

March 9, 2022

To Contracting Officer Jackson McClam:

We write in response to FSA's February 23, 2022, [Request for Information](#) related to its proposed Unified Servicing and Data Solutions (USDS) program. We believe that as FSA designs and implements any new servicing/vendor program, it must address two threshold issues. **First**, any new platform must be able to execute the basic core components of the federal student loan program, ranging from payment processing to repayment plan enrollment and recertification. Servicers have struggled to accomplish this essential function, despite multiple opportunities and new program rollouts. FSA should prioritize function over form in this respect. **Second**, a new platform will not resolve past harms, nor will it substitute for remedial action. For this reason, FSA must simultaneously address past servicing failures, including through an [IDR Waiver](#) similar to the current PSLF Waiver, and then use its prospective new platform and contract procedures to guard against repeat failures.

In addition to these two threshold issues—ensuring sufficient functionality and using vendor contracts to correct course—we provide the following recommendations in response to FSA's RFI.

I. Ensure access and equity.

We urge FSA to put borrower access to effective and equitable student loan assistance and relief programs at the forefront of its USDS program. This should include ensuring that effective servicing is available to borrowers who are low-income, lack an email address or internet access or permanent mailing address, do not read or speak English, have disabilities, or are unable to navigate online portals. FSA's procurement should be informed by an analysis of what servicing improvements are needed to ensure that borrowers most at risk of default get the additional support and services they need to avoid default and successfully repay or discharge their debts, as well as an equity analysis of how servicing can reduce rather than exacerbate racial disparities in the student loan system. All too often, bureaucratic hurdles prevent borrowers from accessing critical federal loan programs. FSA should automate as many programs as possible to ensure access to the most vulnerable borrowers. Finally, FSA should ensure that borrowers have access to their complete and full payment history and any other details necessary to access student aid programs on studentaid.gov.

II. Ensure protections for defaulted student loan borrowers.

The collection of student loans in default constitutes a significant portion of servicer contracting for FSA. Student loan default and collection has devastating consequences for borrowers. Despite this, the USDS is silent on debt collection. As FSA considers implementation of USDS, we urge it to consider extending its departure from white labeling to the post-default space ensuring that borrowers always know which company they are dealing with, and to ensure that

all contractors who service defaulted student loans are in compliance with the Fair Debt Collection Practices Act and all applicable state consumer protection laws.

III. Use contract terms, such as incentive compensation, to drive improvements in borrower outcomes.

As FSA prepares to release a new IDR plan and return borrowers in default to good standing, it must ensure that servicers will accurately and faithfully guide borrowers to the most affordable and sustainable repayment plans for them. FSA already has a track record of using incentive compensation to drive vendor behavior. For example, when its Private Collection Agencies' compensation per rehabilitation increased, the number of loans that were rehabilitated increased. FSA should use contract incentives to steer servicers to lead borrowers to repayment strategies that will pay off or cancel their debt. Although FSA already compensates servicers for enrolling borrowers in IDR, it should assess whether modification to its compensation terms could drive more borrowers to enroll in IDR plans and improve on-time recertification and long-term enrollment in IDR. In addition, FSA should incentivize servicers to assess whether borrowers are eligible for other forms of administrative cancellation-- like borrower defense, closed school discharge, total and permanent disability discharge, and false certification-- and to help borrowers successfully obtain discharges. Lastly, FSA should include contract terms to disincentivize known misconduct, like forbearance steering, and to ensure that servicers only use administrative forbearances when absolutely necessary, so that borrowers do not lose time towards cancellation.

IV. Incorporate strong accountability and oversight mechanisms and standards.

The past decade has revealed both systemic servicer misconduct and insufficient FSA mechanisms to detect and address that misconduct. In recent years, states have responded by passing laws bolstering protections for borrowers and brought actions to enforce consumer protections against these servicers. FSA should learn from states' efforts to protect borrowers and integrate those lessons into USDS. Specifically, FSA should:

A. Avoid white labeling.

We encourage FSA to avoid white labeling, or obscuring information about the role of a servicer, so that harms to borrowers can be attributed to individual contractors. Further, we encourage FSA to take care to ensure that communications from servicers that are co-branded with FSA are accurate; borrowers will assume the Department's imprimatur indicates heightened servicer authority, especially if payments are accepted directly from studentaid.gov.

B. Engage in proactive accountability.

We were encouraged to see the Department's recent interpretation on servicing preemption and its prohibition on raising sovereign immunity as a defense in its recent contract extensions. FSA should also proactively require compliance and licensing in its contract. Accountability also requires that the Department be more proactive. Though there have been improvements in the past few years, recent GAO and Inspector General studies confirm that federal and state

enforcement of Higher Education Act requirements has historically been lax.¹ Furthermore, where the Department has investigated its servicers, it has failed to be sufficiently rigorous. Improving oversight begins with subjecting contracted and subcontracted student loan servicers to scheduled and surprise worksite inspections and examinations. Department staff need to have access to the servicing system so that they can listen to any stored call and review any account information without needing to request it from the servicers. Effective oversight also means that the Department must collaborate with other federal agencies and state Attorneys General to ensure that the servicers it contracts with are in full compliance with federal and state consumer protection laws.

C. Ensure borrowers have access to justice.

Private enforcement is particularly critical to ensuring that servicers operate in borrowers' best interest. Federal agencies and state Attorneys General enforcement actions play a critical role in protecting student loan borrowers. However, a number of factors limit the impact of public oversight. Agencies can only act selectively and cannot address the vast majority of individual violations. Additionally, because citizens are more likely than government agencies to be aware of the nuances of how servicers' practices cause borrowers harm, suits by individuals can drive needed administrative reform. As a result, FSA accountability alone is not enough; the enforcement system must be multi-faceted, including public oversight and enforcement, a robust public and searchable complaint and escalation system, and private enforcement rights. There are a number of ways the Department can create privately enforceable rights, including:

- Stating in the contracts and promissory notes that borrowers are third-party beneficiaries of the servicing agreement and have the right to enforce the servicer obligations that pertain to borrowers; and
- Creating separate servicing contracts between servicers and borrowers that affirm the rights and obligations in the promissory notes and contracts, including servicer obligations that pertain to borrowers.

D. Provide transparency.

Relying on a proprietary contract system hidden from the public and from borrowers is not appropriate in the federal student loan context. Transparency is critical to having a servicing system that works for borrowers. We are encouraged to see the Department's promise to include standards and rights for borrowers; however, borrowers need to know their rights in order to enforce them. In addition to making Department policies publicly available, the Department needs to collect and make publicly available the data that is necessary to evaluate whether its servicers are adequately performing their duties. In addition to the data on the Data

¹ U.S. Dep't of Educ., Office of Inspector Gen., ED-OIG/A05-Q0008, Federal Student Aid: Additional Actions Needed to Mitigate the Risk of Servicer Noncompliance with Requirements for Servicing Federally Held Student Loans (Feb. 12, 2019); U.S. Dep't of Educ., Office of Inspector Gen., Control No. ED-OIG/A04N0004, Final Audit Report (Aug. 24, 2015); U.S. Dep't of Educ., Office of Inspector Gen., Handling of Borrower Complaints Against Private Collection Agencies, Control No. ED-OIG/A06M0012 (July 2014); Federal Student Loans: Oversight of Defaulted Loan Rehabilitation Needs Strengthening: Testimony Before the H. Subcomm. on Higher Educ. and Workforce Training, Comm. on Educ. and the Workforce, 113th Cong. 8 (2014), available at www.gao.gov (statement of Melissa EmreyArras, Dir., Educ., Workforce, and Income Sec., U.S. Gov't Accountability Office).

Center website, the Department needs to include more detailed information, including re-default rates, demographic information, and information related to its enforcement actions. The Department should also make its feedback system, where students can already submit complaints about servicing, public and searchable.

Finally, the development of these rights and policies should not happen in a vacuum. We appreciate the opportunity to provide input at this stage in the re-compete process; however, the Department should make a draft of these documents available and open to comment through Regulations.gov prior to their implementation. Additionally, the Department should respond to commenters to inform them of how submitted comments will be used and by whom, and release a timeline of when the Department will be soliciting public input—including robust user testing—on the single servicing platform, both during and after the solicitation.

Thank you for your consideration. Please contact Persis Yu at persis@protectborrowers.org to discuss further.

Sincerely,

Center for Responsible Lending
National Consumer Law Center (on behalf of its low-income clients)
Student Borrower Protection Center