On August 12, 2022, Student Defense submitted five comments in response to the U.S. Department of Education's proposed 2022 Borrower Defense Rule (hereinafter the "NPRM"), published in the Federal Register on July 13, 2022. The NPRM contains critical changes to the current borrower defense rule that we enthusiastically support. There are, however, multiple ways the rule can be improved. Below is a summary of our recommendations from each of comment:

1. Recoupment

- The NPRM proposes—by its own admission—a system that will continue to fail borrowers and taxpayers by only recouping an estimated 2% of borrower defense discharges. While we strongly support the Department's plan to bifurcate the borrower defense process and establish a more permissive standard, in order to hold bad actors accountable and deter future misconduct, the Department must also put a greater emphasis on recoupment.

- The Department should add provisions to ease the path to holding owners and executives personally liable for losses to students and taxpayers.

- The Department must also make explicit that schools, rather than the Department, bear the burden in administrative proceedings to recoup borrower defense losses. While shifting this burden further supports the statutory purpose of the Direct Loan Program, the Department should acknowledge and explain this change.

- In recoupment proceedings, transparency is key to deter misconduct. The Department should make clear that it will release decisions expeditiously.

2. Borrower Defense Standard & Filing Group Claims

- *State law standard.* The Department should ensure that a violation of state law provides a basis for a borrower defense claim. Under the proposal, borrower defense applications are first reviewed only under a federal standard, and borrowers only get the benefit of a state law standard if their claim is denied and they seek reconsideration. By incorporating a state law standard into the reconsideration process, the Department has tacitly recognized the value of using such a standard. The Department should incorporate the state law standard into its initial review of borrower defense applications.

- *Unfair and abusive conduct.* The Department should ensure that "unfair and abusive" conduct—as interpreted and applied by the FTC and CFPB —can constitute a valid borrower defense claim. This will allow the Department to use these well-developed principles to adjudicate borrower defense claims.

- *Group applications on behalf of certified classes.*The Department proposes to allow only states to submit group borrower applications. This should be expanded to, at minimum, allow representatives of certified classes of borrowers to submit group applications. Throughout the NPRM, the Department correctly touts the value of class actions to promote the purposes of the Direct Loan Program, and class counsel will be well-suited to represent the interests of the class in seeking borrower defense relief. In addition, permitting only state requestors to submit group applications will result in differential treatment of student

borrowers based solely on where they live, as not all states have the resources or the inclination to investigate schools and assemble group borrower defense applications.

3. Closed School Discharge

- *One year grace period before automatic closed school discharge provision is triggered.* Under the Department's current proposal, when a school closes, students who do not complete an approved teach out will be eligible for the routine six-month grace period pursuant to 34 C.F.R § 685.207(b)(2), then will enter repayment for six months, then will receive the automatic discharge (assuming they did not already apply for relief). A cleaner, less burdensome, and more just approach would be for the Department to simply extend that grace period for an additional six months, such that borrowers who attend a school that closes will be entitled to a full one-year grace period before their automatic discharge rights are triggered. This approach would ease the burden on student loan borrowers, who will not have to enter repayment for six months, as well as on the Department, who will not have to collect payments only to refund them six months later.

4. Total and Permanent Disability (TPD)

- *Strengthen the automatic TPD provision.* Under the current proposal, the Secretary would be required to provide automatic TPD relief *only if* he obtained data from the VA or SSA, but there is no obligation to actually obtain such data. Put differently, if the Secretary were to decide not to seek data from the VA or SSA, then he would not be obligated to implement this critical provision. We believe the rule must be strengthened to place an affirmative obligation on the Secretary to obtain data from the VA and SSA. In addition, the Department should work with the VA and SSA (through a joint rulemaking or other means) to ensure that each agency is bound by the process set forth in this regulation.

5. Arbitration and Class Action Waivers

- *Additional clarity around the new transparency provisions.* The Department proposes to require schools to submit arbitral and judicial records "in connection with any borrower defense claim filed in arbitration by or against the school," section 685.300(g), or filed "in a lawsuit," section 685.300(h), for inclusion in a centralized database available to the public. We support this provision but believe the Department should clarify: (i)what it means by "in connection with any borrower defense claim" filed in arbitration or in a lawsuit; and (ii) whether schools are required to submit evidentiary records that are relied on in pleadings and orders as part of the public repository of schools' arbitral and judicial proceedings. Inclusion of the full record would ensure transparency and clarity.