August 1, 2016

The Honorable John King

Secretary of Education

U.S. Department of Education

400 Maryland Avenue, S.W.

Washington, DC 20202

Re: Proposed Rule on Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program (Docket ID ED-2015-OPE-0103)

This comment is submitted by the Center for American Progress (CAP) and Generation Progress (GP).

CAP is a progressive, nonpartisan think tank dedicated to improving the lives of Americans through ideas and actions. As part of its activities in developing policies to reduce poverty and ensure a stable middle-class, CAP advocates for public policies that improve the financial well-being of low- and moderate-income households and promote a financial system that works for all Americans.

Generation Progress is the youth engagement arm of the Center for American Progress, and works with and for young people to promote progressive solutions to key political and social challenges. Generation Progress engages a diverse group of young people nationwide, inspires them to embrace progressive values, provides them with essential trainings, and helps them to make their voices heard—and to push policy outcomes in a strongly progressive direction. Generation Progress also houses the Higher Ed, Not Debt campaign, a national, multi-year, multi-organization campaign dedicated to the premise that a high-quality higher education should be affordable and accessible to all without the burden of debt or financial hardship.

Thank you for the opportunity to submit comments on the proposed regulations clarifying a borrower's ability to raise defenses against repaying their student loan based on an act or omission by their school, as well as regulations related to the financial responsibility of educational institutions and their use of contractual provisions such as mandatory pre-dispute arbitration agreements or class action waivers.

Our organizations have worked with several thousand students who have shared their stories of misrepresentation and deception by unscrupulous educational institutions. This rule is urgently

need to hold schools accountable to the promises they make students and to ensure the integrity of Title IV programs into the future.

Borrower Defenses[1]

Students who were deceived by their school should be made as whole as possible through the processes laid out in this rule.

For students that attend a school that breaks its promises, the costs they incur go far beyond the costs associated with repaying a student loan. Students that attended unscrupulous schools will never be able to, through this rule, get back any of the costs associated with their attendance not related to a Direct Loan disbursement. They will never recover the time, transportation costs and other out of pocket costs they may have wasted pursuing an education that did not live up to its promise. Because of this, full relief, meaning a full discharge of federal loan obligations and reimbursement for loan payments made, must be presumed as the default.

If any form of partial relief is to be considered the Secretary must justify through public explanation why the standard full discharge and reimbursement was not awarded. Using full discharge and reimbursement as the standard, and partial relief as the exception, also has the added benefit of being administratively less burdensome on the Department as they put in place the processes for adjudicating borrower defense claims.

This borrower defense rule must ensure that borrowers with Federal Family Education Loans (FFEL) borrowers are included.

Students were not given a choice as to what type of federal loan they could take out to afford to go to school. Borrowers that took out FFEL loans are entitled to the same protection as borrowers who took out Direct Loans. 42% of borrowers with outstanding federal loans have FFEL loans, so for this rule to truly give relief it must ensure that they are eligible to borrower defense protections under the same process as Direct Loan borrowers. The Department can ensure this level of protection by stipulating that FFEL lenders had a referral relationship with institutions when a high percentage of borrowers at a school had the same lender.

The Federal Standard must serve as a floor, not a pre-emption of state consumer protection law.[2]

The proposed rule correctly defines substantial misrepresentation as “any misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person’s detriment.” It is important that this standard be maintained and that borrowers not have to demonstrate reliance on any misrepresentation, or intent by the school to mislead. It is also vital that the proposed rule maintain omissions as part of this misrepresentation standard, as schools through the omission of important information regarding

[1] Borrower Relief §685.222(i) and Appendix A

[2] §685.222(b), (c), and (d) and §668.71 Federal Standard Limitation Periods

their education often mislead students, rather than an actively misrepresent information related to the education they provide.

However, as noted above, this standard is not sufficient to encompass the many ways in which a school could mislead a borrower, and therefore must serve as a federal floor for protection that a student can use along with state consumer protection laws to make a borrower defense claim.

States play an essential role in consumer protection and it is important that this rule not eliminate a borrower's right to assert a borrower defense based on a violation of state law. State consumer protection laws governing unfair, deceptive, unlawful or fraudulent conduct should not be pre-empted by the federal standard proposed in this rule. Rather the new federal standard should function as a "floor" for protection, rather than the only path to relief for borrowers that have been victim to an unscrupulous school.

As currently drafted the proposed rule suggests that state law standards would present a burden for borrowers seeking relief. This is an unreasonable conclusion given the difficulty for borrowers in bringing a claim. Affording borrowers more options to claim a borrower defense rather than limiting their claims by eliminating state law claims should not be seen as a burden but rather an essential tenet of borrower relief. Borrowers subjected to treatment by a school that may not meet the misrepresentation standard, but would meet a state standard protecting against deceptive, unfair or abusive conduct, should have the opportunity to make a borrower defense claim.

The rule should eliminate arbitrary limitation periods on a borrower's ability to assert a borrower defence claim.[3]

The Department notes in its explanation of the proposed rule that common law generally allows a debtor to assert a claim at any time as long as repayment is on going. A statute of limitations for borrower defenses is inappropriate for this very reason. So long as the Secretary can require repayment, a borrower must be able to defend against repayment. While we agree that claims made closer to the time of a borrower's attendance at a school, while "memories are fresh," will be easier to make, this is not sufficient reason for an arbitrary statute of limitations. If a borrower is able to make a legitimate claim decades after the time of their attendance, so long as that claim meets the standard of this rule they are entitled to relief.

This statute of limitations on borrower defense also creates a system that punishes borrowers who have attempted to repay their loans, creating a disincentive for borrowers to repay. Borrowers with legitimate borrower defense claims, regardless of when those claims are made, are entitled to not only the discharge of loans they have not yet paid, but also reimbursement for loan payments previously made to the Secretary. As it is currently structured, this statute of limitations could punish borrowers who have paid a portion of loans taken out to attend an unscrupulous school.

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[3] §685.222(b), (c), and (d) and §668.71 Federal Standard Limitation Periods

Expand the types of judgment that would trigger borrower defense to include settlements.[4]

The Department's standard for considering judgments against a school for either individual or group borrower processes is too high and must be expanded. The proposed standard requires contested, non-default judgments, a standard so limiting for borrowers as to have virtually no impact, as most litigation ends in a settlement. This standard must be expanded to include cases in which a settlement was reached in order to streamline the process and make it accessible to borrowers.

The process by which a student's eligibility for borrower defense is determined must be transparent and independent, and not a function of the Department's ability to recoup damages from a school

If a student was a victim of substantial misrepresentation by an educational institution, they are entitled to a fair and independent examination of their claim. A borrower defense claim must be considered on its merits, not on the ability of the Department to repay the claim. If a student was defrauded they are entitled to relief, and questions regarding the federal fisc or the Department ability to recoup funds from a school should not influence the determination of a borrower's eligibility for borrower defense.

The adjudication of borrower defense claims must be conducted within an independent reporting structure through a transparent process to ensure that borrowers are given a fair shot at relief. This process must also ensure that that borrower defense claims, including information on the nature of the claim, the school involved and the status of the claim, are all made public.

Process for Individual Borrowers[5]

The process for individual claims must be simple, accessible and transparent for borrowers. It is important that this process is not overly burdensome for an individual borrower, who will not have access to the same resources and evidence that an institution may have.

For borrowers submitting a borrower defense claim against an open school that the Department design the process such that borrowers are not required to enter into an adversarial process against a school that will likely have more resources to bring to bear in a borrower defense case. Rather, for an individual filing a borrower defense claim, they should be required to interact only with the Department, and to the extent that any information or evidence must be obtained from the school, that it is the Department that is communicating with the institution.

Finally the Department must ensure that there is a process by which individual claims can be grouped together in cases where multiple individual claims are received from borrowers that attended a specific school. If a small group of individual claims from one school is received that must trigger an examination by the Department of the nature of the claims and further

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[4] §685.222(e), (f), (g), and (h) Judgment Against a School

[5] §685.222(e)

investigation as to whether a group process must be initiated by which automatic discharge for all students in a school or program is obtained.

Group Process for Borrower Defenses[6]

The proposed regulation does not currently go far enough in order to protect students from large scale misrepresentation by educational institutions, because as currently drafted it does not require the Secretary to grant automatic relief to borrowers in the case of a valid group claim, rather it leaves the determination of relief up to the Secretary's discretion. This does not provide sufficient protection for borrowers. In cases where common facts and claims demonstrate that there is a basis for borrower defense this regulation must require the Secretary to grant relief for borrowers in that established group.

In cases where a group has been established by submissions to the department by State Attorneys General or other advocates, the Department must be required to grant relief. References to consideration of the fiscal impacts of claims must be struck from this portion of the rule. If borrowers were victims of fraud by a school that the Secretary allowed federal funds to flow to, the facts of that fraud do not change based on the fiscal impact of relief. As noted above, considerations of fiscal impact must be reserved for the preventative financial responsibility portions of this rule, and should not be considered as a basis for the granting of relief for a legitimate borrower defense claim. It is essential that this language is struck so that borrowers are given a fair shot at relief that the Department is incentivized to catch and stop fraud by schools early.

Maintain sections that ensure borrowers are not financially penalized for making a borrower defense claim through the use of tools like as forbearance.[7]

It is important that borrowers with an active borrower defense claim not be required to make payments on their loans during the Department's consideration of their claim, however these sections must be strengthened to ensure that borrowers are not required to pay for any interest accrued during the time that the Department considers their claim.

Maintain sections that ensure the Department is able to recover costs from unscrupulous institutions.[8]

We support the Department's ability to recover costs from an institution associated with their financial liability for failing to perform their functions as a Title IV recipient. We support the removal of the three-year limitation on the Department for these recovery actions. As noted above in our comments on the statute of limitations for borrower claims, so long as the Department is collecting on a loan, borrowers must be able to defend against repayment, and so

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[6] §685.222(f) (g) and (h)

[7] Administrative Forbearance §685.205(b)(6) and Mandatory Administrative Forbearance for FFEL Program Borrowers §682.211

[8] Remedial Action and Recovery From the Institution §§685.206, 685.308

to, the Department must retain its ability to recoup the costs of an institution's misrepresentation in the case of a legitimate borrower defense claim. However we would re-iterate that Department's ability to recover from an institution must have no bearing on the adjudication of a borrower defense claim, students should have their claims considered independent of the Department's ability to collect from the school that defrauded them.

Institutional Accountability and Financial Responsibility

The financial responsibility requirements in this rule are vitally important to protect not only students, but taxpayers, and ensure the health and integrity of Title IV programs into the future.

The collapse of Corinthian Colleges underscores the importance of the preventative measures this rule will allow the Department to take by ensuring that schools are acting in a way that is financially responsible early enough that any school collapse does not leave students and taxpayers without the means for recourse or relief from an unscrupulous school. The strength of the financial responsibility requirements of this rule will allow the Department to catch problems earlier, and ensure that if a school is engaged in unscrupulous practices, it will be the school, not taxpayers, that must pay for these actions.

Require institutions to warn students when they are unlikely to repay their loans.[9]

Requiring institutions to warn students when they are unlikely to repay their loans is a valuable disclosure. In general, we encourage the Department to adopt a repayment rate definition that sets a bar for success that better reflects progress toward paying down a loan, not just students avoiding an increase in their balance. But we understand that this measure is being set to reflect deeply problematic behavior and so do not see the value in litigating this point further at the moment. That said, we do suggest the following tweaks:

Create rules to handle loan payments when borrowers take out loans at multiple schools and consolidate

The proposed rule correctly notes that an institution should only be judged on repayment for loans taken out by a student at their school. But borrowers may not necessarily attribute their payments in that way. For example, if they consolidate, then payments will be applied to a single balance. This creates a problem for institutions where borrowers took out loans elsewhere because that individual needs to pay back more money in order to reduce their balance than if they were only paying down loans at that one college. Therefore, the Department should establish rules for how to treat payments on consolidation loans that include debts from multiple colleges. The best strategy may simply be to attribute the same debt payments to loans at multiple institutions.

Move borrowers that spend several years in an in-school deferment to later cohorts

[9] *§668.41(h) Loan repayment warning for proprietary institutions*

Borrowers who go back to school will likely spend several years in an in-school deferment. During this time they will accumulate interest if they have unsubsidized or Grad PLUS loans. In such situations these students may accumulate so much interest that even if they enter repayment for the final year of the cohort window they will be unable to reduce their balance. To assuage this concern, the Department should adjust the cohort a given borrower appears in to the one in which they will have spent at least a majority of the measurement window in a non-in-school deferment status. The Department should consider a similar position for veterans. If desired, the Department could extend this even further to the cohort year in which a borrower will have spent five years in a non-in-school or military deferment status.

Calculate graduate, undergraduate, and Parent PLUS repayment rates separately

Combining graduate and undergraduate debts together in a repayment rate may introduce complications. For one, graduate students can borrow a great deal more money, meaning the amounts they have to repay are larger, and increasing the odds of failing a repayment test. The other is that from a consumer disclosure standpoint, a student looking at an undergraduate program is different from one looking at a graduate program. This means you want to make sure you are properly warning students about at least the general credential level they might pursue.

We also recommend that the Department calculate and separately warn parent borrowers about low repayment rates.

Apply the repayment disclosure to all institutions

Borrowers should have a right to know if they are borrowing at a place where they are unlikely to repay, regardless of where they attend.

Where possible, standardize repayment rates across disclosures

We strongly support the idea of disclosing repayment rate information to borrowers. In doing so, though, the Department should strive to ensure consistency across the data given to borrowers. To that end, if the repayment rates used in this situation are different from those used for gainful employment or other purposes, the Department should pick one standard and stick with it.

Define clear actions and triggering events to ensure the federal government has resources to cover potential loan discharges.[10]

Financial penalties are a crucial tool for protecting student and taxpayer dollars. Under current regulations, it is too easy for institutions to engage in behavior that is not in the best of interests of students and then close down with no warning. When this happens, taxpayers are stuck paying the bill for student loan discharges and forgiveness.

By defining clear guardrails that result in additional financial consequences, the proposed rule creates an important framework for ensuring the federal government has additional resources to

[10] §668.171(c) Actions and Triggering Events

cover the costs of potential loan discharges. In reviewing those guardrails, however, we have some additional suggestions for refining and clarifying them.

Add an automatic trigger for renewal of provisional certification alternatives after three years for institutions without a passing financial responsibility score

Current regulations appear to allow an institution that does not have a passing financial responsibility score to be provisionally certified for no more than three years. Yet they also state that the Secretary can renew this status. In renewing such a status, regulations state the Secretary may assess additional financial protection. Given that an institution in this status has failed to achieve financial responsibility for at least three years, the Department should clarify the amount expected of any sort of renewal of this provisional status and make it an automatic trigger.

Accrediting Agency Actions

Actions taken by an accreditor could be a sign that the institution may imminently lose access to federal financial aid. In those cases, asking for additional funds upfront is a sensible step as an advance protection for taxpayers. Unfortunately, a recent CAP review of accreditor actions taken over the last five years shows that the current sanctions system is highly inconsistent. This is true with respect to terminology, the frequency with which actions happen, and how long an institution stays on a negative status. For more information on this, please see Antoinette Flores's "Watching the Watchdogs," which was published in June 2016 and is available here.

Given this inconsistency, we recommend making several changes to the accrediting actions trigger.

- **Make accreditor actions a discretionary trigger:** The inconsistency among accreditors makes an automatic trigger tied to negative sanctions difficult. Accreditors do not interpret what it means to be on probation or show cause the same, resulting in some agencies where these actions rarely occur and others that use them more often. Making sanctions by accreditors an automatic trigger also risks interfering with their independence and may make them unlikely to take action when they should.

- **Make the submission of a teach out plan under 34 CFR §602.24(c) a separate, automatic requirement:** This regulatory sections creates conditions where an accreditor must request a teach out plan. Unlike accreditor sanctions, these are clearer circumstances that suggest the institution may imminently close. Keeping these conditions as automatic requirements thus makes sense, but only for those under 34 CFR §602.24(c).

- **Remove the requirement that institutions be on a sanction for six months or longer:** One clear finding from our research is that many accreditors appear to be putting institutions on a negative status for a very short period of time. In other agencies, they

require any institution facing a sanction to stay on there for at least a year. We worry that setting a clear threshold of six months will give institutions too much leverage to argue for withdrawal of sanctions faster than should otherwise occur.

- **Clarify whether this should be triggered for the corporate body or the individual campus:** While the federal financial aid programs are most concerned with the main campus, accreditors review every campus. The result is that sometimes they may take action at a branch campus and not a main one. The regulation should clarify whether the sanctions would be applied and calculated off of aid for main campuses or branch campuses depending on which faces accreditor sanctions. This also matters for teach out plans, which might be submitted for a branch campus instead of the entire main campus.

Other events or conditions

The rule correctly identifies that there are many circumstances that may indicate troubling outcomes at an institution but should not rise to the level of an automatic trigger. In general, the items the rule proposes to place into this category makes sense, but we suggest a few tweaks:

Clarify that Title IV fluctuations should be large in both dollar and percentage terms: Big changes in the amount of financial aid received by a college could be a sign of growth that is too fast or an enrollment decline that may signal a school is in serious trouble. But at small schools, big percentage changes could simply be the result of small changes in the number of students. While we are confident that the actual implementation of this rule would not result in the Secretary holding a small school accountable for what is a minor change, it is worth clarifying that the change in federal aid would need to be large both in percentage and dollar terms as a way of proactively assuaging this concern.

Alternative Standards and Requirements[11]

Create a time limit and greater letter of credit requirement for provisional status.

Current regulations create multiple options for institutions with a failing financial responsibility score. But the current terms between the zone or provisional certification alternatives are not sufficiently equal. And the time limits associated with them are unclear. To address this, we recommend the following fixes.

Increase the initial letter of credit for institutions on provisional status.

The Department should create clearer requirements and time limits on this renewed provisional status. For starters, the Department should increase the minimum size of any letter of credit required of an institution that chooses the provisional certification alternative. Currently, an institution choosing this option only has to provide a 10 percent letter of credit, while one that

[11] §668.175 Alternative Standards and Requirements

chooses to avoid provisional certification must submit one equal to 50 percent. We recognize that part of this difference reflects the bigger risks to an institution that come with being provisionally certified. But the current gap in letters of credit is too large. To that end, we recommend the Department increase the minimum letter of credit to provisionally certified institutions under this provision to 25 percent. This should apply only to institutions entering this status after the regulations go into effect.

Automatically increase the letter of credit for institutions that renew their provisional status.

Under 668.175(f)(1) the regulations suggest that an institution may participate under the provisional certification alternative for no more than three consecutive years. But 668.175(f)(3) suggests that the Secretary may allow the institution to renew this provisional certification. Regulations say that renewing a provisional status may result in additional financial requests.

The Department should clarify the terms of renewing a provisional status after three consecutive years in this position. In particular, it should include an automatic trigger that increases the size of the letter of credit owed for any renewals to 50 percent of their federal financial aid. This matches current requirements that institutions must meet for a failing responsibility score where they do not choose the provisional certification alternative. And it reflects that an institution has already spent a great deal of time in a status that suggests financial concerns.

Limit how long an institution may renew its provisional status.

The Department should also provide greater clarity about how long an institution may renew its provisional status under 668.175(f)(3). Current rules are unclear, suggesting an institution could potentially stay in this status forever. The Department should place a time limit on these renewals. Ideally this should be no longer than how long institutions can stay on negative sanctions elsewhere, which tends to be three years. However, even six years in this status may be an unacceptably long amount of time.

Other options for the Department to obtain funds from institutions.[12]

We agree that the Department of Education needs some way to obtain funds from institutions that fail to provide a letter of credit. The current set-aside proposal, however, is overly generous in terms of time and amount. In particular, we suggest the following changes.

Make set-aside amounts larger than letter of credit requests.

The inability to obtain a letter of credit may in and of itself be a warning sign that private investors do not trust the college enough to be involved with it. Therefore, we suggest that any amounts covered by the set-aside provision should be set at 1.5 times the size of a letter of credit. This both will encourage colleges to obtain letters of credit and also send a strong message that the set-aside is a last resort action.

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[12] §668.175(h) Set-aside

Implement other limitations on colleges that cover letters of credit through set asides.

The set aside is not the ideal way to get institutions to provide their financial commitments. Accordingly, this provision should come with greater protections for students and taxpayers. At the very least, this should include some sort of limitation on federal financial aid that prevents the college from increasing the number of federal aid recipients at the school and potentially even considers not allowing for new enrollment of federally aided students. Absent such protections, schools may face perverse incentives where they are encouraged to grow enrollment as a way of meeting the set aside conditions.

Lessen the time period for collecting set-aside amounts.

Nine months is a long period of time for collecting amounts that an institution would otherwise be expected to provide in 30 days through a letter of credit. Nine months is also a long time in general—almost an entire academic year. Collecting the funds in this amount of time makes it possible for institutions to still enroll a large number of students and then run the risk of shutting down. The Department should shorten this time period to no more than half an academic year.

Prohibition of Pre-Dispute Mandatory Arbitration Clauses & Class Action Bans[13]

Students should never be compelled to sign away their legal rights in order to enter a classroom.

We support the Department of Education's proposal to prohibit the use of pre-dispute mandatory arbitration clauses and class action bans in student enrollment agreements. As the Department has recognized, these clauses which limit students' ability to sue make it more difficult to hold institutions of higher education accountable. And yet, such clauses have been ubiquitous among for-profit colleges.[14] Billions of dollars in federal financial aid have flowed to institutions with these types of provisions in their enrollment agreements, effectively giving educational programs a free pass for low quality. Limiting the use of litigation also hampers regulatory effectiveness, as legal developments indicate to regulators and policymakers pressing issues toward which they should direct their resources.[15]

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[13] §685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program

[14] Tariq Habash and Robert Shireman, "How College Enrollment Contracts Limit Students' Rights" (Washington: The Century Foundation, 2016), available at https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/.

[15] For example: Public Citizen, "Private Actions, Public Benefits: Private Litigation Aids Public Enforcement of Consumer Protection Laws," September 20, 2013, available at http://www.citizen.org/documents/private-litigation-public-enforcement-consumer-protection-report.pdf.

When arbitration has been used as a dispute resolution mechanism, the process and outcomes have often been opaque due to confidentiality agreements. Meanwhile, empirical evidence to date generally suggests both a lower likelihood of success in arbitration relative to the courts, as well as lower financial amounts returned to wronged individuals.[16] We applaud the Department for its proposal to collect records pertaining to arbitration processes and outcomes as a necessary step to increase transparency and enable a more thorough analysis of the use of arbitration.

At the same time, we are concerned that the Department's proposed rule does not go far enough to protect students' legal rights. We recommend that the Department ban any pre-dispute arbitration agreement with students, whether a student's ability to enroll is conditioned on these agreements or not. An optional, yet binding, agreement, or an agreement containing an "opt-out provision," are both equally troubling for students who may be unaware of the extent to which such an agreement may limit their rights in the future.

We also encourage the Department to extend these protections to all students at institutions participating in the Direct Loan program, not just those students receiving Direct Loans. Enabling students receiving federal student loans to challenge their school in court, while not extending this right to other students at the same school, would result in a two-tiered system of justice and would make it more difficult to pursue claims against a school. Similarly, the Department should extend its ban on mandatory arbitration to a wider range of claims beyond those related to borrower defense to repayment. Potential claims covered by the rule should, at a minimum, include all educational services provided—not just those financed by a Direct Loan—as well as discrimination, sexual assault, and harassment claims. The failure to provide students with broad access to the courts will ultimately undermine the goal of delivering accountability to schools receiving federal funds that do not adequately serve their students.

Thank you for the opportunity to comment on this rule. For more information or questions regarding this comment feel free to contact Maggie Thompson (mthompson@americanprogress.org), Ben Miller (blmiller@americanprogress.org) or Joe Valenti (jvalenti@americanprogress.org).

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[16] [3] Alexander Colvin, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes," *Journal of Empirical Legal Studies*, 8(1), 1-23, available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1586&context=articles; Consumer Financial Protection Bureau, "Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a)," March 2015, available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.