



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

THE STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL



August 1, 2016

The Honorable John King
United States Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Jean-Didier Gaina
United States Department of Education
400 Maryland Avenue, SW, Room 6W232B
Washington, D.C. 20202

Re: Docket ID ED-2015-OPE-0103

Dear Secretary King and Mr. Gaina:

We, the undersigned Attorneys General of Massachusetts, California, Illinois, Maryland, Kentucky, Connecticut, Delaware, Hawaii, Maine, Minnesota, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia, as well as the Executive Director of the Office of Consumer Protection of Hawaii, write to share our views on the U.S. Department of Education's ("Department") proposed rulemaking on borrower defense to repayment—the process by which student borrowers preyed upon by predatory schools can assert their legal rights to debt relief.

Since early 2015, the state attorneys general have actively engaged with the Department in this rulemaking process because our investigations and enforcement actions have repeatedly revealed that numerous for-profit schools have deceived and defrauded students, and employed other unlawful tactics in order to line their coffers with federal student-loan funds.¹ The resulting

¹ See, e.g., AG Harris Obtains \$1.1 Billion Judgment Against Predatory For-Profit School Operator, Mar. 23, 2016, <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-obtains-11-billion-judgment-against-predatory>; Madigan Sues National For-Profit College, <http://illinoisattorneygeneral.gov/pressroom/201201/20120118.html>; Madigan Announces Settlements With For-Profit Education Management Corporation http://www.illinoisattorneygeneral.gov/pressroom/2015_11/20151116.html; <http://migration.kentucky.gov/Newsroom/ag/nationalcollegesuit.htm>, Aug. 20, 2013 (Kentucky AG suit against

devastation to borrowers and their families has been vast and heartbreaking.

We appreciate the Department’s recognition that students need “consistent, clear, fair, and transparent processes to seek debt relief.”² As we stated earlier this year in our final submission to the Department’s negotiated-rulemaking committee on borrower defense, “[w]e wholeheartedly agree with the Department’s express aim for the rulemaking: ‘to make the process of forgiving loans efficient, transparent, and fair—and to ensure students receive every penny of relief they are entitled to under law.’”³

We wish to express our strong support for a number of the measures adopted by the Department in the proposed rule, as well as to highlight other aspects of it that we believe should be revised in the interest of achieving consistent, clear, fair, efficient, and transparent relief for students.

We are particularly encouraged by a number of the Department’s changes to the proposed rule, including the inclusion of new provisions to limit the use of binding pre-dispute arbitration agreements and class-action waivers by schools and protect the legal rights of students; to increase the reach of closed-school discharge provisions, particularly through an automatic process and increased notice by the Department; and to expand the timeframe during which defrauded students may seek full relief from the Department. Similarly, the Department’s continued support for the group discharge process is encouraging and central to providing meaningful relief to defrauded students. These creative, forward-thinking, and borrower-centered provisions will help remedy the outrageous mistreatment of taxpayers and students by predatory schools. They are important steps toward achieving rightful relief for students and holding predatory schools accountable to taxpayers.

To bolster the proposed rule’s ability to protect consumers and the public fiscal interest, however, we urge the Department to consider the following additional revisions before promulgating the final rule: (i) restore referrals from state attorneys general and legal aid organizations to strengthen the group discharge process; (ii) limit the use of the partial-relief provisions of Appendix A; (iii) continue to recognize violations of state law as a basis to assert borrower defense claims without the need to obtain a final, litigated judgment; and (iv) adjust the language concerning arbitration agreements to ensure the strength of those provisions.

National College); For-Profit School Sued for Deceiving Students and Facilitating Unfair Loans, April 3, 2014, <http://www.mass.gov/ago/news-and-updates/press-releases/2014/2014-04-03-corinthian-complaint.html>; ITT Tech Sued for Deceiving Students About its Computer Network Systems Program and Success in Finding Jobs, April 4, 2016, <http://www.mass.gov/ago/news-and-updates/press-releases/2016/2016-04-04-itt-tech.html>; AG’s office sues ITT Educational Services, <http://www.bizjournals.com/albuquerque/news/2014/02/27/ags-office-sues-itt-educational.html>, Feb. 27, 2014.

² 81 Fed. Reg. 39330 (June 16, 2016).

³ <http://www.ed.gov/news/press-releases/education-department-appoints-special-master-inform-debt-relief-process> (June 25, 2015 public statement by Under Secretary Ted Mitchell).

1. Restore formal group referral from state attorneys general and legal aid organizations

One of the most significant components of the borrower defense rule is the group debt-relief process contained in § 685.222(f)-(h). We applaud the Department’s inclusion of group relief in the proposed regulation. As we have learned from our investigations and enforcement actions, predatory schools often engaged in systemic practices that subjected wide swaths of prospective and enrolled students to the same egregious abuse and deception. As the Department has recognized, automatic group process is necessary if we seek to provide relief to all students with rightful claims, and is consistent with the Department’s current regulations and state consumer-protection laws.

We particularly support the Department’s proposal that where schools have committed systemic offenses against a group of borrowers that would give rise to a borrower defense, the burden shifts to the offending school to show why a particular student should not receive relief. This vital measure recognizes the unfairness and inefficiency of requiring entire cohorts of victimized students to individually assert their rights against a school engaged in well-documented patterns of abuse.

However, the state attorneys general believe the Department should reinstate a critical provision from the negotiated rulemaking that would allow state attorneys general, state regulators, and legal aid organizations to make formal group referrals to the Department. We sought this referral process to increase public transparency in the group relief process; to improve information sharing and communication between federal, state, and nonprofit partners; to build upon the unprecedented collaboration between governmental agencies in addressing abuse in higher education; and to ensure that all parties are empowered to hold each other accountable for better outcomes in the years ahead. Given the role of the states in protecting consumers through state general consumer-protection laws, commonly referred to as “UDAP” statutes (short for Unfair and Deceptive Acts or Practices),⁴ and our recognized role in the “triad” of higher education oversight,⁵ we believe the restoration of a formal referral process will help streamline and strengthen borrower defense implementation.⁶

⁴ These statutes generally make unlawful any unfair or deceptive trade practices as defined by state law. *See, e.g.*, Cal. Bus. & Prof. Code § 17200 (“unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising”); Mass. Gen. Laws ch. 93A, § 2 (“unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful”); 815 Ill. Comp. Stat. 505/2 (“unfair or deceptive acts or practices . . . in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby”). Beyond just outlawing unfair or deceptive acts, some UDAP statutes include an “unlawful” prong that broadly “borrows” violations of other laws and makes them independently actionable as a UDAP violation. *See, e.g.*, Cal. Bus. & Prof. Code § 17200. Some also look to the attorneys general not only as the primary enforcer of their terms, but also as the regulators who clarify the meaning of their statutory provisions. *See, e.g.*, Mass. Gen. Laws ch. 93A, §§ 2, 4.

⁵ *See* United States Government Accountability Office, Higher Education: Education Should Strengthen Oversight of Schools and Accreditors; Table 1: Oversight Roles and Responsibilities of the “Triad,” Dec. 2014, (*available at* <http://www.gao.gov/assets/670/667690.pdf>).

⁶ *See* Editorial, Protecting Students From Bad Colleges, N.Y. Times, June 20, 2016,

Proposed language to add as § 685.222(f)(2): A state attorney general, state or federal enforcement agency, or a legal aid representative may submit a written request identifying a group of borrowers for the Secretary to initiate the process described in either paragraphs (g) or (h) of this section. The Secretary will determine whether such a process will be initiated. At the request of the party seeking group relief, such determination shall be in writing, and shall be issued within a reasonable period of time.

We also take this opportunity to underscore the urgent need for an automatic group-discharge procedure for former Corinthian students and thousands of other victimized borrowers eligible for relief, a belief we know is shared by the Department's Enforcement Office and Borrower Defense Team. As the Special Master's Fourth Report details, the Department has reached out with postal mail and email to more than 335,000 former Corinthian students, but, as of June 24, 2016, had received only 23,185 applications and granted relief to only 3,787 borrowers, less than 2.0% of former students.⁷ Given what we all know about Corinthian's egregious, widespread falsification of job placement rates, the reason for this abysmal response and relief rate cannot be that more than 98% of its students somehow escaped Corinthian's fraud. Rather, this data suggests that requiring affirmative applications for relief is a substantial impediment for many individuals in the demographics that schools like Corinthian were known to target. We urge the Department to implement the proposed group discharge procedures now for appropriate groups of students currently pending before the Department, including the groups proposed by the Massachusetts Attorney General's Office and the Illinois Attorney General's Office.

The experience of the Massachusetts Attorney General also attests to the value of automatic processes for borrower defense. On March 25, 2016, following the Secretary's announcement in Boston that certain Everest and WyoTech students were eligible to seek streamlined debt relief,⁸ the office began an unprecedented outreach effort to assist the approximately 2,400 former Massachusetts Everest students within the identified groups. The office has since made over 3,000 phone calls to connect with eligible students and families, mailed more than 5,700 letters and postcards, and held 11 education and application assistance events in communities with concentrations of former students. These efforts have helped eligible applicants to submit more than 1,000 applications for borrower defense. In total, the office has committed more than 1,200 lawyer, paralegal, and administrative work hours to outreach, in-person assistance, and the organization of submissions to the Department. While these efforts underscore the importance to

<http://www.nytimes.com/2016/06/20/opinion/protecting-students-from-bad-colleges.html> (“[T]he method the department would use to identify [] group[s] is complicated and lacks transparency. One way to fix that is to identify groups through the many lawsuits that state attorneys general have filed in their efforts to clean up this industry. They pioneered this fight, after all, and have the deepest understanding of where the problems lie and how to fix them.”).

⁷ <https://www2.ed.gov/documents/press-releases/report-special-master-borrower-defense-4.pdf>

⁸ <http://www.mass.gov/ago/news-and-updates/press-releases/2016/debt-relief-for-corinthian-students.html>

the states of assisting distressed borrowers, they also demonstrate how laborious it can be to connect even those students in cohorts *already* identified by the Department as *eligible* for a borrower defense discharge to the relief they deserve,⁹ when they are required to affirmatively apply for such relief. These resources could also be used for other efforts, such as enforcement actions to hold more predatory schools accountable. An automatic group discharge procedure would be both fairer and more efficient.

2. *Remove or limit the partial relief process of Appendix A*

The Department’s proposed rule includes “Appendix A,” a methodology designed to allocate, in some circumstances, only *partial* debt relief to successful borrower defense applicants. We strongly recommend that Appendix A be removed from the rule. Alternatively, it should be revised so that partial relief is an option only for borrower defense claims based on breach of contract, because when a school breaches a contractual provision, it is possible that a borrower nevertheless received at least a partial benefit from his or her education. In the case of a school’s substantial misrepresentation, however, borrowers should be entitled to full relief, or at least a presumption in favor of full relief, because already built into that standard is a requirement that the representation be “substantial,” meaning the borrower reasonably relied on the misrepresentation to his or her detriment. As written, Appendix A instead erroneously affords a culpable school—already proven by the borrower to have egregiously violated the law—the presumption that its education had at least some value to the borrower.

Although we recognize that the proposed Appendix A offers a set of non-exclusive, discretionary methods the Department official may consider in calculating relief, in practice it could end up creating a secondary review process for a borrower defense applicant who has already succeeded on the merits of his or her claim. This is an unfair burden to impose on borrowers whose claims concern a school’s substantial misrepresentation. In such cases, as our offices have seen during our investigations and prosecutions of predatory for-profit schools, the partial relief contemplated by Appendix A would be inherently difficult to calculate and insufficient to make a victimized student whole. In the case of Corinthian, for example, our experience has taught us that the vast majority of its students would never have enrolled had the institution truthfully represented its job placement rates.

As the Department discusses in its comments on the Proposed Rule,¹⁰ we recognize the need to balance the interests of harmed borrowers with those of the taxpayers. Removing the presumption of full relief in substantial misrepresentation cases, however, tips the scales of fairness too far in the wrong direction. It is fundamentally unfair to subject individuals or groups who have already raised successful borrower defense claims, establishing that they reasonably relied on a school’s misrepresentations to their detriment, to a second review process. Appendix

⁹ <https://studentaid.ed.gov/sa/about/announcements/corinthian>

¹⁰ 81 Fed. Reg. 39352 (June 16, 2016).

A creates an unnecessary hurdle to the appropriate, full relief to which the majority of successful substantial misrepresentations claimants will be entitled. We suggest revising Appendix A so that it is limited to the breach of contract context, or at least so that it incorporates a presumption of full relief for students whose claims are based on substantial misrepresentations.

3. *Restore violations of state law as basis for borrower defense in the first instance*

As previously discussed, we appreciate that the proposed rule improves upon the status quo in many ways. Yet in one critical aspect it has taken a step backward: it deprives borrowers of the ability to initiate the borrower-defense process based on a violation of state law that has not been reduced to judgment. It is important to note that such violations of state law have been a basis for borrower defense since the rule's enactment in 1995, which itself was based on the Federal Trade Commission's "Holder in Due Course Rule," promulgated 1975.¹¹ It makes sense that a school should be liable for borrower defense if it egregiously violates state law because schools are already subject to the laws of each state in which they decide to do business. The proposed rule, in which the Department is charged with broadening and strengthening borrower defense, now *limits* the bases by which a borrower may seek defense to repayment, turning its back on more than forty years of good law.

To be sure, the proposed rule gives state-law violations some role in the defense-to-repayment regime. Section 685.222(b) allows contested judgments based on state (or federal) law to form a basis for borrower defense. However, requiring borrowers to litigate claims to judgment before they can assert a defense to repayment is unrealistic, unnecessary, and would undermine fairness and the streamlined administrative process the Department has sought to create. Government enforcement actions and private class actions would no doubt help many borrowers, but they cannot relieve borrowers from their obligations to make loan payments while those lawsuits are pending, as the Department can when a borrower files a borrower-defense claim. Furthermore, the vast majority of such litigation ends in settlement or stipulated judgments. Because the proposed rules require contested, non-default judgments, most borrowers would be unable to assert a borrower defense grounded in state law. Allowing settled cases to trigger borrower defense would therefore represent an important step in the right direction. We are also concerned that requiring a litigated judgment could create a perverse incentive for state attorneys general to litigate cases to trial even if the claims would be more efficiently resolved by settlements. But more fundamentally, if violations of state law are enough to relieve a borrower from repayment after those violations are proven in court, then allegations of state-law violations should also be a sufficient basis for simply requesting relief from the Department in the first instance. The Department's conflicting positions in this regard are irreconcilable.

Not only is this approach fairer to borrowers, it is also more consistent with the established structure of student aid. Federal financial aid has long embraced the role of the states. Both Title IV and veterans educational programs, for example, rely in part on state agencies to authorize schools to receive benefits—notwithstanding the argument that doing so risks

¹¹ <https://www.ftc.gov/system/files/documents/rules/holder-rule/760504hidcrule.pdf>

introducing inconsistency into a nationwide educational framework. Preserving a state-law standard as a basis for borrower defense would adhere to this legacy. It would also maintain the parallelism between defense to repayment and the FTC's "Holder in Due Course" rule, under which assignees of credit contracts are liable for the claims, and subject to the defenses, that the borrower could have asserted against the original creditor, including those *under state law*. Consistent with this framework, the Department should continue to allow students to assert *all* claims and defenses they have against the school in the borrower-defense process, not just substantial misrepresentation and breach of contract. Finally, even if the Department promulgates a new rule that does not include state law as a basis for borrower defense, federal loans issued before July 1, 2017 will remain subject to the prior rule. Because that rule includes state law as a basis, the Department will need to interpret state law for years, possibly decades, to come, even as it tells newer borrowers that continuing this practice would constitute an undue administrative burden. Again, the Department's conflicting positions in this regard are irreconcilable.

Recognizing violations of state laws, and especially state UDAP statutes, is essential to ensuring that the borrower-defense regulations fully encompass the past, present, and future transgressions of the predatory for-profit industry. While recent cases may suggest that "substantial misrepresentation" and "breach of contract" may capture the bulk of a school's malfeasance, limiting regulations based on past wrongs risks overlooking future forms of misconduct that may be unforeseeable today. In the words of California's Supreme Court, "it would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited . . . since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery."¹² The Department's proposed rule sacrifices too much adaptability in favor of short-sighted, illusory gains in predictability and ease of administration.

The enduring principle of marketplace fairness embodied in state UDAP statutes offers the flexibility needed to deter and rectify wrongdoing that eludes the limited bounds of "substantial misrepresentation" and "breach of contract." Under the proposed rule, a proprietary school seeking to maximize profits could, for example, practice high-pressure sales, hire unqualified teachers, slash services, unreasonably limit course enrollments to save costs, charge exorbitant fees, fail to respond to student questions, or arbitrarily withhold grades, degrees, or transcripts. All those practices would harm students and some would undermine the entire value of their "education," but the proposed rule provides no avenue to avoid unjustly incurred debts so long as no misrepresentation occurred, no contractual provision is implicated, and no lawsuit raising the practices has progressed to contested judgment. Although the possibility of a student exodus may deter some school malfeasance, students at predatory schools may not always have the option of leaving because, among other reasons, their credits often have limited transfer value. Students might have to choose between enduring injurious conditions en route to a degree of dubious value, transferring and having to repeat many classes, or withdrawing with onerous debt and only a handful of useless credits to show for it. Adoption of state-law violations as a fourth avenue to borrower defense is critical to plug the gaps inherent in the other three.

¹² *People ex rel. Mosk v. National Research Co.*, 201 Cal. App. 2d 765, 772 (1962).

Proposed language to add as § 685.222(e): Violations of State Law. The borrower has a borrower defense if any act or omission of the school attended by the student would give rise to a cause of action or defense against the school under applicable State law.

But even if the Department is not inclined to retain state-law violations as an independent borrower-defense standard, it should incorporate UDAP principles in the final rule. We take heart in the Department’s suggestion that “deceptive, unfair, or abusive practices that may not otherwise constitute a misrepresentation under the proposed definition should be taken into consideration” when determining whether a borrower has reasonably relied on a misrepresentation. But the proposed rule’s “non-exhaustive list” of plus-factors weighing in favor of a finding of a substantial misrepresentation does not go far enough toward achieving needed flexibility. The simple inclusion of violations of UDAP law as a plus-factor that could tip the scales toward finding a substantial misrepresentation would be a significant improvement. The following proposed language adopts the latter approach:

Proposed language to add as § 685.222(d)(2)(i): Violating an applicable State law, including but not limited to unfair or deceptive acts or practices laws, in the course of their communications with, or conduct toward, the borrower.

4. Strengthen and further clarify ban on pre-dispute arbitration agreements

The proposed rules at § 685.300, which prohibit schools’ use of mandatory pre-dispute arbitration agreements, class-action waivers, and other compulsory internal institutional-complaint processes, are a laudable step forward in protecting the legal rights of students. To ensure the efficacy of these prohibitions, we offer two recommendations.

First, schools should not be able to use arbitration agreements containing opt-out provisions. This is not a meaningful choice. In practice, such agreements are as unfair as mandatory pre-dispute arbitration agreements. Predatory for-profit schools, in particular, have a history of using arbitration clauses to violate the legal rights of their students.¹³ In our experience, students often do not consider the consequences of an arbitration agreement, or the value of opting out, until they have a legitimate complaint against the school, at which point, it is too late to opt out of any arbitration requirement that may have appeared in the student’s enrollment agreement. An opt-out arbitration provision thus functions effectively as a mandatory arbitration agreement, and impedes the Department’s goals of promoting dispute procedures that are fair to students and bring school misconduct to light.

¹³ See, e.g., Danielle Douglas-Gabriel, It’s almost impossible for students to sue a for-profit college. Here’s why., Wash. Post, Apr. 28, 2016, <https://www.washingtonpost.com/news/grade-point/wp/2016/04/28/its-almost-impossible-for-students-to-sue-a-for-profit-college-heres-why/> (describing the use of arbitration clauses to “prevent students from banding together or airing their grievances outside the confines of the school”).

Second, the Department should further clarify that arbitration agreements and class-action waivers are prohibited for *all* claims a student may have against a school relating to the making of a loan or the provision of educational services, not just those claims upon which a student could assert a borrower defense. We note that the language defining the scope of the prohibition on forced arbitration and class waivers changed between the final negotiated-rulemaking session and the proposed rule.¹⁴ Some have suggested that the new language referring to “borrower defense claims” could be misconstrued to protect from forced arbitration only those claims involving a “substantial misrepresentation” or “breach of contract” (on the grounds that any other violation by a school would require a fully litigated judgment before it could constitute a borrower-defense claim). It is our understanding that this was not the Department’s intent. Commentary in the NPRM draws an equivalence between the negotiated-rulemaking language and the NPRM language, suggesting that no change was intended.¹⁵ Likewise, the proposed rule explicitly protects claims that “*could be* asserted as a defense to repayment,”¹⁶ which suggests that a borrower with a state-law claim related to educational services could not be forced into arbitration, since that claim “could be asserted” as a defense to repayment in the event a judgment later enters in his or her favor. A contrary reading would be at odds with the proposed rule’s language, the NPRM commentary, and the Department’s stated purpose of fairness, but the consequences of any possible ambiguity warrants further attention. The Department should eliminate residual doubt by making clearer its prohibition on mandatory arbitration and class-action waiver provisions for all claims related to the making of a loan or the provision of educational services.

These modifications will strengthen the rule’s limitation on arbitration agreements and its ability to protect students, providing borrowers real means to contest a school’s potentially illegal practices.

* * *

Notwithstanding our suggestions for improvement, we cannot emphasize enough our belief that the proposed rule is a major breakthrough by the Department in restoring accountability to students and taxpayers from institutions that have cheated the system for far too long. We are encouraged by student-centered provisions to allow for group discharge; limit the use of arbitration agreements and other deprivations of students’ rights; and increase access to closed-

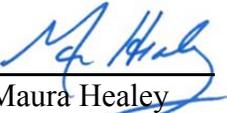
¹⁴ At the final negotiated rulemaking session, the prohibition applied to agreements that cover “any claim . . . asserted by a student . . . based on any act or omission of the school attended by the student that relates to the making of a Federal loan or the provision of educational services financed by that loan.” In the NPRM, the prohibition applies to “borrower defense claims,” defined as “a claim that is or could be asserted as a defense to repayment under § 685.206(c) or § 685.222.” (Proposed § 685.300(i)(1)).

¹⁵ “During the negotiated rulemaking, we sought comment on two alternative options. Both options would bar the use of any pre-dispute arbitration agreements that include a waiver of the student’s right to bring or participate in a class action for claims that would constitute borrower defenses within the scope of § 685.206(c) and proposed § 685.222—in other words, claims related to the making of the Direct Loan or the provision of educational services for which the loan was intended.” 81 Fed. Reg. 39381 (emphasis added).

¹⁶ Proposed § 685.300(i)(1) (emphasis added).

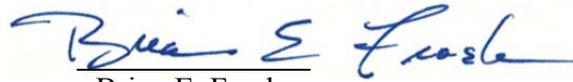
school discharges. We are also very supportive of proposals that impose financial protections on the federal loan program by increasing warning systems, including requiring letters of credit, when a school is at financial risk. On behalf of our consumers and students, we are grateful for the opportunity provided to the state attorneys general to participate actively in this rulemaking process.

Sincerely,

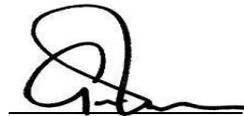

Maura Healey
Massachusetts Attorney General

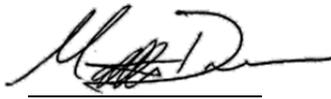

Kamala D. Harris
California Attorney General

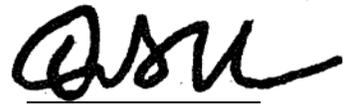

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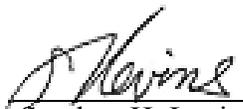

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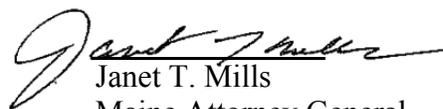

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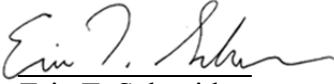

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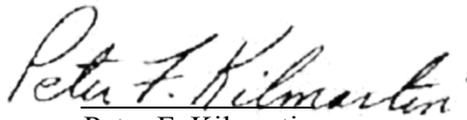
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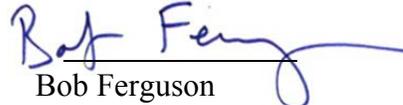
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