 2015.[10] Indeed, shortly after the issuance of the DCL, United Student Aid Funds, which subsequently merged into Ascendium,[11] filed an action under the Administrative Procedure Act challenging it. *See United Student Aid Funds, Inc. v. Duncan*, No. 1:15-cv-01137-APM (D.D.C. filed July 16, 2015). This litigation prompted the DOE to withdraw the guidance on March 16, 2017, and Ascendium[12] issued a press release on March 21, 2017—more than three years prior to the Bureau's CID—affirming that it had stopped assessing Pre-65 Collection Costs when the DCL was issued two years earlier and would continue its practice of not assessing them notwithstanding the DOE's withdrawal of that guidance. *See* Ex. F. The National Council of Higher Education Resources, a non-profit trade association for guarantors, issued a similar press release.[13] In order to deny the Petition, the Bureau would have

[10] The DCL was preceded by a case filed in 2012, *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633 (7th Cir. 2015) *reh'g denied*, 807 F.3d 839 (7th Cir. 2015).
[11] Ex. C, Fairbairn Decl. ¶ 3.
[12] Great Lakes Higher Education Corporation & Affiliates changed its name to Ascendium in November 2018 after Great Lakes Education Services, Inc.—a separate corporate entity—was acquired by Nelnet.
[13] https://cdn.ymaws.com/www.ncher.us/resource/resmgr/media/03-23-17_Statment_on_DCL.pdf.

to conclude that it may resurrect any time-barred claim simply by disavowing knowledge of a particular market. This is neither the law nor sound regulatory enforcement policy.

IV. IN THE ALTERNATIVE, THE DIRECTOR SHOULD STAY THE OBLIGATION TO RESPOND TO THE CID.

If the Director disagrees with the multiple bases to set aside the CID, she should stay its enforcement to conserve Bureau and party resources. As discussed above, Ascendium has challenged the DOE's Rule under the Administrative Procedure Act in the United States District Court for the District of Columbia because the HEA explicitly requires and/or permits guarantors to assess Pre-65 Collection Costs consistent with Congress's allocation of the costs of default in the Title IV program. While not certain to be dispositive, the resolution of that litigation is likely to have a significant impact on the Bureau's evaluation of Pre-65 Collection Costs assessed prior to July 2015, and Bureau counsel has acknowledged that it is at least potentially relevant to the issues. Ascendium's motion for summary judgment is fully briefed as of June 2020 and is awaiting a decision.

The decision whether to grant a stay is "guided by four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC*, No. CV-14-2090-MWF-(PLAx), 2014 U.S. Dist. LEXIS 89022, at *63 (C.D. Cal. May 27, 2014). Ascendium has made a strong showing that it will prevail on its challenge to the Rule because the Rule conflicts with the authorizing statute. *See supra* 5-6; *Bd. of Governors of Fed. Res. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 375 (1986) (vacating regulation that conflicted with the authorizing statute

finding agency "rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute").

Ascendium will be irreparably harmed if it is forced to respond to the CID during the pendency of its challenge to the Rule given the costs of compliance. *See Great Plains Lending, LLC*, 2014 U.S. Dist. LEXIS 89022, at *63 (holding that if the execution of the CID was not stayed, "[r]espondents are likely to suffer irreparable harm because [r]espondents' disclosure of sensitive proprietary documents to the Bureau is a bell that cannot be unrung"). Unlike for-profit entities serving ongoing markets, as the guarantor in a significant but discontinued federal program, Ascendium cannot recover the costs of complying with the CID by, for example, raising additional capital or raising its prices to the DOE. At the same time, the Bureau and the public will not suffer any harm if the stay is granted because there is no ongoing conduct at issue that potentially could violate the CFPA, as specified in the CID's Notification of Purpose. In fact, declining to set aside the Petition during the pendency of the APA action would harm both the Bureau and the public because it would result in two concurrent actions—a motion to enforce the CID and the APA action—addressing the same regulations, which would be a waste of the public, court, and party resources. In light of these factors, the requested stay would be both modest in length and would not adversely impact the investigation. *Id.* (finding no injury caused by a temporary delay in executing a CID).

A stay also would be consistent with Office of Management and Budget guidance regarding the implementation of Section 6 of Executive Order 13924. Specifically, agencies have been encouraged to "consider applying the rule of lenity in administrative investigations, enforcement actions, and adjudication by reading genuine statutory or regulatory ambiguities

related to administrative violations and penalties in favor of the targeted party in enforcement."[14] In this case, the permissibility of Pre-65 Collection Costs is so clear that the Rule violates the Administrative Procedure Act. However, at a minimum, the challenge demonstrates that there is ambiguity sufficient to warrant awaiting a ruling before proceeding with an investigation into the same issue.

V. CONCLUSION.

For all the foregoing reasons, Ascendium respectfully requests the Director set aside the CID. Insofar as the Director declines to set aside the CID, Ascendium respectfully requests in the alternative that she stay the enforcement of the CID pending resolution of Ascendium's motion for summary judgment in *Ascendium Ed. Sols., Inc. v. Devos, et al.*, No. 19-CV-3831-CJN (D.D.C. filed Dec. 27, 2019).

* * *

Respectfully submitted this 14th day of October, 2020

Valerie L. Hletko
Jeffrey P. Naimon
Sarah Davis
BUCKLEY LLP
2001 M Street, N.W., Suite 500
Washington, DC 20036
Telephone: (202) 349-8000
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Counsel for Ascendium Education Solutions, Inc.

[14] Paul J. Ray, M-20-31, *Implementation of Section 6 of Executive Order 13924* (Aug. 2020), https://www.whitehouse.gov/wp-content/uploads/2020/08/M-20-31.pdf.

CERTIFICATE OF SERVICE

I hereby certify that on this, the 14th day of October, 2020, I served this Petition to Set Aside or, in the Alternative, to Modify the CID on the following via electronic delivery:

Executive Secretary
Bureau of Consumer Financial Protection
ExecSec@cfpb.gov

Thomas Ward, Esq.
Assistant Director of the Office of Enforcement
Bureau of Consumer Financial Protection
Enforcement@cfpb.gov

Valerie L. Hletko

EXHIBIT A

United States of America
Bureau of Consumer Financial Protection

Civil Investigative Demand

To **Ascendium Education Solutions, Inc.**
Patricia Kingston
2501 International Lane
Madison, WI 53704

This demand is issued pursuant to Section 1052 of the Consumer Financial Protection Act of 2010 and 12 C.F.R. Part 1080 to determine whether there is or has been a violation of any laws enforced by the Bureau of Consumer Financial Protection.

Action Required (choose all that apply)

☐ **Appear and Provide Oral Testimony**

Location of Investigational Hearing	Date and Time of Investigational Hearing
	Bureau Investigators

☑ **Produce Documents and/or Tangible Things, as set forth in the attached document, by the following date** 10/14/2020

☑ **Provide Written Reports and/or Answers to Questions, as set forth in the attached document, by the following date** 10/14/2020

Notification of Purpose Pursuant to 12 C.F.R. § 1080.5

The purpose of this investigation is to determine whether debt collectors, guaranty agencies, or associated persons, in connection with the collection of student loans, have improperly caused borrowers to incur costs or fees or have improperly charged or collected costs or fees in a manner that is unfair, deceptive, or abusive in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

Custodian / Deputy Custodian

Jeffrey Paul Ehrlich / Maria Ardike
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Bureau Counsel

Maxwell Peltz

Date Issued
09/14/2020

Signature Jeffrey Paul Ehrlich Digitally signed by Jeffrey Paul Ehrlich Date: 2020.09.11 18:33:32 -04'00'

Name / Title **Jeffrey Paul Ehrlich, Deputy Enforcement Director**

Service

The delivery of this demand to you by any method prescribed by the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562, is legal service. If you fail to comply with this demand, the Bureau may seek a court order requiring your compliance.

Travel Expenses

Request a travel voucher to claim compensation to which you are entitled as a witness before the Bureau pursuant to Section 1052 of the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562.

Right to Regulatory Enforcement Fairness

The Bureau is committed to fair regulatory enforcement. If you are a small business under Small Business Administration standards, you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

Paperwork Reduction Act

This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

CIVIL INVESTIGATIVE DEMAND FOR PRODUCTION OF DOCUMENTS, WRITTEN REPORTS, AND ANSWERS TO INTERROGATORIES

I. Requests.

Interrogatories

1. [redacted]
2.
3.
4.
5.
6.
7.
8. If, for any request, there are Documents that would have been responsive but that are now unavailable, identify each Document and its last known location or custodian, and explain why the Document cannot be produced.

Requests for Written Reports

1. [redacted]

2. [redacted]

3. Provide organizational charts For Each Year covering Your business units, parents, and subsidiaries populated with all officers and all managers for each unit, including under all former business names.

Requests for Documents

1. [redacted]
2. [redacted]
3. [redacted]
4. [redacted]
5. [redacted]
6. [redacted]
7. [redacted]

II. Definitions.

A. "**Account**" means a defaulted-student-loan account and unless otherwise specified includes Your accounts (including those serviced by another entity) and accounts of Your Guaranty-Agency Clients for which you provided any services.

B. "**Ascendium**" "**You,**" or "**Your**" means Ascendium Education Solutions, Inc. and Ascendium Education Group, Inc. & Affiliates—and also includes former entities Great Lakes Higher Education Corporation & Affiliates, Great Lakes Higher Education Guaranty Corporation, and Great Lakes Educational Loan Services, Inc. (before its sale)—as well as all parent companies, wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all principals, directors, officers, owners, employees, agents, representatives, consultants, attorneys, accountants, independent contractors, and other persons working for or on behalf of the foregoing.

C. "**Bureau**" means the Bureau of Consumer Financial Protection.

D. "**CID**" means the Civil Investigative Demand, including the Requests, Definitions, and Instructions.

E. "**Collection Costs**" means the collection costs or charges referenced in paragraph (b)(2) of 34 C.F.R. § 682.410, including all versions of that regulation during the Applicable Period. "Collection Costs" includes alternate phrasing, including collections costs, collection fees, collections fees, collection charges, and collections charges.

F. "**Contract**" means and includes the original contract, and any addenda, amendment, attachment, and fee schedule as well as any other Document affecting any contractual term or obligation, including but not limited to any modification, addition, policies and procedures, specification, guideline, requirement, or client-specific addenda.

G. **"Dates"** means the relevant or effective period, such as when the practice occurred, title or position was held, or contractual relationship was in effect.

H. "**Deputy Enforcement Director**" refers to a Deputy Assistant Director of the Office of Enforcement.

I. "**Document**" means any written matter of every type and description, including electronically stored information. "Document" includes any non-identical copy (such as a draft or annotated copy) of another document.

J. "**Electronic Communications**" includes but is not limited to email and meeting requests—including sent, received, cc, or bcc—and any attachments.

K. "**Electronically Stored Information**," or "**ESI**," means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise) of any electronically created or stored information, including but not limited to e-mail, instant messaging, videoconferencing, SMS, MMS, or other text messaging, and other electronic correspondence (whether active, archived, unsent, or in a sent or deleted-items folder),

word-processing files, spreadsheets, databases, unorganized data, document metadata, presentation files, and sound recordings, regardless of how or where the information is stored, including if it is on a mobile device.

L. "**Enforcement Director**" refers to the Assistant Director of the Office of Enforcement.

M. "**For Each Year**" means separately for each year; where yearly data is not available, provide responsive information for the calendar year to date, unless otherwise instructed.

N. "**Guaranty-Agency Client**" means a guaranty agency for which You have provided services.

O. "**Identify**" means to provide: (a) for a business or other organization, the entity name, client code, short name, address, and contact person; and (b) for Documents, the beginning and ending Bates numbers and relevant page number(s).

P. "**Initial Default Notice**" means the notice to borrower described in paragraph (b)(6)(ii) of 34 C.F.R. § 682.410, including all versions of that regulation during the Applicable Period.

Q. "**PCA**" means a private collection agency or any other entity with which You have contracted for the collection of Accounts.

R. "**Person**" means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

S. [redacted]

T. [redacted]

U. **"Versions"** means one of each version of the Document. If a form Document, such as a letter, Version means only unique versions of the form Document.

III. Instructions.

A. **Applicable Period for Responsive Information and Documents:** Unless otherwise directed, the applicable period for the request is f[redacted]

B. **Sharing of Information:** This CID relates to a nonpublic, law-enforcement investigation

being conducted by the Bureau. The Bureau may make its files available to other civil and criminal federal, state, or local law-enforcement agencies under 12 C.F.R. §§ 1070.43(b)(1) and 1070.45(a)(5). Information you provide may be used in any civil or criminal proceeding by the Bureau or other agencies. As stated in 12 C.F.R. § 1080.14, information you provide in response to this CID is subject to the requirements and procedures relating to the disclosure of records and information set forth in 12 C.F.R. pt. 1070.

C. **Meet and Confer:** As stated in 12 C.F.R. § 1080.6(c), you must contact Enforcement Attorney Maxwell Peltz at [redacted] as soon as possible to schedule a meeting (telephonic or in person) to discuss your response to the CID. The meeting must be held within **10** calendar days after you receive this CID or before the deadline for filing a petition to modify or set aside the CID, whichever is earlier.

D. **Privilege Claims:** If any material responsive to this CID is withheld on the grounds of privilege, you must make the privilege claim no later than the date set for the production of the material. As stated in 12 C.F.R. § 1080.8(a), any such claim must include a schedule of the documents, information, or tangible things withheld that states, for each:

1. its type, specific subject matter, and date;

2. the names, addresses, positions, and organizations of all authors and direct or indirect recipients;

3. the specific grounds for claiming the privilege;

4. the request to which the privileged document, information, or thing is responsive; and

5. its Bates number or range.

In addition, the person who submits the schedule and the attorney stating the grounds for the privilege must sign it. A person withholding material solely based on a claim of privilege must comply with the requirements of 12 C.F. R. § 1080.8 rather than file a petition for an order modifying or setting aside a demand under 12 C.F.R. § 1080.6(e). Please follow the enclosed Document Submission Standards for further instructions about producing redacted privileged documents.

E. **Document Retention:** Until you are notified otherwise, you are required to retain all documents and other tangible things that you used or relied on in responding to this CID. In addition, you must retain, and suspend any procedures that may result in the destruction of, documents, information, or tangible things that are in any way relevant to the investigation, as described in the CID's Notification of Purpose. You are required to prevent the destruction of relevant material irrespective of whether you believe such material is protected from future disclosure or discovery by privilege or otherwise. *See* 18 U.S.C. §§ 1505, 1519.

F. **Modification Requests:** If you believe that the scope of the search or response required by this CID can be narrowed consistent with the Bureau's need for documents or information, you are encouraged to discuss such possible modifications, including modifications of the requirements of these instructions, with Enforcement Attorney Maxwell Peltz at [redacted] Modifications must be agreed to in writing by the Enforcement Director or a Deputy Enforcement Director. 12 C.F.R. § 1080.6(d).

G. **Petition for Order Modifying or Setting Aside Demand:** Under 12 U.S.C. § 5562(f) and 12 C.F.R. § 1080.6(e), you may petition the Bureau for an order modifying or setting aside this CID. To file a petition, you must send it by e-mail to the Bureau's Executive Secretary at ExecSec@cfpb.gov, copying the Enforcement Director at Enforcement@cfpb.gov, within 20 calendar days of service of the CID or, if the return date is less than 20 calendar days after service, before the return date. The subject line of the e-mail must say "Petition to Modify or Set Aside Civil Investigative Demand." If a request for confidential treatment is filed, you must file a redacted public petition in addition to the unredacted petition. All requests for confidential treatment must be supported by a showing of good cause in light of applicable statutes, rules, Bureau orders, court orders, or other relevant authority.

H. **Certification:** The person to whom the CID is directed or, if it is directed to an entity, any person having knowledge of the facts and circumstances relating to the production, must certify that the response to this CID is true and complete. This certification must be made on the form declaration included with this CID.

I. **Scope of Search:** This CID covers materials and information in your possession, custody, or control, including but not limited to Documents in the possession, custody, or control of your attorneys, accountants, other agents or consultants, directors, officers, and employees.

J. **Document Production:** The Bureau encourages the electronic production of all material responsive to this CID; please follow the enclosed Document Submission Standards and submit the production following the enclosed Extranet Guide. For all packages destined for Bureau offices, please email Maxwell Peltz, maxwell.peltz@cfpb.gov, for the mailing or internet-protocol address. Please provide any tracking numbers by e-mail as above.

K. **Document Identification:** Documents that may be responsive to more than one request of this CID need not be submitted more than once. All Documents responsive to this CID must be accompanied by an index that identifies: (i) the name of each custodian of each responsive Document; (ii) the corresponding Bates number or range used to identify that person's Documents; and (iii) the request or requests to which each Document responds.

L. **Sensitive Personally Identifiable Information:** If any material called for by these requests contains sensitive personally identifiable information, sensitive health information of any individual, please contact Enforcement Attorney Maxwell Peltz at [redacted] before sending those materials to discuss ways to protect the information during production. You must

encrypt electronic copies of such materials with encryption software acceptable to the Bureau. When submitting encrypted material, you must provide the encryption key, certificate, or passcode in a separate communication.

For purposes of this CID, sensitive personally identifiable information includes an individual's Social Security number alone or an individual's name, address, or phone number *in combination with* one or more of the following: date of birth, Social Security number, driver's-license number or other state-identification number, or a foreign country equivalent, passport number, financial-account number, credit-card number, or debit-card number. Sensitive health information includes medical records and other individually identifiable health information relating to the past, present, or future physical or mental health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

M. **Information Identification:** Each request for a written report or interrogatory in this CID must be answered separately and fully in writing under oath. All information submitted must clearly and precisely identify the request or requests to which it is responsive.

N. **Format for Response to Request for Written Report:** Produce the data specified in the Request for Written Report as follows: in tab-delimited text files, using double-quote-escaped text fields when necessary. Where data derives from separate tables or dimensions, use a separate text file for data elements along each separate dimension. This should comply with at least the first normal form (1NF). Include both unique identifiers, primary keys, and foreign keys (i.e., all fields used to perform joins between tables) in each file expressing the relationship between these files. When data is available for some records and not others, leave the unavailable data items blank (omissions due to unavailability should be identified and discussed during the meet and confer process and described in a narrative with the production). Individual records should never be of varying lengths (number of populated fields). Where information exists at the record level requested (e.g., per account) but is not explicitly included in the individual Written-Report Request, include this information in additional columns in your response. Produce the source code for all scripts used to query, transform, or produce data responsive to each Written-Report Request.

O. **Submission of Documents in lieu of Answers:** Documents in existence before your receipt of this CID that contain the information requested in any interrogatory may be submitted as part of or in lieu of an answer to the interrogatory. If you submit Documents as part of or in lieu of an answer, you must clearly indicate the specific request to which the Documents are responsive, and you must clearly identify the specific portion of the Documents that are responsive, including page, paragraph, and line numbers, as applicable.

P. **Declaration Certifying Records of Regularly Conducted Business Activity:** Attached is a Declaration Certifying Records of Regularly Conducted Business Activity, which may limit the need to subpoena you to testify at future proceedings to establish the admissibility of documents produced in response to this CID. Please execute this Declaration and provide it with

your response.

CERTIFICATE OF COMPLIANCE

I, _____, pursuant to 28 U.S.C. § 1746, declare that:

1. I have confirmed that a diligent search has been made for all responsive documents and information in the possession, custody, or control of Ascendium Education Solutions, Inc.
2. All of the documents and information identified through the search described in paragraph 1 above required by the Civil Investigative Demand dated September 14, 2020 that are within the possession, custody, or control of Ascendium Education Solutions, Inc. have been submitted to the Bureau custodian or deputy custodian identified in this Civil Investigative Demand.
3. If a document or tangible thing responsive to this Civil Investigative Demand has not been submitted, an interrogatory or a portion of an interrogatory has not been fully answered, or a report or a portion of a report has not been completed, a claim of privilege in compliance with 12 C.F.R. § 1080.8 has been submitted.
4. Ascendium Education Solutions, Inc. has reviewed all responsive answers, reports, other documents and tangible things (collectively "Responses"), and has designated as confidential all those Responses, and only those Responses, the disclosure of which would cause substantial harm to the competitive position of Ascendium Education Solutions, Inc., as that term is used for purposes of the Freedom of Information Act.

5. All answers and reports prepared in response to the Civil Investigative Demand dated September 14, 2020 are true and complete.

I certify under penalty of perjury that the foregoing is true and correct. Executed on _____.

_____
Signature

DECLARATION CERTIFYING RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY
Pursuant to 28 U.S.C. § 1746

I, _____, pursuant to 28 U.S.C. § 1746, declare that:

1. I am employed by _____ as _____ and by reason of my position am authorized and qualified to certify the authenticity of the records produced by Ascendium Education Solutions, Inc. and submitted with this Declaration.
2. The documents produced and submitted with this Declaration by Ascendium Education Solutions, Inc., which are numbered _____ through _____, are true copies of records of regularly conducted activity that were:
    a. made at or near the time of the occurrence of the matters set forth, by, or from information transmitted by, a person with knowledge of those matters;
    b. kept in the course of the regularly conducted business activity; and
    c. made by the regularly conducted business activity as a regular practice.

I certify under penalty of perjury that the foregoing is true and correct. Executed on _____.

_____
Signature

CERTIFICATE OF COMPLIANCE WITH RFPA

The Right to Financial Privacy Act of 1978 (RFPA) does not apply to the disclosure of financial records or information to the Bureau of Consumer Financial Protection "in the exercise of its authority with respect to a financial institution." 12 U.S.C. § 3413(r). This civil investigative demand is also issued in connection with an investigation within the meaning of section 3413(h)(1)(A) of the RFPA. Therefore, in accordance with section 3403(b) of the RFPA, the undersigned certifies that, to the extent applicable, the provisions of the RFPA have been complied with as to the Civil Investigative Demand issued to Ascendium Education Solutions, Inc., to which this Certificate is attached.

The information obtained will be used to determine whether the persons named or referred to in the attached Civil Investigative Demand are in compliance with laws administered by the Bureau of Consumer Financial Protection. The information may be transferred to another department or agency consistent with the RFPA.

Under the RFPA, good faith reliance on this certificate relieves the recipient and its employees and agents of any liability to customers in connection with the requested disclosures of financial records of these customers. *See* 12 U.S.C. § 3417(c).

Jeffrey Paul Ehrlich Digitally signed by Jeffrey Paul Ehrlich
Date: 2020.09.11 18:34:48 -04'00'

Jeffrey Paul Ehrlich
Bureau of Consumer Financial Protection
Deputy Director, Office of Enforcement

EXHIBIT B

MEET-AND-CONFER STATEMENT

In conformity with 12 C.F.R. §§ 1080.6(c), 1080.6(e)(1), the undersigned counsel hereby represents that she conferred with counsel for the Bureau in a good faith effort to resolve the issues raised by this Petition to Set Aside or, in the Alternative, Modify the Civil Investigative Demand and was unable to reach an agreement. Ascendium's outside counsel sent a letter to Enforcement counsel Maxwell Peltz on October 12, 2020. A telephonic meet-and-confer, attended by Ascendium's outside counsel (Valerie Hletko and Sarah Davis), Mr. Peltz, and Deputy Custodian Maria Ardike, took place on October 13, 2020 from 4:45 to approximately 5:10 Eastern Daylight Time. During the meet-and-confer process, counsel for the Petitioner raised the issues addressed in this Petition to Set Aside or, in the Alternative, Modify the Civil Investigative Demand. An additional telephonic meet-and-confer, attended by Ascendium's outside counsel (Valerie Hletko and Sarah Davis), Mr. Peltz, and Ms. Ardike, took place on October 14, 2020 from 4:00 to approximately 4:05 Eastern Daylight Time.

Valerie L. Hletko
BUCKLEY LLP
2001 M Street, N.W., Suite 500
Washington, DC 20036
Telephone: (202) 349-8000
Email: vhletko@buckleyfirm.com

Counsel for Ascendium Education Solutions, Inc.

EXHIBIT C

UNITED STATES OF AMERICA
BEFORE THE CONSUMER FINANCIAL PROTECTION BUREAU

IN THE MATTER OF ASCENDIUM EDUCATION SOLUTIONS, INC.

DECLARATION OF JACQUELINE FAIRBAIRN IN SUPPORT OF ASCENDIUM'S PETITION TO SET ASIDE OR, IN THE ALTERNATIVE, MODIFY THE CIVIL INVESTIGATIVE DEMAND

I, Jacqueline Fairbairn, hereby declare as follows:

1. I am the Vice President of Guaranty Services and Support for Ascendium Education Solutions, Inc. ("Ascendium"), and I am authorized to make this declaration.

2. In my role, I oversee Ascendium's bankruptcy, claims, policy, and recovery administration teams. I am also Ascendium's Chief Compliance Officer.

3. Ascendium is the result of a merger among three former guarantors: Great Lakes Higher Education Guaranty Corporation ("GLHECG"), Northwest Education Loan Association ("NELA"), and United States Aid Funds ("USAF"). NELA and USAF affiliated with GLHEGC's parent corporation, Great Lakes Higher Education Corporation ("GLHEC"), effective January 1, 2017. GLHECG's name was changed to Ascendium in November 2018. NELA and USAF merged into Ascendium, ceasing as separate guarantors, on December 31, 2018.

4. I am familiar with Ascendium's policies and procedures regarding the assessment of reasonable collection costs under 20 U.S.C. § 1091a(b)(1) on defaulted Federal Family Education Loan Program loans ("Pre-65 Collection Costs") and related to borrower-outreach activities, including in the 60 days after borrowers receive a notice of default letter ("Pre-65 Period"). I am also familiar with GLHECG's, NELA's, and USAF's prior policies and procedures regarding the assessment of Pre-65 Collection Costs and Pre-65 Period outreach activities.

5. After the Department of Education issued its July 10, 2015 Dear Colleague Letter ("DCL") prohibiting the assessment of Pre-65 Collection Costs on borrowers who (i) obtained a rehabilitation or other acceptable repayment agreement in the Pre-65 Period, and (ii) subsequently complied with that agreement, GLHECG, NELA, and USAF ceased assessing Pre-65 Collection Costs. Ascendium did not resume assessing those fees at any time, including after the DCL was withdrawn on March 16, 2017, nor did GLHECG, NELA, or USAF before their merger.

6. Ascendium does not intend to consider assessing Pre-65 Collection Costs unless the Guaranty Agency Collections Fee Rule is vacated or withdrawn.

7. Ascendium, GLHECG, NELA, and USAF are, or were, regulated by the Department of Education ("DOE") and are, or were, routinely audited to determine their compliance with applicable federal law, including with respect to default collection activities. I have been employed by Ascendium (originally by GLHECG) for 32 years, and I am not aware of any concerns raised by the DOE regarding the assessment of Pre-65 Collection Costs or Pre-65 Period outreach activities.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 14, 2020 in Shawano, Wisconsin

DocuSigned by:
Jacqueline Fairbairn
3EFCAB33E8C54B9...

Jacqueline Fairbairn

EXHIBIT D

Publication Date: July 10, 2015

DCL ID:GEN-15-14

Subject: Repayment Agreements and Liability for Collection Costs on Federal Family Education Loan Program (FFELP) Loans

Summary This letter restates the requirements for guaranty agencies regarding charging collection costs to FFELP borrowers who enter into repayment agreements

Dear Colleague:

In this letter we restate and clarify the rules that bar a guaranty agency from charging collection costs to a borrower who promptly after default enters into a repayment agreement, in particular a rehabilitation agreement, with that agency, and who honors that agreement.

A guaranty agency, after it pays a default claim and acquires the loan from the lender, is required to send an initial notice to the borrower In that notice, the guaranty agency must give the borrower at least 60 days to take any of several actions, including entering into a repayment agreement with the guaranty agency In this letter we refer to this step as the “notice and opportunity to resolve” the debt. A guaranty agency cannot charge collection costs to a defaulted borrower who, within the 60 day period following the initial notice, enters into a repayment agreement, including a rehabilitation agreement, and who honors that agreement

These rules mirror how the Department treats those borrowers in its portfolio of FFELP and Direct Loans who enter into a repayment agreement during the initial notice and opportunity to resolve period for that borrower and honor that agreement Few borrowers in the Department’s portfolio enter into repayment within that initial period

Applicable provisions of the Higher Education Act

Section 484A(a) of the Higher Education Act of 1965, as amended (HEA), provides that defaulted borrowers "shall be required to pay, in addition to other charges specified in this subchapter . . . reasonable collection costs." Section 428F(a) of the HEA requires the guarantor to offer the borrower an opportunity to have a defaulted loan "rehabilitated," and the default status cured, by making nine timely payments over 10 consecutive months, after which the loan may be sold to a FFELP lender or assigned to the Department, and the record of default as reported by the guarantor is removed from the borrower's credit history. Under the HEA and the Department's regulations, the installment amounts payable under a rehabilitation agreement must be "reasonable and affordable based on the borrower's total financial circumstances."

Applicable provisions of Department regulations

The regulations direct the guarantor to charge the borrower "reasonable" collection costs incurred to collect the loan. 34 C.F.R. 682.410(b)(2). Generally, the charges cannot exceed the lesser of the amount the borrower would be charged as calculated under 34 C.F.R. 30.60 or the amount the Department would charge if the Department held the loan. However, there is an exception, discussed later, for collection costs charged in connection with loan rehabilitation. 34 C.F.R. 682.410(b)(2), citing 34 C.F.R. 682.405(b)(1)(vi)(B). Before the guarantor reports the default to a credit bureau or assesses collection costs against a borrower, the guarantor must provide the borrower written notice that explains the nature of the debt, and the borrower's right to request an independent administrative review of the enforceability or past-due status of the loan and to enter into a repayment agreement for the debt on terms satisfactory to the guarantor. 34 C.F.R. 682.410(b)(5)(ii).

The regulations also provide that the reasonable and affordable payment required under a rehabilitation agreement must generally be an amount equal to 15 percent of the amount by which the borrower's adjusted gross income exceeds 150 percent of the poverty guideline amount applicable to the borrower's family size and State, divided by 12. 34 C.F.R. 682.405(b)(1)(iii). If the borrower objects to that proposed monthly payment amount, the guaranty agency must offer a reasonable and affordable payment amount based on the borrower's individual financial circumstances. 34 C.F.R. 682.405(b)(1)(vii). The guarantor must disclose to the borrower who seeks rehabilitation of a loan, among other matters, the amount of any collection costs to be added to the unpaid principal at the time of sale of the loan to a

lender, which amount cannot exceed, currently, 16 percent of the unpaid principal and accrued interest at the time of sale. Section 428F(1)(D)(i)(II)(aa) of the HEA, 20 U.S.C. 1078-6(1)(D)(i)(II)(aa).[1]

Background and rationale for the requirement to provide an initial "notice and opportunity to resolve" the debt

This section describes the context in which the Department adopted regulations requiring a guarantor to provide a borrower with this notice and opportunity to resolve a defaulted loan. Section 430A of the HEA requires guarantors and the Department, prior to reporting to a credit bureau that the loan is in default, to provide the borrower with notice that the loan will be reported as in default status "unless the borrower enters into repayment," and requires the default to be reported "if the borrower has not entered into repayment within a reasonable time, but not less than 30 days from the date of the notice. . ." 20 U.S.C. 1080a(c)(4). In 1992, the Department adopted a regulation which requires the guarantor, "before it reports the default to a credit bureau or assesses collection costs against a borrower," to provide the borrower an initial opportunity to challenge the enforceability or past-due status of the loan, to obtain an independent review of that challenge, to access the related records, and to agree to voluntary repayment. 34 C.F.R. 682.410(b)(5), 57 FR 60280, 60355-56 (December 18, 1992). The regulation uses the future tense in describing those actions that the guarantor may take to collect the debt, after providing the required notice: "costs will be charged," and "the agency will report the default to credit bureaus." 34 C.F.R. 682.410(b)(5)(vi)(E), (F) (emphasis added).

In adopting the FFELP regulation in 1992, the Department expressly considered guaranty agencies' years of experience under the Federal tax refund offset program. Since 1984, the Department had been authorized to refer defaulted student loan debts to the Department of the Treasury for collection by offset against tax refunds owed to defaulted borrowers. 26 U.S.C. 6402(d), 31 U.S.C. 3720A. In 1986, the Department adopted regulations to establish the procedures for referring defaulted debt, which include giving the debtor notice of the proposed offset and an opportunity to avoid the offset by entering into a satisfactory repayment agreement. 34 C.F.R. 30.33, 51 FR 24092, 24095 (July 1, 1986). In adopting this offset rule, the Secretary made clear that the Department would use the guaranty agencies to perform certain functions on its behalf in order to collect those defaulted, federally reinsured loans held by guaranty agencies: sending the required pre-offset notice to the borrower,

conducting an initial review if requested by the borrower, and providing the borrower an opportunity to avoid offset by making a timely agreement to repay the loan. 51 FR 24095, 24096 (July 1, 1986).

In 1992, the Department required a guaranty agency to provide the borrower an initial notice and opportunity to resolve the debt in all circumstances, not just for offset purposes, 57 FR 60280, 60356 (Dec. 18, 1992). Noting that guaranty agencies had experience with notice and opportunity because of their participation in the refund offset program, 57 FR 60280, 60312 (Dec. 18, 1992), the Department in these 1992 regulations provided that a guaranty agency would meet the new requirement by following those pre-offset rules: "the administrative offset procedures set forth at 34 C.F.R. 30.20 – 30.33 satisfy the requirements" that the guarantor must meet "before [the guarantor] reports the default to a credit reporting agency or assesses collection costs." 34 C.F.R. 682.410(b)(5)(iii). Thus, by pointing to the offset procedure as a model for the overall FFELP notice and opportunity to resolve rule, the Department showed that it intended the new FFELP rule to follow the same offset rules: the borrower could avoid the adverse consequences (report of the default status of the debt, liability for collection costs, and further collection actions) by making a timely agreement to repay the debt voluntarily.

Background and rationale for the requirement to charge collection costs

The 1992 final rule also required the guarantor, for the first time, to charge collection costs. 34 C.F.R. 682.410(b)(2); 57 FR 60280, 60355 (Dec. 18, 1992). In this rule the Department interpreted the statutory term "reasonable collection costs" in section 484A(b) of the HEA by capping the collections at the lesser of the actual costs incurred by the guarantor under a "make whole" formula in 34 C.F.R. 30.60, or the rate the Department would charge if it held the loan. As the Department explained in briefs and in the testimony of responsible Department officials in Education Credit Management Corp. v. Barnes, 318 B.R. 482 (S.D. Ind. 2004), aff'd, 459 F.3d 796 (7th Cir. 2006), claims for repayment of defaulted, federally reinsured FFELP loans are claims of the United States, and, accordingly, Department rules for their collection conform with the Federal Claims Collection Standards (FCCS).[2] At the time of the 1992 Department's collection costs rule, the FCCS directed Federal agencies to charge delinquent debtors the costs of collection, which an agency was to determine based "upon cost analyses establishing an average of actual additional costs incurred by the agency in processing and handling claims against other debtors in similar stages of delinquency." 4 C.F.R. 102.13(d)(1992) (emphasis added).[3]

In response to this government-wide directive, the Department adopted a regulation which distinguishes between defaulted borrowers who agree promptly to repay – within the 60-day resolution period – from those defaulters who do not immediately cooperate and for whom the guarantor may incur significant costs to pursue. Consistent with the Department's long-standing practice and with its interpretation of the HEA provisions, the FFELP regulation treats the two groups as in "different stages of delinquency" from the FCCS perspective, and directs that costs be charged only to the second group. The Department stated this position in response to an inquiry from a guarantor in 1997.[4]

Thus, the regulations direct the guaranty agency to charge the borrower collection costs - but only after the guaranty agency provides borrower the opportunity to dispute the debt, to obtain review the objection, and to agree to repay the debt on terms satisfactory to the guarantor. If the borrower agrees within that initial period to repay the debt under terms satisfactory to the guarantor and consistent with the requirements, the borrower cannot be charged collection costs at any time thereafter unless the borrower later fails to honor that agreement.[5] In determining whether those costs are reasonable and properly charged to a borrower who timely agrees to repay and honors that agreement, it is irrelevant whether the guaranty agency uses its own staff to provide the notice and opportunity to resolve or contracts for those services.

Background and rationale for the requirement to offer loan rehabilitation

In June 1994, the Department adopted a regulation to implement the loan rehabilitation provisions in section 428F(a) of the HEA (20 U.S.C. 1078-6(a)). 34 C.F.R. 682.405, 59 FR 33334, 33335 (June 28, 1994). To have a defaulted loan rehabilitated, a borrower must request rehabilitation and voluntarily make nine out of 10 monthly payments in the amount determined by the guarantor in a written installment payment agreement. Thus, a rehabilitation agreement is simply a specific form of a satisfactory repayment agreement.

The Department's loan rehabilitation regulations require that the guarantor explain to the borrower the terms of the rehabilitation agreement or arrangement, including "the amount of the collection costs to be added to the unpaid principal at the time of the sale [which] may not exceed 18.5 percent of the unpaid principal and accrued interest at the time of sale." 34 C.F.R. 682.405(b)(1)(iv) (1994).[6] As explained in a Departmental Dear Guaranty Agency letter on March 29, 1994, the Department did not adopt the (original) 18.5 percent regulatory "cap" on the collection costs charged

at the time of sale in order to give guarantors authority to charge such costs, but rather to limit the amount that a guarantor could charge – at the time of the sale – to those borrowers who were already liable for collection costs under existing authority. The change was needed because, at that time, the maximum collection costs rate that was permitted on borrower payments generally was the rate then charged (on routine recoveries) by the Department, which was "sometimes as high as 43 percent of the outstanding principal and interest on the defaulted loan."[7] The Department "concluded that the amount of collection costs currently assessed borrowers as reasonable under 34 C.F.R. 682.410(b)(2) is not reasonable when the borrower has shown the initiative to address the default through [rehabilitation]."[8]

Nothing in the 1994 rehabilitation regulations exempts loan rehabilitation transactions from the general rule that allows a guarantor to charge collection costs only to a borrower who fails to enter into a repayment agreement satisfactory to the agency within the 60-day period following the initial notice and opportunity to resolve. The loan rehabilitation agreement with the borrower is clearly a "repayment agreement "[9] Moreover, the loan rehabilitation agreement is an agreement on terms that the guaranty agency must accept as satisfactory to the agency Thus, a guaranty agency cannot use the collection activities otherwise required if a borrower, in this initial period, enters into a rehabilitation agreement and then honors that agreement [10]

The charging of collection costs upon completion of a loan rehabilitation by the sale or assignment of the loan was first addressed in the 2006 amendment to section 428F to the HEA Those amendments provided that the guaranty agency "may in order to defray collection costs, charge the borrower an amount not to exceed 18.5 percent of the outstanding principal and interest at the time of the loan sale, and retain such amount from the proceeds of the loan sale." 20 U.S.C. 1078-6 as amended by the Higher Education Reconciliation Act of 2005 (HERA), P L 109 171, section 8014(h), February 8, 2006. The legislative history of this change shows that the amendment was intended to codify "the collection costs permissible for rehabilitated loans at up to 18.5 percent of the outstanding principal and interest of the loan " H R Rep No 276, 109th Cong 1st Sess (2005) at 240 Existing Department regulations had already established which costs were permissible; because the amendment simply "codified" the permissible costs, the amendment did not empower a guarantor to charge costs that were not already permitted under the regulations The Department promptly recognized that this 2006 amendment simply "codified" those permitted costs, rather than superseding existing regulatory limits on collection costs In Dear Colleague Letter Gen 06 02, issued March 2006, the

Department characterized the HERA amendment not as granting "authority" to charge costs, but rather as merely "specifying" the limits to that existing authority as those already contained in the regulation.

Conclusion

Department regulations bar a guaranty agency from charging collection costs to a defaulted borrower who responds within 60 days to the initial notice provided by the guaranty agency, enters into a repayment agreement, including a rehabilitation agreement, and who honors that agreement. This includes, in the case of loan rehabilitation, both collection costs on the initial and subsequent qualifying payments and collection costs upon the ultimate sale or assignment of the loan. For defaulters who do not enter into a repayment agreement, guaranty agencies can and should charge collection costs.

Thank you for your cooperation.

Sincerely,

Lynn B. Mahaffie
Deputy Assistant Secretary for
Policy, Planning, and Innovation
Office of Postsecondary Education

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[1] For sales prior to July 1, 2014, the maximum rate was 18.5 percent. That rate was reduced to 16 percent by section 501 of Pub. L. 113-67, Dec. 26, 2013. That change has not yet been reflected in the Department's regulations.

[2] The Department recognized the applicability of the FCCS to FFELP regulations in 1992 in issuing the FFELP collection costs regulation and again in 1996, in regulating the manner in which payments must be applied by the guaranty agency. 61 FR 60482 (Nov. 27, 1996).

[3] In describing the kinds of differences between groups of borrowers that would warrant differing charges, the General Accounting Office and the Justice Department distinguished in the FCCS between those costs incurred by the agency "in any event" in handling the debt, and those incurred "by virtue of the delinquency." 49 FR 8893 (March 9, 1984). Examples of costs incurred "by virtue of the delinquency" included the costs of hiring additional personnel and retaining private debt collectors to pursue

recovery from those who do not respond to the routine initial demand by the agency. Id. FFELP regulations permit a lender to charge collection costs, but bar the lender from charging for costs of such routine activities as preparing notices and making contact with the borrower. 34 C.F.R. 682.202(f)(2). The Department or the guaranty agency, as applicable, must notify the borrower if it acquires a loan. The cost of doing so, and of responding to the initial notice in which this would be communicated, was expected to be minimal--more akin to the cost of servicing activities that lenders routinely conduct, such as considering requests for forbearances, deferments, or income-based repayment terms - costs which lenders must defray from interest earnings on their portfolio - than to the significant expenses in hiring additional staff or retaining private debt collectors to pursue those borrowers who do not promptly agree to repay.

[4] Letter from Ronald Streets, Program Specialist, Student Financial Assistance Programs, Department of Education, to Phillip Cervin, Asst. Vice President, Texas Guaranteed Student Loan Corporation (July 28, 1997).

[5] 34 C.F.R. 682.404(f) does not require or authorize the guarantor to charge the defaulter collection costs, but simply directs the order in which a payment must be applied to a loan on which those costs are properly charged. Thus, if there are no late charges owed on the loan, §682.404 does not authorize the guarantor to charge late fees simply by mentioning the order in which any late fees properly imposed are to be satisfied.

[6] As noted earlier, this rate was reduced to 16 percent by 2013 amendments.

[7] Dear Guaranty Agency Director Letter, March 29, 1994, at 2.

[8] Id. In March 1995, the Department reduced that charge to no more than 25 percent of the portion of the particular payment that is applied to principal and interest; the amount used to defray costs thus equals 20 percent of the total amount of the payment. Since that 1995 change, the “cap” has not exceeded that rate of 20 percent of the gross amount of the payment.

[9] See: 34 C.F.R. 682.405(a)(2)(i) and (b)(1), which refer to the “rehabilitation agreement” as a “monthly repayment agreement.”

[10] The regulation states that to avoid credit reporting as in default and collection action, the borrower must enter into "a repayment agreement on terms satisfactory to the agency," 34 C.F.R. 682.410(b)(5)(ii)(D). The context makes clear that a rehabilitation agreement is such a "satisfactory" repayment agreement. First, 34 C.F.R. 682.410(b)(6) requires the guarantor to take specific collection action - garnishment and offset - if the borrower fails to timely enter into an "acceptable" repayment agreement. Section 488A of the HEA allows a guarantor to collect the debt by garnishment only if the borrower is "not currently making payments under a repayment agreement with . . . the guaranty agency," 20 U.S.C. §1095a(a) (emphasis added). The guarantor, further, may not even start garnishment for a borrower who "requests rehabilitation." 78 FR 45636 (July 29, 2013). Similarly, 31 U.S.C. §3720A permits collection by offset only of "past-due, legally-enforceable debt," allows the borrower to object to offset on the ground that the debt is not "past-due," 31 U.S.C. §3720A(b)(2), and requires the creditor agency to affirmatively determine that the debt is "past-due." 31 U.S.C. §3720A(b)(3). A "past-due" debt is a debt not paid by the date specified, as pertinent here, in the "applicable agreement" "including a post-delinquency payment agreement." 31 C.F.R. 285.5(b). The guarantor cannot proceed to collect by offset or garnishment any debt already being repaid under any "post-delinquency payment agreement." Therefore, 34 C.F.R. 682.410(b)(6) must be read, in context, to require the guarantor to pursue such collection actions only against a borrower who fails to timely enter into, and to honor, any form of repayment agreement, including a rehabilitation agreement.

Attachments

GEN-15-14: Repayment Agreements and Liability for Collection Costs on Federal Family Education Loan Program (FFELP) Loans in PDF Format, 347KB, 6 Pages (http://ifap.ed.gov/sites/default/files/attachments/dpcletters/GEN1514.pdf)

2015-gen-15-14-subject-repayment-agreements-and-liability-collection)

EXHIBIT E

Publication Date: March 16, 2017

DCL ID:GEN-17-02

Subject: Withdrawal of Dear Colleague Letter (DCL) 15-14

Summary: The purpose of this guidance is to inform you that the Department of Education is withdrawing the statements of policy and guidance reflected in its Dear Colleague Letter (DCL) GEN 15-14 that it issued on July 10, 2015, with the Subject line "Repayment Agreements and Liability for Collection Costs on Federal Family Education Loan Program (FFELP) Loans." The DCL specifically addresses FFELP loans and not Direct Loans in the Department's portfolio

Dear Colleague

The DCL stated that the Higher Education Act, as amended (HEA), and its implementing regulations do not allow guaranty agencies to charge collection costs to a defaulted borrower who enters into a repayment agreement (including a loan rehabilitation agreement under 34 CFR § 682.405) with the guaranty agency within 60 days of receiving the agency's initial notice of default. In the DCL, the Department stated that its regulations bar a guaranty agency from charging collection costs to a defaulted borrower who (i) responds within 60 days to the initial notice sent by the guaranty agency after it pays a default claim and acquires the loan from the lender; (ii) enters into a repayment agreement, including a rehabilitation agreement; and (iii) honors that agreement.

The Department rescinds the DCL and its interpretation of the HEA and its implementing regulations. The Department issued the DCL only after the United States Court of Appeals for the Seventh Circuit asked for its views on the matter in *Bible v. United Student Aid Funds, Inc.*, a case challenging the assessment of

collection costs. [i] The Department subsequently filed an *amicus* brief with the Seventh Circuit on May 21, 2015, announcing the position that it later articulated in the DCL.

The Department thinks that the position set forth in the DCL would have benefitted from public input on the issues discussed in the DCL. Accordingly, the Department withdraws the DCL, and the Department will not require compliance with the interpretations set forth in the DCL without providing prior notice and an opportunity for public comment on the issues addressed in the DCL.

This withdrawal action does not affect borrowers whose loans are held by the Department because the Department does not charge the borrower for collection costs under the circumstances discussed in the DCL. This guidance does not add requirements to applicable law.

Sincerely,

Lynn B. Mahaffie
Acting Assistant Secretary
Office of Postsecondary Education

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[i] *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633 (2015).

Attachments/Enclosures:

Attachments

GEN-17-02: Withdrawal of Dear Colleague Letter (DCL) 15-14 in PDF Format, 54KB, 2 Pages (http://ifap.ed.gov/sites/default/files/attachments/dpcletters/GEN1702.pdf)

2017-gen-17-02-subject-withdrawal-dear-colleague-letter-dcl-15-14)

EXHIBIT F

NEWS RELEASE

FOR IMMEDIATE RELEASE
March 21, 2017

Contact: Richard D. George
608-246-1408
rgeorge@glhec.org

Statement from Great Lakes Higher Education Corporation & Affiliates Regarding Student Loan Collection Fee Policies

Madison, Wis.—In light of today's D.C. District Court filing seeking dismissal of a federal lawsuit against the U.S. Department of Education over student loan collection fee policies, the Great Lakes Affiliated Group Guaranty Agencies (Great Lakes Higher Education Guaranty Corporation, United Student Aid Funds, and Northwest Education Loan Association) wish to clarify their collection fee practices.

Since the U.S. Department of Education issued a Dear Colleague Letter on July 10, 2015, our guarantors have **not** assessed collection fees on borrowers who entered into rehabilitation agreements within 60 days of default on or after July 10, 2015. Notwithstanding the Education Department's March 16, 2017, decision, prompted by a request from a federal judge, to withdraw that Dear Colleague Letter, the Great Lakes Affiliated Group Guaranty Agencies will **continue** their practice of **not** assessing collection costs on borrowers who agree to rehabilitate their loans within 60 days of default.

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About Great Lakes: **Dedicated to making college education a reality since 1967.**
Knowing that education has the power to change lives for the better, Great Lakes Higher Education Corporation & Affiliates was established as a nonprofit group focused on a single objective: helping students nationwide prepare for and succeed in postsecondary education and student loan repayment. As a leading student loan guarantor and servicer, we have been selected by the U.S. Department of Education to provide assistance and repayment planning to more than 8 million borrowers – as well as assistance to colleges and lenders nationwide. Our group's earnings support one of the largest and most respected education philanthropy programs in the country. Since 2006, we have committed over $179 million in grant funding to promote higher education access and completion for students of color, low-income students, and first-generation students. For additional information, visit home.mygreatlakes.org.

EXHIBIT G

Memorandum of Understanding Between

The Bureau of Consumer Financial Protection and

The U.S. Department of Education

Concerning Coordination in Resolving Borrower Complaints

A. Introduction and Purpose

The U.S. Department of Education (ED) and the Bureau of Consumer Financial Protection (Bureau) enter into this Memorandum of Understanding (MOU).

This MOU sets forth the agreement between the Bureau and ED (the Agencies or the Parties) with respect to sharing, to the extent permitted by applicable privacy laws and regulations, information in connection with their statutory responsibilities. In addition, pursuant to Section 1035 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act), this MOU provides the framework for the Parties' "coordination in providing assistance to and serving borrowers seeking to resolve complaints related to their private education or Federal student loans."

The Bureau enters into this MOU pursuant to its authority under sections 1012 and 1035 of the Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, codified at 12 U.S.C. §§ 5492, 5535. ED enters into this MOU pursuant to its authority under Sections 415 and 419 of the Department of Education Organization Act, Pub. L. No. 96-88, codified at 20 U.S.C. §§ 3475, 3479.

Nothing in this MOU limits or expands either Parties' authorities or responsibilities under their respective statutes regardless of loan type or issue type.

B. Complaint Handling

1. The Bureau and ED shall share complaints from student loan borrowers, or their authorized representatives, with the other Agency to the extent permitted by applicable privacy laws and regulations. The Bureau will provide ED with at least 60 days' notice before these sharing processes shall commence.

2. The Bureau will direct borrowers attempting to submit via the Bureau's website complaints about the origination of loans made, insured, or guaranteed under Title IV of the Higher Education Act of 1965, as amended (Title IV loans), to contact ED. The Bureau will provide such complaints submitted through this and other channels to ED and direct borrowers with such complaints to contact ED regarding those complaints.

3. ED will direct borrowers attempting to submit via ED's website complaints related to their private education loans, as defined in section 140 of the Truth in Lending Act, as amended, codified at 15 U.S.C. § 1650(a)(8), to contact the Bureau. ED will provide such complaints submitted through this and other channels to the Bureau and direct borrowers with such complaints to contact the Bureau regarding those complaints.

4. The Bureau will accept complaints related to private education loans and the servicing of Title IV loans and process those complaints in the ordinary course, including providing the complaints to the servicers and providing the servicers' response to the borrower, in accordance with 12 U.S.C. § 5534. ED will have near real-time access to complaints regarding Title IV loans as contemplated in section D (Sharing of Data Analytics). For any complaints concerning both Title IV loans and private education loans, the Agency receiving the complaint shall share the complaint with the other Agency. The Agencies shall work to determine an efficient process to discuss and track such complaints and collaborate, where possible, to attempt to resolve the complaint in compliance with the statutory requirements of 12 U.S.C. § 5535 and 20 U.S.C. § 1018(f).

a. Responsibilities by issue type: for complaints regarding Federal loans with program issues, ED is responsible for program issue resolution, attempting to resolve such complaints, and as appropriate, will discuss such issues with the Bureau regarding the impact, if any, on Federal consumer financial laws. For complaints regarding Federal loans with Federal consumer financial law issues, ED will collaborate with the Bureau and the Bureau is responsible for providing ED with expertise, analysis, and recommendations regarding resolution consistent with Federal consumer financial laws; ED is responsible for attempting to resolve informally such complaints, in accordance with 20 U.S.C. § 1018(f)(3)(A), with the Bureau's input. For complaints regarding private loans with Federal consumer financial law issues, the Bureau is responsible for attempting to resolve informally such complaints, in accordance with 12 U.S.C. § 5535(c)(1), and as appropriate, will discuss issues with ED regarding products offered by, or on the premises of, Institutions of Higher Education or other issues that may impact Federal programs overseen by ED.

5. The Agencies shall meet with one another at least quarterly to discuss observations about the nature of complaints received, characteristics of borrowers, and available information about resolution of complaints, as well as analysis and recommendations. The Agencies shall work to ensure the agencies understand the respective reporting categories and definitions and how they relate to each other for comparison.

6. Each Agency shall provide complaint data in a secure, digital format. The Agencies shall work to determine an efficient, secure, and legally compliant process to provide complaint data.

C. Permissible Uses and Confidentiality of Exchanged Information

1. An Agency that receives nonpublic information pursuant to this MOU will use that information only for purposes authorized by law and as agreed upon by the Parties.

2. Except as with regard to complaints provided under Sections B.2 and B.3, all nonpublic information shared pursuant to this MOU belongs to and will remain the record or property of the providing Agency.

3. The Agencies will not share nonpublic information received pursuant to this MOU with a third party, unless required by law or otherwise specified in this MOU, without notice to and the written permission of the sharing Agency. If an Agency receives a legally enforceable request, demand, or order for nonpublic information shared under this MOU:

a. To the extent permitted by law, the Agency receiving a legally enforceable request, demand, or order for nonpublic information will provide notice to the sharing Agency of such a request, demand, or order as promptly as is reasonably possible; consult with the sharing Agency on the response before complying with the request, demand, or order; and request written permission to share the information and such permission shall not be unreasonably withheld.

b. To the extent permitted by law, the sharing Agency will have a reasonable opportunity to contest the legality of and/or respond to any such request, demand, or order.

c. The Agency will assert any reasonable and appropriate legal exemption or privilege available under applicable law to protect shared nonpublic information from public disclosure.

d. Nothing in this MOU shall prevent the Agency from complying with a legally valid or enforceable order of a court of competent jurisdiction, or, if compliance is deemed compulsory, a request or demand from a duly authorized committee of the United States Senate or House of Representatives. If the sharing Agency reasonably disagrees that the information must be shared, then the sharing Agency must undertake reasonable and appropriate action to obtain a final determination regarding whether compliance is compulsory.

f. The Agency shall use best efforts to ensure that the requestor secures an appropriate protective order or, if the requestor is a legislative body, use best efforts to obtain the commitment or agreement of the legislative body that it will maintain the confidentiality of the nonpublic information.

4. An Agency that receives nonpublic information pursuant to this MOU agrees to establish and maintain such safeguards as are necessary and appropriate to protect the confidentiality of the Non-public Information that may be shared, as well as any derived information. These safeguards include:

a. Restricting access to the nonpublic information to only those of its officers, employees, and contractors who have a need for such information to carry out the receiving Agency's responsibilities under applicable law;

b. Informing those persons who are provided access to the nonpublic information of their responsibilities under this MOU; and

c. Ensuring that the nonpublic information is protected in accordance with the standards applicable to Federal agencies for protection of the privacy and confidentiality of personally identifiable information and for data security and integrity.

5. All information shared pursuant to this MOU will be disclosed subject to applicable laws, regulations, and policies, including but not limited to, the Privacy Act of 1974, 5 U.S.C. § 552a, the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.*, the Trade Secrets Act, 18 U.S.C. § 1905, the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and the Bureau's confidentiality rules at 12 CFR part 1070.6.

6. The Parties agree that the exchange of information pursuant to the MOU is not intended to constitute public disclosure and is not intended to constitute a waiver of any applicable privileges, nor is such exchange intended to waive any provision of any applicable law. The Parties expressly reserve all evidentiary privileges and immunities applicable to the information shared under this MOU.

D. Sharing of Data Analytics

1. The Bureau is currently developing capabilities to share complaint analytical tools via its secure Government Portal. This functionality aims to provide government users with search functionality similar to that used by Bureau staff to enhance data sharing and coordination efforts.

2. The Bureau will make its tools available to ED via the secure Government Portal, subject to the terms of Section C and any applicable confidentiality and data security agreements.

E. General Terms

1. This MOU is effective upon the signatures by representatives of the Parties and remains effective until thirty days after either Party provides written notice to the other Party of its intent to terminate the MOU.

2. In the event this MOU is terminated, information exchanges pursuant to this MOU shall continue to be treated in accordance with any conditions imposed by the Party providing the information, unless such conditions are waived or altered by the Party providing the information.

3. The Parties to the MOU may from time to time amend this MOU in writing, and such amendments when executed by the Parties shall then become a part of the MOU.

4. This MOU may be executed in separate counterparts, each of which when executed and delivered shall be deemed an original, and all of which taken together shall constitute one and the same MOU.

5. This MOU does not transfer funds between the Parties or commit the Parties to transfer funds. Each Party shall bear its own costs of complying with this MOU. In the event funds must be transferred between the Parties for any purpose, such transfer shall be accomplished by a separate interagency agreement.

6. Attachment A to this agreement includes the name, office, and contact information, including addresses and telephone and fax numbers, for the appropriate official(s) to contact for purposes of notices and exchanges of information. This contact information will be updated as appropriate.

FOR THE BUREAU OF CONSUMER FINANCIAL PROTECTION

Robert G. Cameron

By Robert G. Cameron

Title Private Education Loan Ombudsman

Date 1/31/2020

FOR THE U.S. DEPARTMENT OF EDUCATION

By Mark Brown

Title Chief Operating Officer, FSA

Date 1/31/2020

By Joyce DeMoss

Title Ombudsman, FSA

Date 1/31/2020

ATTACHMENT A

For the purposes of notices and exchanges, please contact:

Consumer Financial Protection Bureau

Jocelyn Sutton

Office of the Executive Secretary

Phone: 202-435-9461Fax: 202-435-7329

Jocelyn.Sutton@cfpb.gov

Please also copy the following:

Robert.Cameron@cfpb.gov

and

CFPB_StakeholderServices@cfpb.gov

Department of Education

Joyce DeMoss

FSA Ombudsman

Phone: (202) 377-3881

Joyce.DeMoss@ed.gov

Please also copy the following distribution list:

FSAEngineRoom@ed.gov

EXHIBIT H

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

August 31, 2017

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1275 First St NE
Washington, DC 20002

Dear Director Cordray:

We write to provide notice of our intent to terminate the Memoranda of Understanding (MOUs) between the U.S. Department of Education and the Consumer Financial Protection Bureau (CFPB) regarding the sharing of information in connection with oversight of federal student loans. These include the MOU entered into on October 19, 2011 entitled "Memorandum of Understanding Between the Bureau of Consumer Financial Protection and the U.S. Department of Education Concerning the Sharing of Information" (Sharing MOU) and the MOU entered into on January 9, 2014 entitled "Memorandum of Understanding Concerning Supervisory and Oversight Cooperation and Related Information Sharing Between the U.S. Department of Education and the Consumer Financial Protection Bureau" (Supervisory MOU). Per the terms of the MOUs, they will terminate thirty days from the date of this notice.

The purpose of the Sharing MOU was to allow our agencies "to collaborate to ensure coordination in providing assistance to and serving borrowers seeking to resolve complaints related to their private education or Federal student loans." The Supervisory MOU supplemented the Sharing MOU with regard to certain kinds of information sharing, again so that our agencies could "cooperate in connection with their respective student financial services oversight and supervisory activities."

The Department's mission is to serve students and borrowers, but the CFPB's actions have undermined that mission by violating the intent of the MOUs. As you know, in the Sharing MOU the CFPB agreed to direct to the Department all complaints related to Title IV federal student loans within 10 days of receipt by the CFPB. However, the CFPB has failed to direct such complaints to the Department and has instead handled such complaints itself. It is the Department's role to work with federal student borrowers to ensure that their issues are addressed within the rules applicable to its program. The CFPB's intervention in this area adds confusion to borrowers and servicers who now hear conflicting guidance related to the Title IV student loan services for which the Department is responsible.

Our goals are to ease the burden for borrowers and to enhance the efficiencies of our servicers—not to complicate the federal student loan process with potentially inaccurate and inconsistent directives. The Department entered into the MOUs in reliance on the CFPB's commitment to helping each agency fulfill its respective duties. Instead, the CFPB is using the Department's data to expand its jurisdiction into areas that Congress never envisioned. This latest expansion is characteristic of an overreaching and unaccountable agency, and it has led

the Department to terminate the MOUs in order to ensure fair and consistent enforcement of Title IV requirements and the efficient resolution of borrower complaints. The Department takes exception to the CFPB unilaterally expanding its oversight role to include the Department's contracted federal loan servicers. The Department has full oversight responsibility for federal student loans.

Sincerely,

Kathleen Smith
Acting Assistant Secretary
Office of Postsecondary Education

Dr. A. Wayne Johnson
Chief Operating Officer
Federal Student Aid

cc: Seth Frotman
Student Loan Ombudsman
Consumer Financial Protection Bureau
1625 Eye Street NW
Washington, DC 20006