Proposed Legal Constraints on Private Student Lenders

I. INTRODUCTION

Many American high school graduates face a difficult choice: They can pursue higher education and the higher earnings it provides, but that means taking on debt that it may take them decades to pay back. Or they can forego a college degree and its attendant debt but be stuck earning lower wages for their entire lives. For many of these students, there is no viable third option.

From an early age, many Americans have been told about the value of a college degree—without one, finding a job is difficult and lifetime income is severely depressed. Data relating educational attainment to unemployment rates and wages indicate that these assertions are probably true. In 2013, the unemployment rate for those with a high school diploma was nearly double that of Americans with bachelor's degrees, and persons without a high school diploma were almost three times as likely to be unemployed as college graduates.[1] Educational attainment also relates directly to earnings. In 2013, median earnings for persons with bachelor's degrees were $1,108 per week, while workers with only a high school diploma and those without a diploma earned $651 and $472, respectively.[2] The highest earners are those with professional degrees, who earned a median $1,714 per week in 2013, for an annual salary just over $90,000.[3]

Thus, for many Americans, seeking higher education has a foreseeable financial benefit. However, especially as the costs of higher education increase, many students and their families find themselves lacking sufficient capital to finance their educations. Between the academic years beginning in 2003 and 2013, the average annual tuition and fees for a four-year undergraduate degree have increased twenty-five percent for private nonprofit institutions and over fifty percent for public institutions.[4] The Center for American Progress reports that the cost of higher education has increased more than one thousand percent since 1980, about ten times the increase in the Consumer Price Index

1. *Earnings and Unemployment Rates by Educational Attainment*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/emp/ep_table_001.htm (last updated Mar. 24, 2014) (finding that the unemployment rate in 2013 was four percent for Americans with bachelor's degrees, 7.5 percent for those with a high school diploma, and eleven percent for those without a high school diploma).

2. *Id.* This translates to a median annual salary of $24,072 for those without a diploma, assuming a fifty-two week work year. In 2013, the poverty line for a family of four was $23,550 in the contiguous United States. *2013 Poverty Guidelines*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://aspe.hhs.gov/poverty/13poverty.cfm (last updated Jan. 24, 2013).

3. *Earnings and Unemployment Rates by Educational Attainment*, *supra* note 1. Doctoral-degree holders had the lowest unemployment rate at 2.2 percent, while 2.3 percent of professional degree holders were unemployed. *Id.*

4. *See* COLL. BD., TRENDS IN COLLEGE PRICING 2013, at 15 (2013), *available at* http://trends.collegeboard.org/sites/default/files/college-pricing-2013-full-report.pdf, *archived at* http://perma.cc/3WXK-ELS4 (describing changes in college costs over time and adjusting for inflation).

during the same period.[5] The amount of student borrowing has risen accordingly, increasing approximately six percent per year between 2008 and 2012, from an average of $23,450 per borrower in 2008 to $29,400 in 2012.[6] The Institute for College Access and Success found that, in 2012, seventy-one percent of graduating students used loans to finance at least a part of their college educations.[7] These figures only encompass undergraduate borrowing; graduate and professional students also borrow significantly.

Student loans are the source of more unsecured debt than credit cards.[8] American students owed about $1.2 trillion in outstanding

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5. ANNE JOHNSON ET AL., CTR. FOR AM. PROGRESS & CAMPUS PROGRESS, THE STUDENT DEBT CRISIS 6 (2012), *available at* http://www.americanprogress.org/wp-content/uploads/2012/10/WhiteStudentDebt-5.pdf, *archived at* http://perma.cc/ZB54-W7K8. The report also notes that the Consumer Price Index increased about one hundred percent over the same period, with gasoline prices rising two hundred percent and healthcare costs rising two hundred fifty percent. *Id.* While this Note does not address the contribution that lowering the cost of higher education would make to affordability and loan volume, others are pursuing that solution. In August 2013, President Obama released a proposal that includes a number of measures designed to make college more affordable. For example, the proposal incentivizes institutions to lower costs by tying federal aid to a new ratings system, which would incorporate information about each institution's ease of access, affordability, and outcomes. Release, The White House, Fact Sheet on the President's Plan to Make College More Affordable: A Better Bargain for the Middle Class (Aug. 22, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/08/22/fact-sheet-president-s-plan-make-college-more-affordable-better-bargain-, *archived at* http://perma.cc/ EP8U-2L52. A draft of the ratings system is currently available for public comment. Press Release, Dep't of Educ., For Public Feedback: A College Ratings Framework (Dec. 19, 2014), http://www.ed.gov/news/press-releases/public-feedback-college-ratings-framework, *archived at* http://perma.cc/EMT6-KJCD. Additionally, in October 2014, the Department of Education issued new regulations directed at for-profit colleges that, among other things, provide a mechanism to revoke federal student aid if students carry high debt loads compared to their incomes after graduation. 34 C.F.R. § 668 (2014). The full text of the final rule is available at https://www.federalregister.gov/articles/2014/10/31/2014-25594/program-integrity-gainful-employment#h-7. *See also* Press Release, Dep't of Educ., Obama Administration Announces Final Rules to protect Students from Poor-Performing Career College Programs (Oct. 30, 2014), http://www.ed.gov/news/press-releases/obama-administration-announces-final-rules-protect-students-poor-performing-care, *archived at* http://perma.cc/TX4F-XKCB.

6. Allie Bidwell, *Average Student Loan Debt Jumps 10 Percent*, U.S. NEWS (Dec. 4, 2013, 2:16 PM), http://www.usnews.com/news/articles/2013/12/04/average-student-loan-debt-jumps-10-percent, *archived at* http://perma.cc/K9LW-3RJD. The Institute for College Access and Success notes that its figures are reported by colleges and universities and may not include all private loans if students neglected to report them. Further, debt averages do not include figures from graduates of for-profit universities, because such colleges are not required by law to report their students' debt. However, there are some indications that a higher percentage of students at for-profit institutions take out loans and that they borrow in larger amounts. *Id.*

7. INST. FOR COLL. ACCESS & SUCCESS, STUDENT DEBT AND THE CLASS OF 2012 1 (2013), *available at* http://projectonstudentdebt.org/files/pub/classof2012.pdf, *archived at* http://perma.cc/MP3Q-YZ3F.

8. ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN (2012) 4, *available at* http://files.consumerfinance.gov/f/ 201210_cfpb_Student-Loan-Ombudsman-Annual-Report.pdf, *archived at* http://perma.cc/DK64-F29L.

student loans as of May 2013, a total increase of twenty percent since 2011.[9] Forty percent of households headed by an individual under the age of thirty-five carry student loan debt.[10] This increase in borrowing has had broad effects on consumerism: the number of twenty-five- to thirty-four-year-olds purchasing homes has decreased, with substantially more people in this age bracket moving in with their parents.[11]

This Note considers regulatory methods for curbing the high and variable interest rates offered by private student lenders. Part II examines the mechanics of private student loans, describes existing regulations that govern private student lenders, and identifies recent disputes about government-lender relationships. Part III considers a number of methods for addressing high-cost student lending and draws upon the authority of the Consumer Financial Protection Bureau and its regulations governing other types of lending. Part IV proposes, in the short term, instituting enhanced disclosure for high-cost loans and incentivizing lender-school partnerships to help students find low-cost options before they commit to borrowing. In the long term, Part IV argues that lenders should be required to consider a student's projected ability to repay an educational loan before lending. Using ability-to-repay as a prerequisite could decrease overborrowing and default rates and allow students to enter the job market with debt loads that they realistically can repay. As described in Part III, this framework, along with a qualified-loan safe harbor for consumer-friendly mortgages, was implemented for mortgage lenders following the recent financial crisis. Part IV thus proposes that regulators formulate and test an ability-to-repay calculation and a qualified-loan structure that would provide students similar protections as mortgagors currently receive.

II. THE CURRENT STATE OF STUDENT BORROWING

A. How Lenders Reach Students

The process of financing education often begins with an application for federal aid; specifically, students and families fill out the Free Application for Federal Student Aid ("FAFSA"). The Department of Education then determines the "Expected Family Contribution"

9. Rohit Chopra, Student Loan Ombudsman, Consumer Fin. Prot. Bureau, Remarks at Center for American Progress Conference: Student Debt Swells, Federal Loans Now Top a Trillion (July 17, 2013), *available at* http://www.consumerfinance.gov/speeches/student-debt-swells-federal-loans-now-top-a-trillion/, *archived at* http://perma.cc/L24N-QAT5.

10. ANNUAL REPORT, *supra* note 8, at 18.

11. *Id.* (discussing data from 2011).

("EFC")[12] that each student will be directly responsible for financing. Each institution calculates a cost-of-attendance figure, which includes tuition and fees plus an estimated cost of other necessary expenses.[13] The school's cost of attendance less the EFC (and other aid, such as merit-based scholarships) yields the amount of federal aid available.[14] This aid comes in many forms, including grants, work-study, and subsidized federal loans.

Thus, students (and sometimes their families) are responsible for contributing the EFC to their educations. There are a number of options available to fund the EFC besides paying out of pocket. The federal government offers two unsubsidized loan options: PLUS loans and unsubsidized Stafford loans. In addition, there are financing options that operate entirely in the private market.

PLUS loans are available to parents of undergraduate students and to students seeking graduate or professional degrees.[15] PLUS loans have a predetermined (i.e., not calculated on a borrower-by-borrower basis), fixed interest rate and borrowers can obtain an amount up to the school's cost of attendance, less other financial aid; however, PLUS loans are not available to borrowers with adverse credit histories.[16] The government also offers Stafford loans, which are not credit-dependent but have fixed annual caps and lifetime limits.[17]

Before 2010, many students secured federal loans under the Federal Family Education Loan Program ("FFEL Program"). Under the FFEL Program, private lenders actually funded the loans, and

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12. EFC is comprised of a percentage of income and assets. For dependent students, parent income and assets are included, as well as the number of other dependents and the number of dependents simultaneously attending a postsecondary institution. *Federal Pell Grant Program*, U.S. DEP'T OF EDUC., http://www2.ed.gov/programs/fpg/index.html, *archived at* http://perma.cc/A2VE-2UFJ (last modified Apr. 9, 2014).

13. *How Colleges Figure "Cost of Attendance,"* COLLEGEDATA, http://www.collegedata.com/cs/content/content_payarticle_tmpl.jhtml?articleId=10065, *archived at* http://perma.cc/3WTM-NYEW (last visited July 4, 2014).

14. *Id.*

15. U.S. DEP'T OF EDUC., FEDERAL STUDENT LOAN PROGRAMS 2 (2013), *available at* http://studentaid.ed.gov/sites/default/files/federal-loan-programs.pdf, *archived at* http://perma.cc/3QTD-TEZR. There are a number of specific credit conditions considered adverse, including having accounts more than ninety days past due and foreclosure or repossession within the past five years. *Glossary*, U.S. DEP'T OF EDUC., https://studentaid.ed.gov/glossary, *archived at* http://perma.cc/8RJ9-58QK (last visited Aug. 19, 2014). Borrowers with adverse credit histories can be eligible for PLUS loans with an endorser. *PLUS Loans*, U.S. DEP'T OF EDUC., https://studentaid.ed.gov/types/loans/plus#can-i-still, *archived at* http://perma.cc/48QU-5TMT (last visited Aug. 19, 2014).

16. *PLUS Loans*, *supra* note 15.

17. *Subsidized and Unsubsidized Loans*, U.S. DEP'T OF EDUC., https://studentaid.ed.gov/types/loans/subsidized-unsubsidized, *archived at* http://perma.cc/4LVV-FTF2 (last visited Sept. 7, 2014).

educational institutions and the federal government guaranteed them.[18] In addition to the guarantee, the federal government paid a subsidy to private lenders for each qualifying loan originated. Qualifying loans had to have interest rates below a congressionally mandated maximum.[19]

Students receive access to federal loans as a part of the financial aid package presented by their schools; so, under the FFEL Program, private lenders had direct relationships with colleges and universities.[20] These lenders lobbied schools both to use them as federal loan providers and to refer students to them for private loans if federal unsubsidized loans did not cover the EFC.[21] Because schools and private lenders communicated about federal loans, when a student applied for a private loan, the school would verify that a borrower was, in fact, enrolled and that total aid and borrowing did not exceed the institution's stated cost of attendance.[22] Lenders would supply the private loan funds directly to schools, which would apply all required monies to tuition and fees before disbursing the balance to students to spend on living expenses.[23]

A 2009 report by the Congressional Budget Office determined that, by directly lending to students rather than paying banks' origination fees, the federal government could save significant sums.[24] The Health Care and Education Reconciliation Act of 2010 eliminated the FFEL Program.[25] Today, all federal loans are made under the Direct

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18. CONSUMER FIN. PROT. BUREAU, PRIVATE STUDENT LOANS: REPORT TO THE SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, THE SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, THE HOUSE OF REPRESENTATIVES COMMITTEE ON FINANCIAL SERVICES, AND THE HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND THE WORKFORCE 11 (2012), *available at* http://files.consumerfinance.gov/f/ 201207_cfpb_Reports_ Private-Student-Loans.pdf, *archived at* http://perma.cc/M934-HHP2.

19. *Direct Loans vs. the FFEL Program*, FINAID, http://www.finaid.org/loans/dl-vs-ffel.phtml, *archived at* http://perma.cc/PFF4-PM9H (last visited Jan. 11, 2014); *FFEL Program Lender and Guaranty Agency Reports*, OFFICE OF FED. STUDENT AID, http://studentaid.ed.gov/ about/data-center/lender-guaranty, *archived at* http://perma.cc/S3VX-HCR7 (last visited Jan. 11, 2014).

20. CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 11.

21. *Id.*

22. *See id.* (noting that schools ensured that lending did not exceed the EFC).

23. *Id.*

24. CONG. BUDGET OFFICE, COST ESTIMATE, H.R. 3221: STUDENT AID AND FISCAL RESPONSIBILITY ACT OF 2009 1, (2009), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ ftpdocs/104xx/doc10479/hr3221.pdf, *archived at* http://perma.cc/VC7-FN7F (estimating that a direct-lending alternative to the FFEL Program would save the federal government $13.3 billion between 2009 and 2013).

25. *FFEL Program Lender and Guaranty Agency Reports*, *supra* note 19.

Loan Program, which lends government funds instead of federally guaranteed private funds.[26]

As described above, under the FFEL Program, educational institutions themselves delivered private student loan funds after verifying students were not borrowing more than the cost of attendance.[27] This cooperation and verification system broke down during a lending boom between 2005 and 2007.[28] Private lenders began marketing their products "direct to customer" and disbursing some funds directly to students instead of using educational institutions as intermediaries.[29]

B. Features of Private Student Loans

While most educational loans are borrowed from the federal government, students and graduates owe over $150 billion to private lenders.[30] In some ways, private loans appear similar to federal unsubsidized loans. Neither requires students to make payments until six months after graduation, but both accrue interest that is capitalized.[31]

However, while unsubsidized federal loans have a predetermined interest rate,[32] many private student lenders determine rates based on an individual student's creditworthiness.[33] While lenders advertise a range of interest rates, a student only learns of the risk-

26. *Federal Family Education Loan (FFEL) Program*, U.S. DEP'T OF EDUC., http://www2.ed.gov/programs/ffel/index.html (last modified Apr. 9, 2014), *archived at* http://perma.cc/76AM-QC5L.

27. CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 11. In its report, the CFPB referred to school financial aid offices during this time as "gatekeepers." *Id.*

28. *Id.* at 19; *see infra* Section II.B.

29. CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 19.

30. *Id.* at 3.

31. *Id.* at 11–12.

32. Rates currently range from 3.86 percent to 6.41 percent, depending on the loan type. *Interest Rates and Fees*, U.S. DEP'T OF EDUC., http://studentaid.ed.gov/types/loans/interest-rates#what-are-the-interest, *archived at* http://perma.cc/5ZTW-JMMY (last visited Nov. 12, 2014). These are the rates for loans originated for the 2013–2014 academic year. *Id.* Loans originated in prior years are subject to different rates. *Id.* For some perspective, note that in the fall of 2013, the average new car loan interest rate was 3.94 percent and the average thirty-year mortgage carried an interest rate of 4.1 percent. Marcy Gordon, *Average Rate on Mortgage at 4.1 Percent*, USA TODAY (Oct. 31, 2013, 1:50 PM), http://www.usatoday.com/story/money/personalfinance/2013/10/31/ mortgage-rates/3325943/, *archived at* http://perma.cc/5LH2-RWUN; Chris Woodyard, *More New-Car Buyers Opt for 7-Year Loans*, USA TODAY (Oct. 28, 2013, 6:12 PM), http://www.usatoday.com/story/money/cars/2013/10/28/long-term-car-loans/3191819/, *archived at* http://perma.cc/EX98-BX3K.

33. CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 12. The proportion of cosigned private loans has increased substantially since the financial crisis in 2008. *Id.* at 26.

based rate the lender is actually offering once a loan is approved.[34] Consumer Financial Protection Bureau data documenting private loans originating between 2005 and 2011 show that, while the most creditworthy borrowers sometimes received an initial rate below the Stafford rate, the average initial rate never dipped below 6.8 percent (the federal unsubsidized loan interest rate at the time). The maximum rate topped sixteen percent for loans originating in the fourth quarter of 2008.[35]

As this may suggest, private loan interest rates can be variable, fluctuating with the market.[36] This makes interest rates unpredictable across both the borrowing and repayment periods. Additionally, variable-rate caps can reach nineteen percent for the least creditworthy borrowers, almost three times the rate offered for unsubsidized federal loans.[37]

The total amount of private lending available is dependent on the market. Student loans are collateralized and sold as asset-backed securities.[38] Trends in private student lending can be compared to the boom in the subprime mortgage market that occurred between 2005 and 2007.[39] During this same period, there was high demand for student-loan securities.[40] Because investors assumed the risk of default, lenders were incentivized to originate more loans.[41] CFPB research indicates that, between 2005 and 2007, private lenders decreased credit standards, offering more loans to less creditworthy borrowers.[42] During the recession, the amount of loans in default increased dramatically.[43] Since that time, market demand for these securities has decreased, and lenders have correspondingly increased their underwriting standards and begun requiring cosigners in order to improve the likelihood of repayment.[44] Although "subprime student lending," as well as the total amount of private student lending, appears to have decreased in the

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34. *Id.* at 13.

35. *Id.* at 14.

36. *See id.* at 13 (describing how changes in the market create risks for private student loan borrowers).

37. *Id.* at 12.

38. *Id.* at 18.

39. *Id; see also infra* Parts III.D, IV.A, and IV.B.2 for further comparison of the private student loan and mortgage industries, as well as the regulatory frameworks that govern them.

40. CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 18.

41. *Id.*

42. *Id.* at 22–23.

43. *Id.* at 24–25.

44. *Id.* at 26–27.

current financial market,[45] the 2005 to 2007 boom indicates that future securities demand could loosen lending standards.[46] In fact, Sallie Mae, one of the largest private student lenders, has a goal to increase its private loan origination by a rate of twenty percent per year.[47]

Finally, private lenders do not offer the borrower protections that the federal government provides.[48] Federal loans offer a number of repayment plans that calculate monthly payments based on the borrower's income after graduation.[49] Many of these plans forgive any remaining balance if a borrower pays according to the plan for a specified number of years.[50] Further, once federal loans are in default, borrowers have the opportunity to cure the default, which will change how it is reflected on the borrower's credit report.[51] Borrowers of private student loans do not enjoy these protections.[52] In fact, many private lenders requiring a cosigner will demand immediate and full repayment of the loan amount if a cosigner dies or goes bankrupt while the student

45. According to MeasureOne, an organization that compiled a report on private student loans, for the 2008–2009 academic year, 7.85 percent of private student loans were not school certified. For 2013–2014 loans, that number decreased to 0.93 percent (up from 0.79 percent the year before). MeasureOne's data comes from disclosures by the six largest private student lenders, which make up about sixty-nine percent of the market. DAN FESHBACH ET AL., MEASUREONE, THE MEASUREONE PRIVATE STUDENT LOAN PERFORMANCE REPORT—JULY 2014 1–2, 15 (2014).

46. In October 2014, pursuant to the Dodd-Frank Act, a number of agencies collaborated and issued a final rule that requires entities securitizing assets to retain five percent of the credit risk. Some loans that meet certain underwriting standards, such as Qualified Mortgages (discussed *infra* Part III.D.2), are exempted from the credit risk retention requirement. Credit Risk Retention (final rule Oct. 22, 2014), *available at* http://www.occ.gov/news-issuances/news-releases/2014/nr-ia-2014-140a.pdf. These regulations may diminish the incentive to reestablish subprime student lending as it occurred in the 2005 boom.

47. Wade Malcolm, *Details Emerge on Sallie Mae Split*, DEL. ONLINE. (Dec. 13, 2013, 8:47 PM), http://www.delawareonline.com/story/money/2013/12/13/details-emerge-on-sallie-mae-split-/4017579/, *archived at* http://perma.cc/6C7D-PBDU.

48. CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 12–13. Recently, however, Wells Fargo and Discover (both private student lenders) announced new programs that would allow modifications to student loan repayment programs. Wells Fargo's program is currently active and is directed towards students experiencing financial hardship. Robert Farrington, *Private Student Loan Lenders Start Offering Loan Modifications*, FORBES (Nov. 26, 2014), http://www.forbes.com/sites/robertfarrington/2014/11/26/private-student-loan-lenders-start-offering-loan-modifications/; News Release, Wells Fargo, Wells Fargo Launches Private Student Loan Modification Program, (Nov. 19, 2014), https://www.wellsfargo.com/about/press/2014/student-loan-modification_1119.content, *archived at* http://perma.cc/23WW-3KRK.

49. *Overview of Direct Loan and FFEL Program Repayment Plans*, FED. STUDENT AID, http://studentaid.ed.gov/repay-loans/understand/plans *archived at* http://perma.cc/UBY8-PT8N (last visited Sept. 14, 2014), *archived at* http://perma.cc/UBY8-PT8N. The options vary based on the type of loan and the calculation used to determine the payment amount. *Id.*

50. *Id.* (twenty to twenty-five years).

51. CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 12–13.

52. *Id.* (noting that, since many private loans require a cosigner, it is less likely that borrowers will be unable to repay their debt compared to borrowers of Stafford loans, which are not granted based upon creditworthiness).

has outstanding debt.[53] As neither public nor private student loans are generally dischargeable in bankruptcy,[54] a lack of repayment options can make it more difficult for students to manage private loan debt. In 2012, over 850,000 private student loans, with a total debt in excess of $8 billion, were in default.[55]

C. Common Dangers of Private Student Loans

In addition to unfavorable terms, private loans present other issues. First, after the FFEL Program was eliminated, lender-school collaborations suffered, and lenders did not always pursue information about a student's EFC or other sources of aid.[56] Instead of basing loan offers on the student-specific EFC-aid disparity, lenders created general caps based on fixed amounts or the school's reported cost-of-attendance figure.[57] In short, this allowed students to borrow more funds than their

53. *CFPB Finds Private Student Loan Borrowers Face "Auto-Default" When Co-Signer Dies or Goes Bankrupt*, CONSUMER FIN. PROT. BUREAU (Apr. 22, 2014), http://www.consumerfinance.gov/newsroom/cfpb-finds-private-student-loan-borrowers-face-auto-default-when-co-signer-dies-or-goes-bankrupt/, *archived at* http://perma.cc/PY85-K4PG.

54. 11 U.S.C. § 523(a)(8) (2012) (stating that education loans are not dischargeable in bankruptcy unless this would impose "undue hardship" on the debtor and the debtor's dependents); *see also* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (providing a three-part test for "undue hardship," including that the borrower, having made a good-faith effort at repayment, would not be able to maintain "minimal" standards of living for a "significant portion of the repayment period" if forced to pay). This reform was passed in 2005. Today, there is substantial support for revisiting or reversing this prohibition, which could pressure lenders to improve underwriting standards or to provide modification options for borrowers facing default. *See, e.g.*, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN (2014) 27–30, *available at* http://files.consumerfinance.gov/f/201410_cfpb_report_annual-report-of-the-student-loan-ombudsman.pdf, *archived at* http://perma.cc/YT9D-KBKX (suggesting that the current discharge rules allow high post-default recovery for student loans, incentivizing lenders not to help borrowers avoid default); MARK KANTROWITZ, WHO GRADUATES COLLEGE WITH SIX-FIGURE STUDENT LOAN DEBT? 3 (2012), *available at* http://www.finaid.org/educators/20120801sixfiguredebt.pdf, *archived at* http://perma.cc/SY63-8VLH (positing that allowing discharge of student loans would encourage lenders to strengthen underwriting standards); Tyler Kingkade, *Private Student Loan Bankruptcy Rule Traps Graduates with Debt amid Calls for Reform*, HUFFINGTON POST (Apr. 15, 2012, 9:51 AM), http://www.huffingtonpost.com/2012/08/14/private-student-loans-bankruptcy-law_n_1753462.html (quoting Sallie Mae representatives who claim to support bankruptcy reform, at least for some students). Bankruptcy reform also faces strong opposition from some banks and politicians. *See id.* (discussing opposition to bankruptcy reform and quoting Senator Dick Durbin, who believes that the legislation he has introduced numerous times to reverse the bankruptcy prohibition for student loans is "going nowhere"). This Note acknowledges the potential propriety of bankruptcy reform but examines other possible approaches to modifying predatory private student lending practices.

55. ANNUAL REPORT, *supra* note 8, at 2.

56. CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 19.

57. *Id.*

schools deemed necessary.[58] During the recession, many private lenders reinitiated school verification before originating new loans and decreased their total lending, diminishing this effect in recent years.[59] However, as noted in Section II.B, market demand for asset-backed securities could incentivize lenders to loosen underwriting standards in the future and originate more loans.[60] CFPB data on loans marketed direct to customer between 2005 and 2007 indicates that students have the propensity to borrow more than their schools' calculated cost of attendance when excess funds are available.[61]

Second, student borrowers are not satisfied with their private loans. While students frequently complain that they are unable to negotiate repayment plans, borrowers also experience confusion and difficulty getting information from their creditors.[62] Loans are often sold from one company to another, and terms change in the process.[63] When a borrower has a checking account with the same parent institution as his loan servicer, lenders have directly deducted late payments from the borrower's checking account.[64] Borrowers may be told that they should enroll in repayment or incentive programs but experience difficulties when they actually try to do so.[65] Thus, borrowers are often unhappy with the inflexible terms of their loans but have little recourse when they contact the lenders.

In sum, the private student loan industry yields a number of concerns for consumers eager to invest in their educations. First, except for the most creditworthy borrowers, interest rates are higher than federal loans and are often variable, leading to unpredictability when it comes time to repay. Second, when market demand for asset-backed securities is high, private lenders are willing to make subprime student loans for amounts much higher than students need to cover their educations and costs of living. Third, the private industry does not offer the repayment and forgiveness options that are available on the federal level, making it difficult for debtors to meet their obligations. Further, borrowers often face challenges finding answers to their concerns when

58. *See id.* (stating that lenders "circumvented the school's financial aid office" and allowed students to "borrow more than the EFC").

59. *Id.* at 18–21.

60. *See id.* at 89 ("[T]here is no guarantee that the direct-to-customer (DTC) loan market of the near past will not reemerge as the economy improves.").

61. *Id.* at 20–21.

62. ANNUAL REPORT, *supra* note 8, at 6–12.

63. *Id.* at 8 (noting one student's complaint that payment-processing times and corresponding late fees changed when her loan was sold to a new servicer).

64. *Id.* at 7.

65. *Id.* at 8–9.

they try to contact their lenders or servicers. These borrower-unfriendly lending practices have yielded a significant amount of defaults, which affect graduates' ability to support themselves and their families.

D. Existing Regulatory Framework

Disclosure-based regulations and lender supervision currently govern the private student lending market. For example, the Higher Education Opportunity Act[66] extended Truth in Lending Act[67] requirements to the private student loan industry. Intending to promote a class of knowledgeable borrowers, these regulations primarily require disclosing terms and conditions to consumers seeking credit.[68] Disclosures specifically applicable to private student loans include interest rates, fees, repayment terms, cost estimates, consumer rights, and information about federal student loan alternatives.[69]

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 created the Consumer Financial Protection Bureau ("CFPB") and gave the agency explicit authority over private student loan providers.[70] The CFPB has authority to promulgate rules under the guidelines of some existing consumer protection statutes, such as the Truth in Lending Act.[71] The CFPB was also charged with appointing a Student Loan Ombudsman, who, in conjunction with the Department of Education, is required to compile a report on federal student loans.[72] The current Ombudsman, Rohit Chopra, has not only compiled much information about recent trends in private student loans,[73] but has also provided a platform for borrowers to submit publicly available complaints that shed light on consumer frustrations with the private

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66. Pub. L. No. 110–315, 122 Stat. 3078 (codified as amended in scattered sections of 15 U.S.C, 20 U.S.C., 25 U.S.C., and 42 U.S.C. (2012)).

67. 15 U.S.C. § 1601–1667f.

68. *See* DAVID H. CARPENTER, CONG. RESEARCH SERV., R42572, THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB): A LEGAL ANALYSIS 1–4, 11–12 (2014) (discussing the CFPB's purpose and relevant regulations).

69. 12 C.F.R. §§ 1026.46–47 (2014). The private loan regulations also disallow some cobranding using the school's name or symbols and require that, when schools are permitted to endorse particular lenders, it be clearly disclosed that the school itself is not providing the funds. *Id.* § 1026.48.

70. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (codified as amended in scattered sections of 5 U.S.C., 7 U.S.C., 12 U.S.C., 15 U.S.C., 18 U.S.C., and 42 U.S.C.); CARPENTER, *supra* note 68, at 16.

71. CARPENTER, *supra* note 68, at 23–25.

72. 12 U.S.C. § 5535; CARPENTER, *supra* note 68, at 12.

73. A summary of which is provided *supra* Sections I.A and I.B.

student lending market.[74] On December 6, 2013, the CFPB issued a final rule that will allow the agency to supervise large market participants in the student loan servicing industry.[75]

Thus, while current regulations attempt to provide students with better information before they agree to loans and with supervision over servicing practices once they have loans, these regulations do not address student loan affordability. While the cost of going to college continues to increase and students look for ways to finance their educations, private student lenders continue to market high or variable interest rates that can be difficult to repay after graduation.

E. Sallie Mae and Private Loan Funding

Sallie Mae is one of the largest private student lenders in the United States, both originating and holding the largest amount of student loan debt as of 2010.[76] Additionally, in 2009, Sallie Mae won a contract to become a federal loan collector and servicer.[77] Sallie Mae also benefitted from the Ensuring Continued Access to Student Loans Act ("ESCALSA"), which allowed private lenders to continue profiting from the FFEL Program in 2008 and 2009 after they claimed that, given the financial climate at that time, they could not afford to make loans

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74. Rohit Chopra, *Thousands of Voices on Private Student Loans*, CONSUMER FIN. PROT. BUREAU BLOG (June 13, 2012), http://www.consumerfinance.gov/blog/thousands-of-voices-on-private-student-loans/, *archived at* http://perma.cc/U7AT-TX6V; ANNUAL REPORT, *supra* note 8, at 2; *see* CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 70 (discussing public comments from consumers). Full text of the comments submitted is available at *Request for Information Regarding Private Education Loans and Private Educational Lenders*, REGULATIONS.GOV, http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=CFPB-2011-0037, (last visited Dec. 20, 2014).

75. 12 C.F.R. § 1090.106 (2014), *available at* https://www.federalregister.gov/ articles/2013/ 12/06/2013-29145/defining-larger-participants-of-the-student-loan-servicing-market#h-9, *archived at* http://perma.cc/6P7D-3FE7.

76. *Largest Education Lenders*, FINAID, http://www.finaid.org/loans/biglenders.phtml, *archived at* http://perma.cc/V587-8LHM (last visited Sept. 14, 2014) (data listed is accurate as of March 2010). According to Sallie Mae, since the recession, twenty private student lenders originate student loans. Letter from John F. Remondi, President & Chief Operating Officer, Sallie Mae, to Monica Jackson, Office of the Exec. Sec'y, Consumer Fin. Prot. Bureau (Jan. 17, 2012), *available at* http://salliemae.newshq.businesswire.com/sites/salliemae.newshq.businesswire.com/files/ doc_library/file/SallieMaeResponsetoConsumerFinancialProtectionBure.pdf, *archived at* http:// perma.cc/S3BD-9W8J.

77. *Title IV Student Loan Management/Servicing*, GENERAL SERVICES ADMINISTRATION, https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=d767e036118e6fc63ecdf7d6 1a5471a4&_cview=0, *archived at* http://perma.cc/VFF4-P2BQ (last visited Feb. 22, 2014). A redacted copy of the government's contract with Sallie Mae is available at https://www.fbo.gov/ index?id=c845bdd7d98de24fe163b8a55e5f76a8, archived at http://perma.cc/KL4C-NYZK. The structure of Sallie Mae's business has recently changed. The present structure and its implications are discussed *infra* Section III.B.

according to the program's required terms.[78] ESCALSA allowed private lenders to sell loans to the Department of Education and borrow from an asset-backed commercial paper conduit at low rates such that lenders would retain sufficient liquidity to originate more loans.[79] Sallie Mae generated hundreds of millions of dollars in profits in 2009 and 2010 based on their access to the loan purchase program implemented under ESCALSA.[80]

In June 2013, Senator Elizabeth Warren brought to light a troubling source of Sallie Mae's loan funding.[81] According to Sallie Mae's annual Securities Exchange Commission filing in 2012, the company borrowed $8.5 billion from the Federal Home Loan Bank in Des Moines to originate new private student loans.[82] Congress created Federal Home Loan Banks to provide funds to local lenders who were supposed to stimulate regional development by providing loans to "families, farms and businesses."[83] Tax exemptions allow the Federal

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78. DEP'T OF EDUC., ENSURING CONTINUED ACCESS TO STUDENT LOANS ACT (ESCALSA) ANNUAL REPORT TO CONGRESS 2–4 (2011), *available at* http://studentaid.ed.gov/sites/default/files/fsawg/datacenter/library/July2011ECASLAReport.pdf, *archived at* http://perma.cc/58VX-5A2J. Congress quickly passed ESCALSA in May 2008 in response to threats that lenders would not make loans under the FFEL Program for the 2008–2009 school year. Under the FFEL Program, the Higher Education Act set loan terms and interest rates; in the 2008 financial climate, the FFEL Program lenders argued that they could not afford to lend on those terms. The government's primary concern was ensuring students would get the necessary disbursements to meet their education costs. Thus, ESCALSA required lenders to use loan proceeds to originate more loans; however, it also allowed private lenders to stay in the federally guaranteed market in 2008 and 2009. *Id.* According to a letter from Senator Elizabeth Warren to Sallie Mae, the company's 10-Ks report that it made $284 million in 2009 and $321 million in 2010 using ESCALSA programs. Letter from Elizabeth Warren, Senator, Mass., to Jacob Lew, Sec'y, U.S. Dep't of the Treasury, and Arne Duncan, Sec'y, U.S. Dep't of Educ. (Sept. 19, 2013), *available at* http://www.warren.senate.gov/files/documents/Letter%20from%20Elizabeth%20Warren%20to%20ED,%20Treasury%20-%209-19-2019.pdf, *archived* at http://perma.cc/C3YA-NXFB.

79. DEP'T OF EDUC., *supra* note 78, at 2–7.

80. Letter from Elizabeth Warren, *supra* note 78; *see also* Shahien Nasiripour & Joy Resmovits, *Sallie Mae Lags in Student Debt Relief amid Ongoing Federal Probes*, HUFFINGTON POST (September 3, 2013, 3:50 PM), www.huffingtonpost.com/2013/09/03/sallie-mae-student-debt_n_3839243.html, *archived at* http://perma.cc/MJ8P-TRSU (reporting, in September 2013, that Sallie Mae had earned over $300 million dollars as a federal loan servicer); *Title IV Student Loan Marketing/Servicing*, *supra* note 77 (setting forth specifics of loan award program).

81. Letter from Elizabeth Warren, Senator, Mass., to Edward DeMarco, Acting Dir., Fed. Hous. Fin. Agency (June 24, 2013), *available at* http://www.warren.senate.gov/files/documents/20130624FHFALetter.pdf, *archived at* http://perma.cc/98WD-H62V.

82. *Id.*; Letter from Elizabeth Warren, Senator, Mass., to John F. Remondi, President and Chief Exec. Officer, SLM Corp. (June 25, 2013), *available at* http:// www.warren.senate.gov/files/documents/SallieMaeLtr.pdf, *archived at* http://perma.cc/78KB-URU9.

83. *Overview*, FED. HOME LOAN BANKS, http://www.fhlbanks.com/overview_whyfhlb.htm, *archived at* http://perma.cc/5SHV-SE5X (last visited Jan. 9, 2014). In a response to Senator Warren's letter, Sallie Mae President and CEO John Remondi claimed that the funds were only used for federally guaranteed loans as a part of the now-discontinued Family Education Loan Program, an action authorized by Congress. Letter from John F. Remondi, President and Chief

Home Loan Banks to access inexpensive capital and lend at low interest rates.[84] Sallie Mae was therefore able to borrow on its $8.5 billion line of credit with a 0.23 percent interest rate. Sallie Mae earned $2.5 billion in interest income in 2012 by lending that money to students at rates twenty-five to forty times higher than the rate at which the company borrowed.[85] Thus, while Sallie Mae enjoys extremely low interest rates that were not intended to be accessed by private corporate lenders, they do not pass those rates on to their borrowers.[86]

Due to the large financial incentive to maintain and renew its government contract,[87] an obvious strategy to regulate private student lending would be to take advantage of Sallie Mae's dependence on federal contracts. When offering lucrative servicing contracts to corporations that also offer private loans directly to students, the Department of Education could include contract terms that require lenders to offer fixed-rate loans with some interest rate cap or calculation. This measure would directly address the affordability problem by placing a limit on interest rates, which current CFPB regulation cannot achieve on its own. It would likely also allow the federal government greater access to information about private lending products that could help the CFPB monitor student lending and formulate future regulations to address concerns.

Seemingly considering this strategy, in 2013 the CFPB Student Loan Ombudsman warned investors in financial services providers that "repeated violations of the law can have serious repercussions for the financial institutions they invest in, especially for those institutions

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Exec. Officer, Sallie Mae, to Elizabeth Warren, Senator, Mass. (June 25, 2013), *available at* http://salliemae.newshq.businesswire.com/sites/salliemae.newshq.businesswire.com/files/doc_library/file/Letter_to_The_Honorable_Elizabeth_Warren_Dated_June_25_2013_from_John_F_Remondi_FINAL_2.pdf, *archived at* http://perma.cc/GB9V-Z743.

84. 12 U.S.C. § 1433 (2012); Letter from Elizabeth Warren, Senator, Mass., to Edward DeMarco, Acting Dir., Fed. Hous. Fin. Agency, *supra* note 81.

85. Letter from Elizabeth Warren, Senator, Mass., to Edward DeMarco, Acting Dir., Fed. Hous. Fin. Agency, *supra* note 81.

86. CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 13. Sallie Mae did not disclose the FHFA credit line in its October 2013 quarterly report; however, the Huffington Post reported that as of September 30, 2013, Sallie Mae was still accessing the credit line. Shahien Nasiripour, *Sallie Mae Reduces Disclosure of Controversial Funding Source*, HUFFINGTON POST (Nov. 5, 2013, 11:23 AM), http://www.huffingtonpost.com/2013/11/05/sallie-mae-elizabeth-warren_n_4218834.html, *archived at* http://perma.cc/QV3T-VCKL.

87. According to a fall 2013 Huffington Post article, Sallie Mae had plans to "increase its revenue from federal contracts." Shahien Nasiripour, *Sallie Mae Faces Additional Government Probes as Scrutiny Increases*, HUFFINGTON POST (Oct. 28, 2013, 11:43 PM), www.huffingtonpost.com/2013/10/28/sallie-mae-investigations_n_4172169.html, *archived at* http://perma.cc/4AM5-4TKT. This indicates that loan servicing was a profitable division of Sallie Mae's business and that the threat of losing its contract work could provide a compelling reason to amend its lending policies.

who depend on federal and state licensures and contracts."[88] Senator Elizabeth Warren, in her letter to the Departments of Education and the Treasury, also suggested that Sallie Mae should not receive the benefit of federal programs and contracts based on its predatory lending and numerous servicing infractions.[89]

Appearing to believe that the threats were real, Sallie Mae recently spun off its loan servicing business into a separate entity, Navient.[90] Navient services loans under federal contracts while Sallie Mae continues as a private student lender.[91] The company admitted that it was motivated to make the split to "simplify [Sallie Mae's] regulatory requirements" by extracting the private loan business from the reach of the Department of Education and the FDIC.[92] The federal government renewed Navient's servicing contract (inherited from Sallie Mae in the spinoff) in June 2014.[93]

Thus, while conditioning government contracts on favorable private loan terms may create large monetary incentives for companies who directly offer student loans or do so through subsidiaries, many lenders would likely follow Sallie Mae's lead and separate their private student loan businesses into entirely separate entities. This regulatory arbitrage would make contract incentives more effective to address borrower concerns directly related to federal loans, such as servicing failures and misrepresentations. Therefore, it is critical that other agencies, such as the CFPB, find alternate methods to push private student lending towards more affordable interest rates.

III. POTENTIAL FRAMEWORKS FOR ANALYZING AND REGULATING PRIVATE STUDENT LOANS

Today's students take on increasing amounts of debt to finance their educations in hopes that they will earn good jobs and achieve goals

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88. Nasiripour & Resmovits, *supra* note 80.

89. Letter from Elizabeth Warren, Senator, Mass., to Jacob Lew, Secretary, U.S. Dep't of the Treasury, and Arne Duncan, Sec'y, U.S. Dep't of Educ., *supra* note 78.

90. *See, e.g.*, *Sallie Mae is Changing*, SALLIE MAE, https://www.salliemae.com/about/who-we-are/future/, *archived at* http://perma.cc/YX2A-3RS7 (last visited Sept. 7, 2014) (stating that Navient will be the servicer of student loans); *Sallie Mae Board Approves Strategic Separation of Navient Corporation, Sets Record Date and Distribution Date*, SALLIE MAE, (Apr. 10, 2014, 9:00 AM), http://news.salliemae.com/press-release/corporate-and-financial/sallie-mae-board-approves-strategic-separation-navient-corpora, *archived at* http://perma.cc/7RKG-RWPE (announcing the split of Sallie Mae's loan management and servicing company, Navient, from its consumer banking business).

91. *Sallie Mae Board Approves Strategic Separation of Navient Corporation*, *supra* note 90.

92. Malcolm, *supra* note 47.

93. Alan Zibel, *U.S. Extends Navient Corp Student Loan Contract*, WALL ST. J., June 17, 2014, http://online.wsj.com/ articles/u-s-extends-navient-corp-student-loan-contract-1403043388.

like providing for their families and owning their own homes.[94] However, student debt ultimately prevents many college graduates from realizing these goals.[95] Students who borrow money should be accountable for the funds that they owe. Nonetheless, protecting students from the high interest rates offered by private student lenders can help to make higher education more affordable and allow graduates to enter the workforce without crippling payments that limit their abilities to fulfill the dreams they have worked for. Further, if students take out affordable loans that they can repay in a timely manner, lenders could save on collection costs.[96] There are a number of legal frameworks that can inform realistic and effective methods to limit the high interest rates that private student lenders charge.[97]

A. Payday Lending Regulation as a Model for Private Student Lending Regulations

Payday lending has been the subject of much comment in the past several years for some of the same reasons that private student lending is gaining attention. Payday lending is often seen as predatory; lenders make enormous profits by charging exorbitant interest rates to people who are borrowing in the short term to make it to their next paycheck.[98] Many see these lenders as taking advantage of borrowers' short-term needs.[99] As during the student lending boom, where underwriting standards diminished to increase loan volumes,[100] payday lenders often ignore a payday borrower's projected ability to repay a

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94. *See supra* Part I.A.

95. ANNUAL REPORT, *supra* note 8, at 18.

96. While it is possible that savings on collection costs would offset increased earnings that higher interest rates yield, this Note does not assert that that is the case. However, improved ability to collect would presumably be a benefit to lenders.

97. Some have contemplated a private right of action based on the price unconscionability doctrine as a method for consumers to challenge high interest rates and predatory lending. *See generally* Hirsh Ament, *Predatory Lending: What Will Stop It?*, 4 J. BUS. & TECH. L. 371 (2009) (arguing that the unconscionability doctrine can be used to prevent foreclosures stemming from predatory mortgage lending); Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819 (1994) (analyzing price unconscionability cases through a price fairness model). Although individual litigation might prove too costly in the context of student loans, price unconscionability class action suits might be an effective consumer-driven effort to limit high, variable interest rate student loans. However, this Note will focus on government-created statutory and regulatory responses to private student lending affordability and will not discuss consumer-initiated solutions.

98. Nathalie Martin, *1000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 570 (2010).

99. *Id.*

100. CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 22–23.

loan.[101] Private student lenders might be cast in the same light. Students know that without a college degree their careers and lifetime earning prospects will suffer. They have opportunities to go to school but cannot afford to do so without borrowing. Private lenders take advantage of that necessity by lending at high and variable interest rates. Thus, state and federal legal responses to payday lending might provide an informative framework for addressing private student lending.

One prominent legislative response to predatory lending in the payday loan industry[102] is to create a criminal usury cap. A criminal usury cap establishes a statutory maximum for interest rates.[103] A number of states have implemented criminal usury caps specific to short-term lending. For example, Alabama caps payday loan interest rates at 17.5 percent,[104] while New Hampshire's cap is higher, at 36 percent.[105] To further ensure the efficacy of the cap, New Hampshire law also mandates that all charges and fees be included.[106] Thus, lenders cannot circumvent the law by lowering interest rates but reconfiguring origination and other fees to maintain the same profit off of any loan that would have been made before the measure was passed in 2010. Universal inclusion of charges and fees in the cap is a critical component of effecting the cap's purpose and helping borrowers understand the full cost of their debts.[107] The CFPB already engages in some fee inclusion regulation, albeit not related to interest rate caps. Through its authority to implement the Truth in Lending Act, the CFPB dictates annual percentage rate ("APR") calculation formulas. These formulas let lenders know what types of fees and charges must be included in APR figures that they must disclose to consumers.[108]

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101. *See* Leah A. Plunkett & Ana Lucía Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 SUFFOLK U. L. REV. 31, 55 (2011).

102. Because of differences between private student lending and payday loan structures, this is also the method most readily applicable to the private student lending market. Other common methods include statutory maximums on the amount that can be borrowed in a payday loan as well as a statutory maximum term. Some states have prohibited payday lending outright. For a summary and side-by-side comparison of state payday lending statutes, see *Payday Lending Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/ financial-services-and-commerce/payday-lending-state-statutes.aspx, *archived at* http://perma.cc/47B3-74WF (last updated Sept. 12, 2013).

103. *See* Plunkett & Hurtado, *supra* note 101, at 36 ("Criminal usury caps can provide an outer limit to allowable interest rates.").

104. ALA. CODE § 5-18A-12 (2013).

105. N.H. REV. STAT. ANN. § 399-A:12 (2013).

106. *Id.*

107. Plunkett & Hurtado, *supra* note 101, at 50.

108. *Id.* at 51; *see also* 15 U.S.C. § 1605 (2012); 12 C.F.R. §§ 226.4, 226.14, 226.22 (2014).

Although the CFPB is currently not authorized to implement usury caps,[109] Congress itself employed caps when it passed the Military Lending Act of 2007 and the Servicemembers Civil Relief Act of 2010 ("SCRA").[110] The Military Lending Act prohibits extending consumer credit to military members or their dependents at an annual percentage rate higher than thirty-six percent,[111] and the SCRA limits interest on debts incurred before military service (including student loans) to six percent.[112] Knowing violation of the SCRA is punishable by a fine and up to one year of imprisonment, and violations of the Military Lending Act can carry both civil and criminal penalties.[113] In 2013, the CFPB brought its first enforcement action against a payday lender for violation of a cap,[114] and in 2014, the Justice Department and FDIC fined Sallie Mae and its former subsidiary $97 million for charging excessive interest and late fees in violation of the SCRA.[115]

Federal legislators thus accept a usury cap as a viable means to control consumer debt, at least in some circumstances. If Congress deemed college students a class that ought to be protected, caps would be an obvious means to limit the extent to which lenders like Sallie Mae could take advantage of students to lend inexpensive capital at high rates. Under a cap, private student loans would operate more like federal student loans and promote equal access to education funding.

Nonetheless, there are some limitations to the benefits of usury caps. First, there are differences in the structures of payday and student loans. Payday loans are short-term loans in small amounts, and although lenders often disregard ability to repay, the loans are secured by the borrower's next paycheck. Student loans are borrowed in substantially higher amounts and are unsecured. In many ways, default risk is unpredictable since it is difficult to anticipate what a student's employment will be by the time the loans come due years after

109. 12 U.S.C. § 5517(o) ("No provision of this title shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law.").

110. 10 U.S.C. § 987; 50 U.S.C. app. § 527.

111. 10 U.S.C. § 987(b).

112. 50 U.S.C. app. § 527(a)(1).

113. 10 U.S.C. § 987; 50 U.S.C. app. § 527.

114. *Consumer Financial Protection Bureau Takes Action Against Payday Lender for Robo-Signing*, CONSUMER FIN. PROT. BUREAU (Nov. 20, 2013), http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-takes-action-against-payday-lender-for-robo-signing/, *archived at* http://perma.cc/8QFM-CL8L.

115. Tara Siegel Bernard, *Sallie Mae to Pay Fine over Loans to Troops*, N.Y. TIMES, May 13, 2014, http://www.nytimes.com/2014/05/14/your-money/sallie-mae-to-pay-fine-over-loans-to-troops.html?module=Search&mabReward=relbias%3Aw%2C%5B%22RI%3A9%22%2C%22RI%3A17%22%5D&_r=0, *archived at* http://perma.cc/5A7Q-LD4P.

borrowing. In calculating a cap, legislators or regulators would likely have to consider the long-term nature of student lending, which might fluctuate with the job market, making it more difficult to find a single reasonable figure.[116]

Further, in the face of increased regulation payday lenders have developed new products to take advantage of legal loopholes that allow them to continue lending with essentially the same rates and terms as before.[117] One scholar referred to payday loans as a "hydra," the mythological creature that was able to grow two new heads each time one of its nine was cut off.[118] As long as lenders maintain relationships with educational institutions and offer loans through financial aid offices, this issue would likely be easy to control. However, in the face of new regulation, private student lenders might depend more heavily on direct-to-customer marketing so that they could offer new products that circumvent the cap.

Finally, any regulation that will increase the cost to lenders will decrease the number of student loans available.[119] Without readily available funding, some potential students might not be able to seek a degree at all. Since demand for higher education is high and education access is a major concern for the current Administration, eliminating access to student lending may contravene general social preferences favoring equal opportunity.[120]

B. Government Refinancing of Private Student Loans

In 2014, Senator Elizabeth Warren introduced a bill that would allow debtors with student loans to refinance to current federal student loan interest rates.[121] In the private loan context, the bill authorizes the

116. See *infra* Part IV.A for further discussion on the uncertain nature of student future income.

117. Martin, *supra* note 98, at 593–94.

118. *Id.* at 592.

119. *See generally* Chris Cirillo, Note, *Payday Loan Regulation: Any Interest?*, 11 DEPAUL BUS. & COM. L.J. 417 (2013). Cirillo argues that some regulatory measures, like disclosure, ability-to-repay assessment, and limits on mechanisms that allow consumers to extend payday loans, are preferable to usury caps. These measures protect consumers by allowing them to read about and understand their loans without substantially diminishing the supply of payday loans, which are useful when used appropriately. *Id.*

120. Although the CFPB is currently not authorized to create usury caps, in its general rulemaking authority the Bureau is specifically required to consider "the potential reduction of access by consumers to consumer financial products or services resulting from such rule . . . ." 12 U.S.C. § 5512(b)(2)(A)(i) (2012).

121. Max Ehrenfreund, *Sen. Elizabeth Warren Wants You to Be Able to Refinance Your Student Loans*, WASH. POST WONKBLOG (June 5, 2014), http://www.washingtonpost.com/

federal government to assume existing private student loans and refinance them to the interest rate applicable to federal loans originated in 2013–2014.[122] The bill requires that student debtors be in good standing with their private lenders to qualify for the program.[123] Other eligibility requirements would be left to the discretion of the Secretary of Education, who would be charged with focusing on student debt-to-income ratio, "minimizing inequities" between refinanced private loans and federal loans, and avoiding windfalls for private lenders.[124] The bill narrowly lost a vote on the Senate floor and died in June 2014.[125]

Senator Warren's proposal appeared to address the access problem relatively well. By providing an ex post solution for students who took out loans with unfavorable terms, the bill did not restrict the supply of private loans ex ante. Therefore, students who could only afford to go to college by taking out private loans had that opportunity. The Congressional Budget Office analysis of the bill predicted that the Secretary's debt-to-income eligibility criteria, which would be determined after the bill was in effect, would only preclude about five percent of outstanding loans (federal and private), with "outstanding loans" presumably including the ten percent of private loan debtors who are in default.[126] Refinancing under this model would apparently be available to a large group of students.

However, the refinancing option might not change ex ante incentives for private lenders because it does not directly regulate the terms of new loans. First, only loans originated before July 1, 2013 would be eligible for Senator Warren's program.[127] Thus, the program would not directly affect future private loan terms. Second, even if the program were extended to loans originated later, private lenders would likely react to the program by designing financing products that allow them to collect early in the life of the loan. If private lenders can make strong profits by originating loans with high rates and fees and collecting on them until the government assumes the loan, they are

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blogs/wonkblog/wp/2014/06/05/sen-elizabeth-warren-wants-you-to-be-able-to-refinance-your-student-loans/, *archived at* http://perma.cc/RZ-7RAW.

122. S. 2432, 113th Cong. § 101(b)-(c) (2014).

123. *Id.* § 101(b).

124. *Id.*

125. *See* Danielle Douglas, *Elizabeth Warren's Bill to Refinance Students Loans Dies in the Senate. Now What?*, WASH. POST WONKBLOG (June 11, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/11/elizabeth-warrens-bill-to-refinance-student-loans-dies-in-senate-now-what/, *archived at* http://perma.cc/HJ65-G3M4.

126. Letter from Douglas V. Elmendorf, Dir., Cong. Budget Office, to Senator Elizabeth Warren, Senator, Mass., 3 (June 6, 2014), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/s2432ltr.pdf, *archived at* http://perma.cc/FD4H-U82E.

127. S. 2432, 113th Cong. (2014).

unlikely to start originating consumer-friendly loans. The surging sales of collateralized loan portfolios in 2005–2007 suggests that it can be profitable to student lenders to originate loans and then sell them before they are paid off.

The bill seemed to be a strong option for helping to cure the staggering debt that students already face. Of course, since it did not pass the Senate, the idea would need to be resurrected in Congress in order to prove to be a viable solution. Furthermore, because of its ex post nature, the refinancing option does not make long-term, sustainable changes to how private loans are originated.

C. CFPB Authority to Prevent Unfair, Deceptive, or Abusive Practices

The Consumer Financial Protection Bureau has statutory authority to promulgate rules "as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."[128] The CFPB also has authority to prevent "unfair, deceptive, or abusive acts or practices 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."[129] The "unfair" and "deceptive" language matches the Federal Trade Commission Act, and existing jurisprudence on the definition of unfairness sets a high standard.[130] To be unfair, a practice cannot be

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128. 12 U.S.C. § 5512(b)(1) (2012).

129. *Id.* § 5531(b). In the fall of 2014, the CFPB sued two for-profit colleges that instituted their own private lending programs to students. *CFPB Sues For-Profit College Chain ITT for Predatory Lending*, CONSUMER FIN. PROT. BUREAU (Feb. 26, 2014), http://www.consumerfinance.gov/newsroom/cfpb-sues-for-profit-college-chain-itt-for-predatory-lending/, *archived at* http://perma.cc/V339-7FFY; *CFPB Sues For-Profit Corinthian Colleges for Predatory Lending Scheme*, CONSUMER FIN. PROT. BUREAU (Sept. 16, 2014), http://www.consumerfinance.gov/newsroom/cfpb-sues-for-profit-corinthian-colleges-for-predatory-lending-scheme/, *archived at* http://perma.cc/TBW8-S4WF. Among other charges, the CFPB alleged violations of the Consumer Financial Protection Act, namely that the lenders engaged in unfair, deceptive, or abusive practices. Complaint at 27–32, Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc., No. 1:14-cv-292 (S.D. Ind., Feb. 26, 2014), *available at* http://files.consumerfinance.gov/f/201402_cfpb_complaint_ITT.pdf; Complaint at 32–34, Consumer Fin. Prot. Bureau v. Corinthian Colleges Inc., No. 14-7194 (N.D. Ill. Sept. 16, 2104), *available at* http://files.consumerfinance.gov/f/201409_cfpb_complaint_corinthian.pdf. The outcomes of these cases should provide some insight into courts' willingness to hold private student lenders liable for their lending practices. However, the complaints are predominantly predicated upon the tactics that the schools, which allegedly had relationships of trust with their students, used to coerce or deceive students into taking on their financial products. *See* Complaint, *ITT Educ. Servs.*, No. 1:14-cv-292. Complaint at 32–34, *Corinthian Colleges*, No. 14-7194. Thus, the terms of the loans are not directly at issue.

130. *Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 114 (2007) (testimony of Sheila C. Bair, Chairman, Fed. Deposit

easy for consumers to avoid.[131] Because the definition includes a required cost-benefit analysis,[132] lenders argue that the availability of credit alone is a benefit substantial enough to put high-interest loans outside the purview of unfairness.[133] Hence, the CFPB might struggle to regulate private lenders under the present legal definitions of "unfair" or "deceptive."

Analysis of the statutory definition of "abusive" indicates that it is more flexible.[134] The definition reads as follows:

> The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice--
>
> (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
>
> (2) takes unreasonable advantage of--
>
> (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
>
> (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
>
> (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[135]

Some commentators suggest that the "abusive" standard was intended to be more subjective than "unfair[ness]." These commentators suggest that it was added to the Dodd-Frank Actin order to eliminate the cost-benefit requirement and create a broader range of potential regulation.[136]

This potentially permissive standard (even without the aforementioned ban on usury caps) might not allow the CFPB to affect interest rates directly. Some student borrowers who submitted complaints to the CFPB indicated that they were confused about whether their loans were private or federal.[137] If the CFPB can identify private lender direct-to-customer marketing practices as "tak[ing]

Ins. Corp.), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg37556/pdf/CHRG-110hhrg37556.pdf, *archived at* http://perma.cc/8HFY-WDXL.

131. *Id.*

132. *Id.*

133. *Id.*

134. Tiffany S. Lee, *No More Abuse: The Dodd-Frank and Consumer Financial Protection Act's "Abusive" Standard*, 14 J. CONSUMER & COM. L. 118, 120 (2011).

135. 12 U.S.C. § 5531(d) (2012).

136. Lee, *supra* note 134, at 120–21 (quoting FDIC Chairman Shiela Bair, speaking about the same standard in the Home Ownership and Equity Protection Act, as saying: " '[A]busive' is a more flexible standard . . . to address some of the practices that make us all *uncomfortable*." (alteration in original)).

137. ANNUAL REPORT, *supra* note 8, at 11.

unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service," the agency might be able to regulate loan marketing by requiring school involvement. Since educational institutions provide a buffer between students and lenders (and lenders often vie to be on a school's "preferred lender list"), the schools themselves could provide students information about the most affordable loans. This could provide market pressure on lenders to reduce rates and eliminate variable-rate options.[138]

Loan availability and market forces would still drive interest rates under this framework. However, incentivizing institutional cooperation from the schools could help pressure private lenders to improve the fairness of their practices. In August 2013, President Obama released a proposal aiming to develop new rating standards for colleges and universities.[139] The proposal provides financial incentives for institutions that lower costs—the ratings, which would incorporate information about each institution's ease of access and affordability, would be tied to federal aid distribution.[140] To encourage schools to take on a facilitation responsibility with respect to private loans, similar funding incentives could be offered to schools that partner with lenders offering fixed, comparatively low interest rate products.

D. Mortgage Regulation as a Model for Private Student Lending

A number of analogies might be made between the mortgage lending market and private student lending.[141] First, going to college and purchasing a home are generally considered a part of the "American dream," commodities that are so highly valued that Americans are willing to take on significant debt to acquire them. The markets also share an important similarity: both lending types experienced a boom in the mid-2000s, yielding large subprime lending markets that later left many borrowers in default.[142] However, while private student lending benefited only incrementally from increased disclosure regulations, mortgage lending received much regulatory attention since

138. Current statutes already prohibit educational institutions from accepting benefits from private lenders in exchange for a place on the preferred lender list. 15 U.S.C. § 1650.

139. Release, The White House, *supra* note 5.

140. *Id.* The President expects federal aid funding incentives to be effective because schools rely on student ability to borrow $150 billion per year from the government in order to afford higher education. *See id.*

141. ANNUAL REPORT, *supra* note 8, at 13 (highlighting a number of similarities).

142. *See supra* Part II.B.

the crisis.[143] Mortgage lending regulation could plausibly inform statutory and regulatory measures that could promote private student loan affordability.

1. "High-Cost" Loans: Increased Disclosure and Unfavorable Term Restrictions

The Home Ownership and Equity Protection Act of 1994 ("HOEPA") defines a class of "high-cost mortgages" by instituting interest-rate cutoffs.[144] The CFPB has some authority to reevaluate the cutoffs periodically but is limited by a discrete statutory range.[145] The statute and corresponding rules in Regulation Z require increased disclosure for high-cost loans "in conspicuous type size."[146] For example, high-cost, variable-rate loans must include disclosure of the maximum possible annual percentage rate[147] and the maximum possible monthly payment based on said rate.[148] Disclosure must also include the following statement, verbatim:

> You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application. If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.[149]

A similar disclosure structure could be applied to high-cost private student loans.

In addition to heightened disclosure requirements, high-cost mortgages are prohibited from carrying specified consumer-unfriendly terms, such as certain penalties for prepayment, increased interest rates after default, and negative amortization.[150] Limiting such terms in the high-cost context helps to protect consumers and diminishes the profitability of these products, helping to level the playing field between low-interest and high-interest loans. This framework could benefit

143. *See, e.g.*, Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103–325, 108 Stat. 2190 (codified as amended in scattered sections of 15 U.S.C.); Truth in Lending (Regulation Z), 12 C.F.R. § 1026 (2014).

144. 15 U.S.C. § 1602(bb). Although the concept of the statute has remained the same, several amendments have been made over time, including some made pursuant to the Dodd-Frank Act. Mercedes Kelley Tunstall, *CFPB Moves to Broaden Scope of "High-Cost" Mortgages*, 66 CONSUMER FIN. L.Q. REP. 390, 390 (2012). Note that the current cutoffs (6.5 percent or 8.5 percent) are higher than recent interest-rate averages for mortgages (4.1 percent for a thirty-year mortgage). 15 U.S.C. § 1602(bb); Gordon, *supra* note 32.

145. 15 U.S.C. § 1602(bb)(2).

146. *Id.* § 1639(a)(1) (2012); 12 C.F.R. §§ 1026.30, 1026.32(c).

147. 12 C.F.R. § 1026.30.

148. *Id.* § 1026.32(c)(4).

149. *Id.* § 1026.32(c)(1).

150. *Id.* § 1026.32(d).

student borrowers in the same manner that it benefits mortgagors. Allowing high-cost loans to persist with increased regulation, as opposed to imposing a usury cap, would mitigate some concerns about regulations decreasing the total volume of education financing available.[151]

2. Ability to Repay

On January 10, 2014, a new CFPB regulation called the Ability to Repay and Qualified Mortgage Standards Under the Truth in Lending Act became an effective part of Regulation Z.[152] Under the rule, most mortgages (not just high-cost mortgages) require lenders to employ an eight-factor analysis to make a "reasonable and good faith determination" of the borrower's projected ability to repay before originating a new loan.[153] The factors include the borrower's employment status, anticipated income or assets, credit history, other various financial obligations, debt-to-income ratio, and the expected monthly payment on the mortgage.[154] The expected monthly payment must be calculated based on the mortgage's highest possible interest rate.[155] Remedies for Truth in Lending Act violations include a private or class right of action and a defense to foreclosure.[156]

The Qualified Mortgage component of the CFPB's recent regulation allows mortgages that meet heightened standards to enjoy a "safe harbor" presumption of compliance with the ability-to-repay determination.[157] Among other requirements, Qualified Mortgages have limited fees, offer relatively equal payments throughout the life of the mortgage, are underwritten using the maximum interest rate but

151. While restricting the range of possible terms would likely decrease private student loan availability to some extent because disallowing consumer-unfriendly terms would increase the cost to lenders, availability would arguably not suffer as much as it would under a usury cap, which would disallow loans at these rates entirely. *Cf.* Tunstall, *supra* note 144, at 391 (stating that very few HOEPA high-cost mortgages are available because of the regulations; between 2004 and 2010, the percent of HOEPA mortgages originated dropped from 0.4 percent to 0.06 percent).

152. 12 C.F.R. § 1026.43; *Ability to Repay and Qualified Mortgage Standards Under the Truth in Lending Act*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/regulations/ability-to-repay-and-qualified-mortgage-standards-under-the-truth-in-lending-act-regulation-z/.

153. *Id.*; *see also* Michael B. Mierzewski et al., *CFPB Finalizes Ability-to-Repay and Qualified Mortgage Rule*, 130 BANKING L.J. 611 (2013) (providing a summary of the ability-to-repay and qualified mortgage safe harbor components of the rule).

154. 12 C.F.R. § 1026.43(c)(2).

155. *Id.* § 1026.43(c)(5).

156. 15 U.S.C. §§ 1640(a), (k) (2012).

157. 12 C.F.R. § 1026.43(e). Here, the rule distinguishes higher-priced mortgages. Higher-priced mortgages that meet the qualified mortgage standards only benefit from a rebuttable presumption of ability-to-pay compliance, not the safe harbor. *Id.*

allow the loan to be paid off during its term, and cannot exceed a specified debt-to-income ratio.[158] Income calculations assess employment for the two years preceding the mortgage as well as the likelihood of employment for the subsequent three years.[159] The safe harbor provides lenders with greater assurances that they will not be liable for failing to make a good faith and reasonable ability-to-repay determination.[160] It also might decrease compliance costs associated with making an individual ability-to-repay analysis for every new loan applicant.[161]

Some consider the new rule to function like a veiled usury law.[162] By disallowing mortgages that consumers are unlikely to be able to repay, the rule functionally caps both the total amount borrowed and interest rates on an individual basis. Professor Adam Levitin acknowledges that ability-to-repay requirements are paternalistic; they will prohibit access to people who cannot afford high-cost loans.[163] However, Professor Levitin argues that, in today's world of complex mortgage-lending regulation, the safe harbor rule is good for lenders because it is predictable and therefore easier to administer.[164]

Because the rule has only recently taken effect, its efficacy in driving more responsible lending and borrowing is essentially untested. However, the structure of requiring stricter lending requirements and providing remedies for loans that fail the requirements might help to decrease troublesome student lending.

IV. A PROPOSED PLAN FOR PRIVATE STUDENT LENDING

Each of the measures analyzed in Part III can assist in identifying values and concerns about student lending and education access. However, by compiling a plan that utilizes components of the various frameworks, students may be better served. This Section

158. *Id.*

159. 12 C.F.R. pt. 1026, app. Q.

160. CONSUMER FIN. PROT. BUREAU, ABILITY-TO-REPAY AND QUALIFIED MORTGAGE RULE: SMALL ENTITY COMPLIANCE GUIDE 28 (2014), *available at* http://files.consumerfinance.gov/f/201401_cfpb_atr-qm_small-entity-compliance-guide.pdf, *archived at* http://perma.cc/3V35-W9SJ.

161. *See id.* at 15–24 (noting that lenders must use "reasonably reliable third-party records" to calculate ability-to-repay and providing guidance on what that individualized determination should entail).

162. Adam Levitin, *Usury Laws Are Dead. Long Live the New Usury Law. The CFPB's Ability to Repay Mortgage Rule*, CREDIT SLIPS (Jan. 14, 2013), http://www.creditslips.org/creditslips/2013/01/usury-laws-are-dead-long-live-the-new-usury-law-the-cfpbs-ability-to-repay-mortgage-rule.html, *archived at* http://perma.cc/S7YF-ZHDF.

163. *Id.*

164. *Id.*

proposes short- and long-term regulatory action to promote healthy student lending.

A. Long-Term Strategy: Ability-to-Repay Model

In the long term, the ability-to-repay and qualified-loan model has strong potential for solving issues associated with private student loans. Requiring private student lenders to assess ability to repay will decrease default rates by prohibiting students from overborrowing. If college graduates enter the job market with loans that they can realistically pay back, the decreased consumerism discussed in Part I can be prevented. If an ability-to-repay calculation were required before initiating any new private student loan, a qualified-loan safe harbor (like the one discussed in Part III.D.2) would be attractive to lenders when it would decrease compliance costs.

The first step in establishing an ability-to-repay model would be to create and refine an ability-to-repay formula to apply to student lending.[165] Regulators can look to existing data[166] but would need to identify predictors of future income, collect or refine data on those predictors, and design a study to evaluate the efficacy of the formula. Once the formula was complete, an infrastructure for collecting and disseminating the necessary information between students, schools, and lenders would have to be implemented. Thus, development would likely entail a substantial commitment of time and resources.

In developing the formula, regulators could import some of the factors developed to prevent a repeat of the mortgage crisis, such as existing debts and obligations, expected monthly payments at the maximum interest rate, and credit history.[167] While some personal financial history factors are easily translatable from the mortgage context to the student-loan context, other factors are more speculative. Notably, to determine ability to repay, regulators would need to find an

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165. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 78 (acknowledging that student lending is more complex than other consumer lending because it cannot rely on credit history and income).

166. The CFPB has suggested some proxies for ability to repay in this context. *Id.* at 79. For example, "there are some statistics that may be correlated with the value of a degree from a particular school." *Id.* Further, some private lenders have used a school's "Cohort Default Rate" as an indicator of ability to repay. *Id.* The Cohort Default Rate for a particular school reflects the percentage of federal student borrowers during a period of time who enter repayment and default. *Id.* Cohort Default Rate is currently used to determine whether a school is eligible to receive federal loan funding. *Id.*

167. 12 C.F.R. pt. 1026, app. Q (2014). Although many students do not have substantial credit history or debt, those factors should be considered for students who do.

accurate method of predicting future income for students who have yet to secure (or even apply for) jobs. Here, the concrete, contemporaneous employment data used for mortgage lending would not apply, necessitating a heavy reliance upon long-term employment projections.[168]

Regulators could use an amalgam of preexisting tools to predict graduate employment and earnings. For example, the Census Bureau tracks work-life earnings by bachelor's degree, which could serve as an ability-to-repay predictor for students who select a field of study before originating their loans.[169] The Department of Labor collects earnings and unemployment data based on educational attainment.[170] Especially in today's economic climate, institutions themselves may collect data indicating how many of their graduates are gainfully employed.[171] Additionally, individual achievement data personal to the student, such as high school GPA or standardized testing scores, might help to project a borrower's likelihood of graduating and becoming employed.[172] Although the speculative nature of many of these factors and the dependence of the job market generally on the economy could make the formula less predictive than the current mortgage formula, it could help stem lending to students who will likely not be able to repay their loans.

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168. Such as expected future income and assets. *Id.*

169. *Educational Attainment, Pathways After a Bachelor's Degree*, U.S. CENSUS BUREAU, http://www.census.gov/library/infographics/pathways-series.html *archived at* http://perma.cc/6E3Z-XVQX. The data is divided by the subject matter of the bachelor's degree but also looks to earnings of holders of those degrees based on their professions and any post-secondary education. *Id.* That students often change their courses of study would undermine the efficacy of this predictor without some sort of refinancing mechanism if a student changed majors.

170. *Earnings and Unemployment Rates by Educational Attainment*, *supra* note 1.

171. This would, of course, require that institutions report such data accurately and in detail. In the last several years, many institutions (notably, law schools and for-profit colleges) have faced scrutiny for reporting job statistics that mislead students about the type of position or amount of compensation that they can expect to receive. *See, e.g.*, Stephen Burd, *New Disclosures Show What's Wrong with For-Profit College Job Placement Rates*, EDCENTRAL (Feb. 20, 2014), http://www.edcentral.org/new-gainful-employment-data-shows-whats-wrong-profit-college-job-placement-rates/, *archived at* http://perma.cc/AW7R-2KKK (providing some examples of employment data manipulation by for-profit colleges and calling for a single federal standard for reporting such data); Christine Parker, *NY Law Schools Inflate Job Figures: Critics*, N.Y. POST, Mar. 11, 2012, http://nypost.com/2012/03/11/ny-law-schools-inflate-job-figures-critics/, *archived at* http://perma.cc/S6ZZ-Q32G (breaking down employment statistics at New York area law schools after requesting details on how the figures are calculated).

172. Since student financial aid packages are adjusted annually, lenders could also consider college performance after the first year to hone ability to repay. However, this might create undesirable consequences. Some students who did not perform well in a particular academic year could become ineligible for future lending, which would leave students with student debt but no ability to continue seeking their degrees.

An ability-to-repay formula could benefit individual borrowers while providing broader positive effects on funding higher education. First, the credit-history-based factors (borrowed from mortgage lending) would promote valuable lender-school information sharing, which generally prevents students from borrowing in excess of the cost of attendance. To determine students' other debts, private lenders would have to work with schools or the federal government to learn the amount of federal loans being accessed. Via lender-school communication, schools can also better monitor who is borrowing, and financial aid offices can be in contact with students seeking private loans to help them make sure that they have exhausted federal loans.

Second, by calculating ability to repay based on a student's academic performance and the outlook of the degree he or she wishes to pursue, class-based access might be tempered by more merit-based factors. Although assets and credit history will clearly still be important components of underwriting standards, introducing more forward-looking factors into creditworthiness might diminish their effects. Thus, loan access would be less dependent on whether a student could provide a viable cosigner and on the financial condition of the student's family.

This method will deny access to education to some potential students who do not have the credit histories and the academic and career outlooks to secure loans and pay for their educations. Although this paternalism can be seen as suppressing the American dream, its application in the mortgage industry suggests that this is a value judgment that Americans are ready to make in a similar, highly valued context. Assisting citizens in determining whether higher education is going to be an individually profitable endeavor might help more than it hurts. Although some cases will likely seem unfair, the overarching goal would be to move towards maximizing access while avoiding foreseeable default for those who would be better off not seeking higher education at the time they apply.

B. Short-Term Strategy

Because the ability-to-repay formula would take some time to develop and implement, in the interim, two of the other measures discussed in Part III can provide students some assistance borrowing affordably.

1. Partner with the Institution

First, a plan similar to the President's proposed rating system[173] should be used to tie federal loan funding to schools that partner with preferred lenders offering loans below a certain rate. This system would reward educational institutions that direct their students towards favorable loans and incentivize other institutions to do the same. Since federal loan funding is already allocated to schools, this proposal only requires reallocation of existing funds based on cooperation and does not subsidize for-profit lenders. Existing regulations prohibit lenders from bribing schools to be included on a preferred lender list, so private lenders could not legally compensate the schools to forego the federal funding.

Educational institutions are ideal intermediaries. They are in direct contact with students, so they provide an effective marketing channel for private lenders. If they work both with private lenders and the CFPB, they can act as watchdogs for each of their students to limit overborrowing.[174] While it avoids imposing a usury cap, setting a maximum preferred lender rate sends a clear message about what is affordable and provides a clear benefit to lending at that rate; this partnership structure would reward preferred lenders with access to borrowers and school endorsements. It would not, however, eliminate direct-to-customer marketing, which could still lead to overborrowing or accepting high-cost private loans before exhausting federal loans. Nonetheless, the continued use of some direct-to-customer marketing here could provide a sort of silver lining from an access perspective: while students would hopefully find the most affordable options first, higher-cost options would still be available.

2. Implement Strong and Clear Warnings

Second, a warning similar to the one presented in Part III.D.1 should be required for high-cost private student loans. However, some adjustments to the existing mortgage warning could make the nature of the disclosure even clearer to students. In the mortgage context, the mandated warning language attempts to alert consumers to the potential unfavorable outcome: borrowers could lose their homes.[175]

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173. Release, The White House, *supra* note 5.

174. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 18, at 89–90 (suggesting that Congress require private lenders secure a school certification of a borrower's need for private loans before such loan may be issued, but not suggesting tying any incentive to the requirement).

175. 12 C.F.R. § 1026.32(c)(1) (2014).

Although it was probably designed to attract borrower attention, instead of highlighting the unfavorable quality of the mortgage at hand compared to other products on the market (its cost), the warning merely identifies the potential negative outcome of all mortgages. If the goal is to encourage students to consider lower-cost loans, the warning should also be about the rate itself.

Regulation Z already requires a number of disclosures specific to private education loans.[176] Private lenders must inform students that federal loans might be available and identify contemporary federal loan interest rates.[177] However, the regulations leave it to borrowers to compare interest rates on their own. To help students understand whether they are receiving an expensive financing option, the CFPB should define a "high-cost student loan" and implement corresponding disclosure requirements; if a loan meets the definition of "high cost," lenders should have to display an additional warning that directly explains to borrowers that their loans are expensive compared to other financial products (both public and private). Such a warning could help identify healthy interest rates for student loans without implementing an impermissible usury cap.

For example, the following language could supplement the benefits of disclosing federal interest rates by clearly and concisely articulating that less expensive loans may be available:

> Because the interest rate of this loan exceeds [decided-upon rate codified by regulation] the Consumer Financial Protection Bureau (CFPB) considers this product to be a **high-cost private student loan**. Student loans are **not typically dischargeable in bankruptcy**[178] and **you will be responsible for repaying this loan regardless of your future income and whether you complete your degree**. The CFPB recommends that you consider the interest rates and repayment terms of federal and private student loan alternatives to find the most affordable loan available before making the commitment to borrow.

The warning should also include some statistics about the amount of high-interest student debt in default. As in the mortgage warning, information about the potential outcome of high-cost borrowing can help students (who are likely novice borrowers) understand the consequences that frequently befall students who accept expensive loans. Including specific information, such as statistics, would serve as a concrete indicator that the student should proceed cautiously before accepting the loan.

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176. *See id.* § 226.47.

177. *Id.* §§ 226.47(a)(6)(i)–(ii), (b)(4)(i)–(ii).

178. Regulation Z currently requires disclosure that borrowers may still have to pay back private student loans in bankruptcy, *id.*§§ 226.47(a)(3)(iv), (b)(3)(vi); however, this warning proposes joining that information with disclosures that the loan at issue is high-cost and with information about defaults by high-cost borrowers.

If displayed prominently, a warning like this one could help students understand that there are a variety of interest-rate options and loan types to consider. Since most consumers would probably seek to avoid a high-cost option, students would likely look into other options once notified that they might be available. In times where underwriting standards are high, a student may not qualify for a loan with a lower rate. However, a warning like this one would help provide that student the opportunity to shop for other options and make an informed decision about whether the benefit of the degree is worth the debt load and the risk of default. The proposed warning, designed to be clearer and to provide a loan-cost benchmark, should be displayed prominently, where the student is most likely to see it. Since many financial transactions now take place online, regulators could also consider warning delivery methods that would appeal to students, such as mandatory videos or infographics. Since most students are novice borrowers and inexperienced with contracts, they might be more likely to pay attention to visual media than to read "the fine print," even when the message is presented in very large print.[179]

Disclosure requirements are already plentiful. Ideally, by offering students a discrete benchmark by which to compare the costs of their loans, students can also make informed decisions regarding whether the decision to go to school is worth accepting a high-cost loan. Further, by including information about the amount of high-cost debt in default, students might better understand that those risks are very real when students consume expensive financial products.

V. CONCLUSION

As the cost of higher education continues to climb, students have demonstrated how much they value that education by borrowing in correspondingly high amounts. While it is prudent to explore means of bringing costs down, it is important to recognize that, even if a degree comes at a lower cost, many Americans will still need to access student loans. Although federal student loans serve many American students, private student lending meets the excess demand. This form of lending can be considerably less affordable because of its high and variable

172. There is substantial academic literature on how to make regulatory warnings more effective. The exact location and format of this warning are beyond the scope of this Note. For a summary of research regarding effective warnings, see, for example, Michael S. Wogalter, Vincent C. Conzola & Tonya L. Smith-Jackson, *Research-Based Guidelines for Warning Design and Evaluation*, 33 APPLIED ERGONOMICS 219 (2002), *available at* http://www.who.int/fctc/guidelines/ArtElevenWogalterNine.pdf, *archived at* http://perma.cc/K5ZN-85FP.

interest rates. Especially during times of economic prosperity, lending standards have been relaxed, yielding massive default. This Note proposes a strategy to curb the price of private student lending.

First, in the long term, the Consumer Financial Protection Bureau should develop an ability-to-repay and qualified-loan structure for private student loans similar to the one developed for the mortgage industry. This system would require the CFPB to develop a formula that predicts future student income. Lenders would then use that formula to determine whether a loan applicant would be likely to be able to afford repayment after graduation. Although a formula would likely be time-consuming to develop, it could help prevent students from taking out loans that they will ultimately default on. Under this regime, lenders could also develop qualified loans with favorable terms that could be offered without assessing an applicant's ability to repay. By incentivizing lenders to save on the costs of individual calculations, the CFPB would encourage the private student loan market to offer more favorable terms and rates from the outset.

Second, in the short term, the federal government should condition federal loan funding on higher education institutions' cooperation in facilitating lender-student relationships when lenders offer affordable loans. By requiring that preferred lender–school relationships are only cultivated when loans are affordable, schools can direct students who have exhausted federal options toward a loan with a reasonable rate. These relationships will also yield information sharing that will help schools and private lenders protect against overborrowing. Presently, many private lenders confirm with schools that a loan recipient is indeed enrolled and that the student is not borrowing in excess of the school's cost of attendance. However, lenders are doing so of their own volition in response to the recession and could revert to more direct-to-customer marketing practices should underwriting standards loosen.

Third, the CFPB should promulgate a rule defining high-cost student loans and requiring clear warnings to appear on agreements for those loans. The warnings should inform students, first, that the loan is high cost, second, that lower-cost options (both federal and private) may be available, and, third, that educational debt is rarely dischargeable in bankruptcy. Students are often not savvy borrowers, and a clear, comparative warning would likely incentivize them to pursue other loan options before agreeing to an expensive debt load.

In conjunction, these measures could simultaneously push the private student loan market toward more affordable products and inform students about their best options before borrowing. Although this may result in some paternalism that decreases education access, the scheme could ultimately help achieve the underlying goal of preventing default—a goal that students, regulators, and lenders should share.

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