Empowering Consumers as a Remedy for Unfair Business Practices in the Student Loan Servicing Market

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I. INTRODUCTION

Mrs. Kaitlyn McCollum is a public-school Spanish teacher who obtained her undergraduate degree from Middle Tennessee State University ("MTSU") in 2013.[1] Even before enrolling at MTSU, McCollum had her goals set on graduating debt-free.[2] During her senior year of high school, she decided to contract with the Department of Education (the "ED") for a federal grant, known as the Teacher Education Assistance for College and Higher Education ("TEACH") grant,[3] to help her pay for her college education.[4] To receive the TEACH grant, Mrs. McCollum promised to teach a high-demand subject at a low-income school for at least four years after graduation.[5]

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1. Brittany Weiner, *Teacher Grants Converted to Loans Forcing Teachers to Pay Up*, WSMV (Dec. 10, 2018), https://www.wsmv.com/news/teacher-grants-converted-to-loans-forcing-teachers-to-pay-up/article_02a0272a-fcfc-11e8-af40-9b22e74af3fc.html.

2. *Id.*

3. Under the TEACH Grant, the ED promises to provide students with financial aid in the form of a grant, so the funds do not have to be paid back. *See* U.S. Dep't of Educ., *A TEACH Grant Can Help You Pay for College if You Plan to Become a Teacher in a High-Need Field in a Low-Income Area*, FED. STUDENT AID, https://studentaid.gov/understand-aid/types/grants/teach (last visited Jan. 17, 2020). In return, the student must agree to teach a high-demand subject area at a specific low-income school for at least four years after graduating from undergrad or graduate school with a degree in education. *Id.* Additionally, the terms require that the teacher send in an annual certificate showing that they completed a year of teaching at the school. *Id.* If the student fails to perform his service obligations, the grant converts into a loan and the student will be responsible for paying the funds back to the ED. *Id.* The contract states that once the grant is converted into a loan, it cannot be converted back into its original state as a grant and the interest accrues from the time that the grant was first received. *Id.*

4. Weiner, *supra* note 1.

5. *Id.*

Upon graduation, she fulfilled her promise by teaching the full four years and submitting the requisite paperwork to her loan servicer.[6] However, during McCollum's fourth year of teaching in a low-income public school, her federal student loan servicer had converted her grant into an interest-bearing loan with interest accruing from the time she first received the grant in 2013.[7] The loan servicer made this conversion because the servicer had received McCollum's annual certification[8] paperwork two days late.[9] This delay, and the resulting interest,

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6. *Id.*; *see also* Jonquil Rose Newland, *Tennessee Teacher Forced to Repay Thousands in Free Grant Money*, KSHB (May 22, 2018, 10:15 PM), https://www.kshb.com/news/national/tennessee-teacher-forced-to-repay-thousands-in-free-grant-money.

7. Weiner, *supra* note 1; Newland, *supra* note 6.

8. The annual certification is paperwork that a participant in the TEACH program must complete and submit to her servicer each year after completing one of the four required school years of full-time service. U.S. Dep't of Educ., *supra* note 3. It specifically states the following: "[The teacher] must provide [her] TEACH Grant servicer with documentation of that service on a form that will be available from [her] TEACH Grant servicer. This form must be certified by the chief administrative officer of the school or ESA where [teacher is] teaching, and must confirm that for the specified year: [the teacher] was a highly-qualified teacher . . . ; [the teacher] taught in a low-income school or ESA, as defined above in Item 1 of this section; and more than half of the classes that [the teacher] taught during the period being certified were in a high-need field." See U.S. Dep't of Educ., *Teacher Education Assistance for College and Higher Education Grant Program Agreement to Serve*, FED. STUDENT AID, https://studentloans.gov/myDirectLoan/atsHtmlPreview.action (last visited Feb. 4, 2020).

9. Mrs. McCollum sent her paperwork on July 29th and the paperwork was due on July 31st. Mrs. McCollum admitted that the paperwork might have been received a day or two late. Newland, *supra* note 5. Before November 2018, the Agreement to Serve ("ATS") did not expressly state an actual deadline for submitting the annual certification paperwork but based the deadline on when the student would ceased to be enrolled at the university where she received the TEACH grant. U.S. Dep't of Educ., *supra* note 3. The certification must be submitted every year. *See* Ford v. Pa. Higher Educ. Assistance Agency, No. 5:17-cv-49, 2018 U.S. Dist. LEXIS 44549, at *4–8 (N.D. Ohio Mar. 19, 2018). After facing public criticism that the deadline for the annual certification was too arbitrary and unknown to participants seeking to fulfill contractual duties, the ED acknowledged the problems with its deadline system and began taking steps to fix them. Chris Arnold & Corey Turner, *Exclusive: Ed Department to Erase Debts of Teachers, Fix Troubled Grant Program,* NAT'L PUB. RADIO (Dec. 9, 2018 7:00 PM), https://www.npr.org/2018/12/09/664317114/exclusive-ed-department-to-erase-debts-of-teachers-fix-troubled-grant-program (stating

unexpectedly created an additional $22,000 debt, plus accrued interest, which left her feeling mentally and emotionally torn.[10] She could do nothing to rectify the situation and fix the minor mistake.[11] Instead of relieving her post-grad financial burden, the grant that she worked for over the past four years became an expensive and unexpected loan that required repayment.[12]

Ms. Lisa Wickman ("Wickman") is also a teacher.[13] However, unlike Mrs. McCollum, Ms. Wickman was not a TEACH grant participant. Instead, Ms. Wickman borrowed the average federal student loan[14] to help pay for her college education.[15] She expected to pay back her federal student loans but did not expect to be penalized by her student loan servicer for making early loan payments.[16] Ms. Wickman

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that the Department of Education agreed that the annual certification form was "too complicated and confusing").

10. Newland, *supra* note 6.

11. *Id.* (noting that Mrs. McCollum immediately appealed, but her appeal was denied).

12. Weiner, *supra* note 1.

13. Annie Nova, *She Tried to Make Extra Payments on Her Student Loans, Then Almost Lost Thousands of Dollars*, CNBC (July 7, 2018, 4:53 PM), https://www.cnbc.com/2018/07/05/she-tried-to-make-extra-payments-on-her-student-loans-she-almost-lost.html.

14. Throughout the years, the federal government has issued several different categories of federal student loans, including loans under the William D. Ford Federal Direct Loan Program and loans under the Federal Perkins Loan Program, which expired in September 2017. *See* Rebecca Safier, *The Complete Guide to Federal Student Loans*, STUDENT LOAN HERO (Oct. 24, 2018), https://studentloanhero.com/featured/federal-student-loans-guide. Today, the average federal student loan is distributed from the William D. Ford Federal Direct Program, which offers Direct subsidized loans, Direct unsubsidized loans, Direct PLUS loans, and Direct consolidated loans. *Id.*

15. Nova, *supra* note 13.

16. *Id.* Ms. Wickman made an early loan payment of seven thousand dollars to her federal student loan servicer Navient Corp. in efforts to save money on her interest and decrease debt sooner. *Id.* She sent her payment to the address listed on the servicer's website and for weeks the payment never showed on her account. *Id.* After calling customer service, a Navient representative gave Ms. Wickman false information and told Ms. Wickman that she sent the payment to the wrong address. *Id.* Navient did receive Ms. Wickman's payment and told her that they would issue a refund within a few weeks, but it took exactly four months for Ms. Wickman to receive her refund. *Id.* Meanwhile, interest continued to accrue on the loan despite the mistake made by the servicer. *Id.*

sent her early loan payment by check to the address listed on the federal loan servicer's website, and the payment was cleared by her bank, but the servicer failed to properly apply her payment to her account.[17] Although the student loan servicer was responsible for the mistake, Ms. Wickman was left to face the consequences; she continued to incur additional interest during the time that the federal student loan servicer misapplied and lost her early payment.[18]

Mrs. McCollum and Ms. Wickman's experiences are all too frequent within the federal student loan servicer industry. Many Americans have raised similar complaints regarding the ED and their federal student loan servicers.[19] There are numerous lawsuits against major student loan servicers alleging that these servicers employ unfair and deceptive business practices by creating obstacles to repayment and purposely providing customers with bad information, causing struggling borrowers to pay more on their loans.[20]

The ED's lax standards and failure to enforce regulations have facilitated bad business practices and customer dissatisfaction within

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17. *Id.*

18. *Id.*

19. *See* Ford v. Pa. Higher Educ. Assistance Agency, No. 5:17-cv-49, 2018 U.S. Dist. LEXIS 44549, at *4–8 (N.D. Ohio Mar. 19, 2018); U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-314, BETTER MANAGEMENT OF FEDERAL GRANT AND LOAN FORGIVENESS PROGRAMS FOR TEACHERS NEEDED TO IMPROVE PARTICIPANT OUTCOMES 26 (2015), https://www.gao.gov/assets/670/668634.pdf (stating that from August 2013 to September 2014, the ED discovered 2,252 grants that were erroneously converted to loans); Tom Groenfeldt, *Student Loan Servicers Get a Report Card from LENDEDU,* FORBES (Jan. 10, 2019, 8:00 AM), https://www.forbes.com/sites/tomgroenfeldt/2019/01/10/student-loan-servicers-get-a-report-card-from-lendedu/#23073a1f4b14; Corey Turner & Chris Arnold, *Dept. of Education Fail: Teachers Lose Grants, Forced to Repay Thousands in Loans*, NAT'L PUB. RADIO (Mar. 28, 2018, 5:01 AM), https://www.npr.org/sections/ed/2018/03/28/596162853/dept-of-education-fail-teachers-lose-grants-forced-to-repay-thousands-in-loans (stating that reports from the ED "suggest[ ] that thousands of teachers had their grants taken away and converted to loans, sometimes for minor errors in paperwork"); *CFPB Sues Nation's Largest Student Loan Company Navient for Falling Borrowers at Every Stage of Repayment*, CONSUMER FIN. PROT. BUREAU (Jan. 18, 2017) https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/ [hereinafter *Failing Borrowers*].

20. *Failing Borrowers*, *supra* note 19.

the servicer industry.[21] A 2019 report released by the ED's independent general inspector found the Office of Federal Student Aid ("FSA")—the office within the ED that oversees student loans and student loan servicers—was negligent in regulating federal student loan servicers and did not hold these servicers accountable for violating federal regulations.[22] Although the FSA's contracts with the servicers allowed them to hold these companies accountable, they neglected to do so.[23] The FSA did not use the federal performance metrics relevant to servicer compliance when assigning student loan accounts to servicers.[24] This allows the servicers to continue receiving business without any incentive to follow federal requirements.[25]

Furthermore, because the loan servicer industry is a concentrated market, it offers consumers very little choice, allowing the industry to continue to operate using business practices that violate federal requirements and are unfair to customers. While consumers remain tied to federal loan servicers until their balance is paid in full—for many, the majority of their adult life—they have limited options for

21. *See* DEANNE LOONIN ET AL., STUDENT LOAN LAW 85 (6th ed. 2019); Jillian Berman, *Watchdog slams the Department of Education's Oversight of Student-Loan Companies,* MARKET WATCH (Feb. 18, 2019, 9:01 AM), https://www.marketwatch.com/story/watchdog-slams-the-department-of-educations-oversight-of-student-loan-companies-2019-02-14 (discussing how the current administration is working to shield loan companies and fails to hold servicers accountable).

22. See U.S. DEP'T OF EDUC. OFF. INSPECTOR GEN., ED-OIG/A05Q0008, FEDERAL STUDENT AID: ADDITIONAL ACTIONS NEEDED TO MITIGATE THE RISK OF SERVICER NONCOMPLIANCE WITH REQUIREMENTS FOR SERVICING FEDERALLY HELD STUDENT LOANS 2 (2019), https://assets.documentcloud.org/documents/5738762/IG-Report-on-Servicers.pdf (providing a report on the general inspector's findings); Ken Sweet, *Report Finds Problems with Student Loan Servicing, Oversight*, AP NEWS (Feb. 14, 2019), https://www.apnews.com/cc655fdea293469d86231e4bcb10a5ee.

23. U.S. DEP'T OF EDUCATION OFF. INSPECTOR GEN., *supra* note 22, at 2 n.4 ("FSA's contracts with the servicers allowed FSA to take certain actions, such as withholding payments or reducing loan volume, to hold servicers accountable when they failed to comply with Federal loan servicing requirements.").

24. *Id.*

25. *Id.* at 2 ("By not holding servicers accountable for instances of noncompliance with Federal loan servicing requirements, FSA did not provide servicers with an incentive to take actions to mitigate the risk of continued servicer noncompliance that could harm students. Further, FSA's not holding servicers accountable could lead to servicers being paid more than they should be (the contracts with servicers allow FSA to recover amounts paid for loans not serviced in compliance with requirements).").

moving the loan to another provider.[26] Lack of consumer choice gives companies less incentive and motivation to use fair business practices.

Additionally, the deceptive behavior by student loan servicers can cause unnecessary increases in student loan debt.[27] Sadly, this leads to more financial hardship and stress, negatively affecting consumers' mental health and quality of life.[28] It is important that the ED take the appropriate stand to prevent the many unfair practices within the industry.

This Note highlights the issues within the federal student loan service market and proposes a solution to enhance the ED's current plan for addressing unfair business practices within the student loan servicer industry. Specifically, the ED should allow consumers a choice in selecting a student loan servicer, which would additionally require the ED to provide a rating and review system so that consumers can make informed decisions. As this Note explains, the ED has the authority to undertake this action and should aim to promote more competition within the highly concentrated student loan servicer market.

Part II of this Note summarizes the current issues within the federal student loan servicer market and discusses the reasons behind the industry's market failure. Part III of this Note proposes a two-fold solution to increase competition and transparency in the industry. Part IV briefly concludes.

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26. LOONIN ET AL., *supra* note 21, at 78.

27. Nova, *supra* note 13 (discussing a borrower's mishap in dealing with student loan servicer that caused her student debt to unnecessarily increase).

28. Eliza Mills, *When the Stress of Debt Strains Mental Health*, SDPB RADIO (Nov. 10, 2017), https://listen.sdpb.org/post/when-stress-debt-strains-mental-health ("Stress from debt . . . could increase the risk of eating disorders, alcoholism, and anxiety."); Chris Ciciora, *Student Loan Debt for the Millennial Generation and Ineffectiveness of the Federal Student Loan Program*, 50 J. MARSHALL L. REV. 139, 139–40 (2016) (discussing the negative impact student loan debt has on borrowers, such as causing borrowers to put off personal and financial milestones like getting married and having kids); Robert T. Muller, *Crushing Debt Affects Students Mental Health*, PSYCHOLOGY TODAY (Jan. 4, 2018), https://www.psychologytoday.com/us/blog/talking-about-trauma/201801/crushing-debt-affects-student-mental-health.

II. MARKET FAILURE IN THE FEDERAL STUDENT LOAN SERVICER INDUSTRY

Student loan debt is nearly inevitable for anyone wanting to obtain a higher education in the United States.[29] With roughly 44.2 million borrowers owing a total of 1.52 trillion dollars in the federal student loan debt,[30] most citizens cannot avoid having to deal with a federal student loan servicer at some point in their lifetime. Associating with a federal student loan servicer initially means contracting with the ED, the federal government agency which chooses and pays your federal student loan servicer.[31] The ED's mission is to "promote student achievement and preparation for global competitiveness,"[32] but some of its actions contravene this principle. By contracting with unfair student loan servicers[33] and limiting a borrower's ability to choose her servicer, the ED has placed many students in substantial financial hardship.[34]

Since 2014, there have been nine federal student loan servicers.[35] Of the nine, four major for-profit student loan servicers have

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29. Patrick W. Watson, *The Reason Behind the Student Debt Problem,* FORBES (Feb. 26, 2018, 11:34 AM), https://www.forbes.com/sites/patrickwwatson/2018/02/26/the-real-reason-behind-the-student-debt-problem/#31a300371f92 (explaining that the need to obtain more student loans comes from a high demand of employers who expect an employee to have a college degree even when the job does not pay for the price of obtaining a college degree).

30. Zack Friedman, *Student Loan Debt Statistics in 2018: A $1.5 Trillion Crisis,* FORBES (Jun. 18, 2018, 8:32 AM), https://www.forbes.com/sites/zackfriedman/2018/06/13/student-loan-debt-statistics-2018/#759c78ec7310; U.S. Dep't of Educ., *Federal Student Loan Portfolio: Portfolio by Debt Size,* FED. STUDENT AID, https://studentaid.ed.gov/sa/about/data-center/student/portfolio (last visited Feb. 2, 2020).

31. *Mission*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/mission/mission.html (last visited Feb. 2, 2020).

32. *Id.*

33. Ken Sweet, *AP Exclusive: Gov't Questions Unfair Student Loan Practices*, FOX BUS. (Nov. 20, 2018), https://www.foxbusiness.com/markets/ap-exclusive-govt-questions-unfair-student-loan-practices.

34. LOONIN ET AL., supra note 21, at 76.

35. *See* U.S. Dep't of Educ., *What Loan Servicers Do,* FED. STUDENT AID, https://studentaid.ed.gov/sa/repay-loans/understand/servicers (last visited Feb. 2, 2020).

managed a majority of the country's federal student loan debt, and consumers have lodged many complaints against each of them.[36] These servicers included Navient (formerly Sallie Mae), Pennsylvania Higher Education Assistance Agency ("PHEAA"), Nelnet Inc., and Great Lakes Educational Loan Services Inc. ("Great Lakes").[37] Their responsibilities include "collecting payments on a loan, advising borrowers on resources and benefits to better manage their federal student loan obligations, responding to customer service inquires, and performing administrative tasks associated with maintaining a loan on behalf of the U.S. Department of Education."[38] Navient, PHEAA, Nelnet, and Great Lakes (collectively referred to as "the companies") received a great deal of the federal government's student-loan-servicing business.[39] Together, the companies have "collect[ed] payments from [approximately] 30 million borrowers who owe $950 billion, or 93 percent of outstanding government-owned student loans."[40] Each company is paid for every student that it services, and each company receives a set price for nearly every type of service it provides to the consumer-student.[41]

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36. Groenfeldt, *supra* note 19; Donna Rosata, *Complaints About Student Loan Servicers Mount as Protections Erode*, CONSUMER REPORTS (Apr. 28, 2017), https://www.consumerreports.org/student-loans/student-loan-servicers-complaints-mount-as-protections-erode/.

37. U.S. Dep't of Educ., *Loan Servicing Contracts*, FEDERAL STUDENT AID, https://studentaid.gov/data-center/business-info/contracts/loan-servicing (last visited Jan. 15, 2020). After a recent merger between the Nelnet and Great Lakes in 2018, there are now technically only three major federal student loan servicers. Nelnet, *Nelnet Completes Acquisition of Great Lakes Educational Loan Service, Inc.*, PR NEWS WIRE (Feb. 7, 2018) https://www.prnewswire.com/news-releases/nelnet-completes-acquisition-of-great-lakes-educational-loan-services-inc-300595308.html; *see also* Jillian Berman, *Elizabeth Warren, Cory Booker Take Aim at Student Loan Company Merger,* MARKET WATCH (Jun. 27, 2019, 4:18 PM) https://www.marketwatch.com/story/elizabeth-warren-cory-booker-want-feds-to-review-student-loan-company-merger-2019-06-27.

38. U.S. Dep't of Educ., *supra* note 37.

39. *See* Jillian Berman, *One Company Will Now Handle Close to Half of All Student-loan Payments*, MARKET WATCH (Mar. 6, 2018 4:09 PM), https://www.marketwatch.com/story/one-company-will-now-handle-close-to-half-of-all-student-loan-payments-2018-02-09.

40. *Id.*

41. In the loan servicing contract, the ED promises to pay private servicers a set fee for each type of service performed by the student loan servicer. Depending on

Although they work as agents for the ED and are responsible for providing customer service to millions of student consumers, these major federal student loan servicers have tremendously failed the public by engaging in unfair or deceptive business practices.[42] Borrowers have experienced many issues with their servicers regarding "objective counseling about the range of [repayment] options, applying for and staying in income-driven repayment, consolidating [loans], getting basic account information, and ensuring proper application of payments."[43] There have been numerous complaints concerning the practices of the four major federal student loan servicers, and lawsuits against these companies are on the rise.[44] However, plaintiffs have had limited success when taking legal action against these four student loan companies. Consumers seeking remedies from these companies face

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the type of work performed, the servicer can make more or less revenue. For example, in a contract with the federal student loan servicer Great Lakes Educational Loan Services, the company is paid a unit rate of $1.05 for every student it services that is in school, $2.85 for every student that is it services that is in currently in deferment, $1.05 for every student it services that is currently in forbearance status, and the list continues for each particular service offered and provided to the Department. *See, e.g.*, U.S. Dep't of Educ., Amendment No. 0080, Additional Terms and Conditions § B.13.N (Sept. 1, 2014), https://studentaid.gov/sites/default/files/ED-FSA-09-D-0012_MOD_0080_GreatLakes.pdf.

42. *See* LOONIN ET AL., *supra* note 21, at 85.

43. LOONIN ET AL, *supra* note 21, at 78.

44. *See generally* Ford v. Pa. Higher Educ. Assistance Agency, No. 5:17-cv-49, 2018 U.S. Dist. LEXIS 44549 (N.D Ohio Mar. 19, 2018); Consumer Fin. Prot. Bureau v. Navient Corp., 2017 U.S. Dist. LEXIS 123825 (M.D. Pa. 2017); Stacey Cowley, *California will be the Fourth State to Sue Navient,* N.Y. TIMES (Jun. 28, 2018), https://www.Nytimes.com/2018/06/28/business/Navient-student-loans-california.html; *Failing Borrowers*, *supra* note 18 (discussing the three lawsuits brought by the Consumer Financial Protections Bureau against Navient, a major federal student loan servicer, for "misallocating customers' payments, steering borrowers incorrect information and ignoring borrowers' request for help"); *Great Lakes Class Action Lawsuit By Public Service Student Loan Forgiveness Borrowers 2018*, HOPE CREDIT (Sept. 17, 2018), http://hopecredit.net/great-lakes-class-action-lawsuit-by-public-service-student-loan-forgiveness-borrowers-2018/; *Nelnet Class Action Lawsuit*, DOMINA LAW, https://www.dominalaw.com/investigations/nelnet-class-action-lawsuit/ (last visited Feb. 2, 2020); Annie Nova, *She Was Denied Public Service Loan Forgiveness, So She Filed a Lawsuit*, CNBC (Dec. 18, 2018, 9:35 AM), https://www.cnbc.com/2018/12/18/borrowers-denied-public-service-loan-forgiveness-file-lawsuits.html.

an uphill battle, and an appropriate solution is needed to better protect student loan borrowers.

A. Failed Attempts to Change Bad Behavior

Many have made efforts to punish and prevent predatory practices within the student loan servicing industry. Consumers have attempted to seek relief through private actions against their servicers.[45] Unfortunately, plaintiffs have had low success rates in lawsuits against their servicers.[46] Many of the cases have been dismissed due to plaintiffs' failure to state a cause of action, sovereign immunity, and federal preemption of state law claims.[47] Typically, borrowers are left with little to no options for recourse.[48]

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45. Within the past three years, all of the four major federal student loan servicers have had numerous private lawsuits brought against them challenging the servicers' business practices. *See* Mirandette v. Nelnet Inc., No. 16-2224, 2018 U.S. App. LEXIS 1155, at *2 (6th Cir. 2018); Ford v. Pa. Higher Educ. Assistance Agency, No. 5:17-cv-49, 2018 U.S. Dist. LEXIS 44549, at *4–8 (N.D Ohio Mar. 19, 2018); Travis v. Navient Corp. 284 F. Supp 3d 335, 338 (E.D.N.Y. Feb. 16, 2018); Dawson v. Great Lakes Educ. Loan Servs., No. 15-cv-475-bbc, 2016 U.S. Dist. LEXIS 12652, at *1-2. (W.D. Wis. Feb. 3, 2016). In addition, the ED provides a Federal System Aid ("FSA") feedback system which allows consumers to file complaints directly with the ED when the consumer has an issue or discrepancy with her account balance. *See* U.S. Dep't of Educ., *supra* note 35.

46. *See* cases cited *supra* note 45.

47. *See e.g.*, *Ford*, 2018 U.S. Dist. LEXIS 44549, at *13–17. In *Ford*, the plaintiffs alleged a RICO claim because the defendants switched the TEACH grant recipients to a paperless option without knowledge causing them to miss important information in regards of keeping their grants. *Id.* at *13–14. The court dismissed the RICO claim and sided with defendant PHEAA that the claim failed because it did not properly allege a scheme to defraud when no actual fraudulent statement was made to the plaintiff. *Id.* at 14–18.

48. Normally, the borrower must depend on the Direct loan contracts, which include some protections for borrowers. Direct loan contracts contain provisions that require servicers to "limit soliciting or promoting of other products while servicing ED debt, require timely and accurate processing of discharge request, and require timely and accurate responses to written and email questions." NCLC, *Response to U.S. Department of Education Office of Federal Student Aid Request for Information: Title IV Student Loan Servicing*, SLBA (Jan. 30, 2015), https://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/response-rfi-servicing-jan2015.pdf. These provisions offer very minimum standards to direct a servicer's course of conduct when dealing with consumers. *Id.*

1. Few Means of Private Enforcement

The lack of specific federal regulations for loan servicers often poses a problem for plaintiffs seeking to remedy servicer wrongdoing through private enforcement. For example, in *Ford v. Pennsylvania Higher Education Assistance Agency*, the plaintiffs produced evidence that the servicer was involved in wrongdoing when it switched the plaintiffs' method for receiving important notifications and certificate forms without the plaintiffs' knowledge.[49] Instead of sending required paperwork through the mail or to the plaintiffs' personal emails, the servicer sent required documents through the servicer's private "paperless portal" without notifying the plaintiffs.[50] This scheme denied the plaintiffs adequate notice and caused them to miss the deadline to return the required certificate forms to maintain their grants.[51] Consequently, the servicer converted plaintiffs' grants into loans and the plaintiffs attempted to sue the servicer under several theories involving fraud and unjust enrichment.[52] Unfortunately, the plaintiffs were unsuccessful in their case because there were no laws specifically geared towards regulating federal student loan servicers for direct loans.[53]

In addition to the lack of specific regulations for loan servicers, the contracts between the ED and loan servicers do not provide clear standards for a loan servicer's conduct towards borrowers. The only provision in the standard loan servicing contract that directly relates to protecting borrowers against predatory lending is "[t]he department . . . expects best of business practices to be deployed."[54] This contract provision is vague and does not clearly define the rules or set a clear standard for the expectations servicers must meet when dealing with borrowers. Moreover, the lack of private enforcement language in servicer contracts hinders borrowers' abilities to bring claims under a

49. *Ford*, 2018 U.S. Dist. LEXIS 44549, at *5–9.

50. *Id.* at *6–7.

51. *Id.*

52. *See id.* at *12–25.

53. *See id.*

54. *See, e.g.*, U.S. Dep't of Educ., Contract No. ED-FSA-09-D-0012, Additional Servicer Full Requirements Attachment A-3 3 (2009), https://www2.ed.gov/policy/gen/leg/foia/contract/greatlakes-061709.pdf.

third-party contract beneficiary theory.[55] In the absence of clear contractual language or defined regulations outlining the standards for servicer conduct, borrowers are left without a means to remedy bad behavior.

2. Sovereign Immunity as a Hurdle to Accountability

Furthermore, sovereign immunity remains an issue for plaintiffs seeking recourse. A student loan servicer is not actually a governmental entity, but it exercises quasi-governmental functions while working as an agent for the ED or its state equivalents.[56] Because of this, servicers sometimes assert sovereign immunity as a derivative defense to bar lawsuits.[57] However, at least one federal circuit court has rejected sovereign immunity as a bar to lawsuits against servicers that engage in misconduct while performing quasi-governmental functions.[58]

Even if sovereign immunity does not bar claims against a servicer, it still prevents plaintiffs from bringing suit against the ED itself. For example, in *Dawson v. Great Lakes Education Loan Services,* the plaintiff sued both the ED and Great Lakes for Great Lakes' behavior in "violating terms of the loan agreement and federal regulations governing the administration of her loans when it capitalized interest that accrued during a particular type of administrative forbearance period."[59] Although the Court denied the federal student loan servicer's counterclaim for declaratory relief that servicer's conduct was not fraudulent or intentional, the Court further denied the plaintiff any rem-

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55. *See, e.g.*, Hyland v. Navient Corp., 2019 U.S. Dist. LEXIS 113038, at *21–23 (S.D.N.Y. July 8, 2019) (noting that the contract between the ED and Navient lacked language evidencing an intent to permit plaintiffs to bring third-party beneficiary claims).

56. *See* U.S. Dep't of Educ., s*upra* note 35 (explaining that loan servicers collect payments, advise borrowers, offer customer service, and perform administrative tasks on behalf of the ED).

57. *See, e.g.*, United States *ex rel.* Oberg v. Pa. Higher Educ. Assistance Agency, 804 F.3d 646, 676–77 (4th Cir. 2015).

58. *See id.* (finding that the loan servicer was not an arm of the state and could not receive sovereign immunity).

59. Dawson v. Great Lakes Educ. Loan Servs., No. 15-cv-475-bbc, 2016 U.S. Dist. LEXIS 12652, at *1-2. (D.W.D Wis. Feb. 3, 2016).

edy from the ED because of the federal government's sovereign immunity.[60] As *Dawson* illustrates, sovereign immunity remains a challenge for plaintiffs that wish to hold the ED accountable for misconduct in student loan servicing schemes.

3. Preemption of State Law Claims

Preemption of state law claims offers yet another challenge to plaintiffs seeking relief from fraudulent or improper servicer behavior. Although many states have sought to prohibit much of the predatory behavior and have participated in filing lawsuits against these major servicers,[61] federal law places a burden on state law tort actions by exempting student loan servicers from a state's disclosure requirements.

The Higher Education Act of 1965 (the "HEA") states that "[l]oans made . . . shall not be subject to any disclosure requirements of any State law."[62] Jurisdictions have split on whether this provision

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60. *Id.* at *16–20. Under the doctrine of sovereign immunity, the "United States cannot be sued unless it gives express consent to the jurisdiction of the court in which it is sued." *Id.* at *7 (citing Hercules, Inc. v. United States, 516 U.S. 417, 422 (1996)). In *Dawson*, the plaintiff contended that the government gave express consent under the Little Tucker Act. Under the Little Tucker Act, the government waives sovereign immunity for "monetary relief [only] in the form of 'actual, presently due money damages.'" *Id.* at *8–9. The court denied waiver of governmental immunity because the court concluded that the alleged misconduct by the ED was only an accounting error that would entitle the plaintiff simply to injunctive relief, rather than present monetary damages. *Id.* at *15–17. Therefore, the claim was dismissed, and nothing was done to punish the ED for permitting the server to wrongfully increase the plaintiff's student loan debt. A failure to punish bad actions will do nothing to discourage a servicer's unfair practices.

61. States such as California, Illinois, Pennsylvania, Washington, and Mississippi have sued the major servicer Navient for improper actions on behalf of borrowers. Zack Friedman, *How This New Navient Lawsuit Affects Your Student Loans*, FORBES (Oct. 8, 2018, 8:32 AM), https://www.forbes.com/sites/zackfriedman/2018/10/08/navient-lawsuit-student-loan-forgiveness/#56a2484043bd. New York has also sued PHEAA for abusive servicing practices to consumers. Jonathan Stempel, *New York Sues Big U.S. Student Loan Servicer for Abusing Borrowers*, REUTERS (Oct. 3, 2019, 1:32 AM), https://www.reuters.com/article/us-new-york-student-loans-lawsuit/new-york-sues-big-u-s-student-loan-servicer-for-abusing-borrowers-idUSKBN1WI252.

62. 20 U.S.C. § 1098g (2018).

of the HEA expressly preempts state law claims based on fraud, negligent misrepresentation, or improper disclosure.[63] In *Nelson v. Great Lakes Education Loan Services*, the Seventh Circuit held that the disclosure provision of the HEA did not preempt state law misrepresentation and improper disclosure claims.[64] The Federal District Court for the Middle District of Pennsylvania similarly found that the HEA did not preempt a state law improper disclosure claim.[65] In *Chae v. SLM Corporation*, however, the Ninth Circuit held that "allegations that [the servicer made] fraudulent misrepresentations in its billing statements . . . are expressly preempted by the [HEA]."[66] The Federal District Court for the Northern District of Florida has likewise concluded that the disclosure provision in the HEA preempts misrepresentation claims.[67]

The ED, for its part, has interpreted the disclosure provision within the HEA to preempt state law claims against loan servicers.[68] The ED's interpretative guidance has only complicated the inquiry further, as courts disagree on how much deference the ED's interpretation

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63. *Compare* Chae v. SLM Corp., 593 F.3d 936, 950 (9th Cir. 2010) (holding that the HEA expressly preempted a state law claim), *with* Nelson v. Great Lakes Educ. Loan Services, 928 F.3d 639, 647–58 (7th Cir. 2019) (rejecting arguments that the HEA preempted state law claims on express preemption, conflict preemption, and field preemption grounds).

64. *Nelson*, 928 F.3d at 647–58.

65. Pennsylvania v. Navient Corp., 354 F. Supp. 3d 529, 549–53 (M.D. Pa. 2018).

66. *Chae*, 593 F.3d at 950.

67. Lawson-Ross v. Great Lakes Higher Educ. Corp., No. 1:17-CV-253-MW/GRJ, 2018 U.S. Dist. LEXIS 199048, at *7–9 (N.D. Fla. Sept. 20, 2018).

68. Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10,619 (Mar. 12, 2018) (to be codified at 34 C.F.R. Ch. VI).

is due.[69] Until a Supreme Court decision[70] or an act of Congress[71] resolves the issue, preemption remains an obstacle to state law relief.

4. Regulations Without Choice or Transparency

Existing case law demonstrates the disadvantages for consumers who seek private action. Along with the limited options for recourse, the costs of litigation and legal expenses serve as another burden on a private plaintiff attempting to seek a remedy. For these reasons, regulatory enforcement offers a more attractive solution to curbing misbehavior by student loan servicers.

Perhaps the most promising solution to fixing the servicer industry is to create a completely new system for repayment and servicing needs. In 2017, the Secretary for the U.S. Department of Education, Betsy Devos, attempted to develop a new solution for the student loan servicer crisis when she suggested that the ED should contract exclusively with one servicer to manage all student loans.[72] Many consumer protection advocates and antitrust experts rejected this approach, fear-

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69. *See Navient Corp.*, 354 F. Supp. at 552 (giving little weight to the ED's interpretation because it was issued after litigation commenced and was merely an informal statement); *but see Lawson-Ross*, 2018 U.S. Dist. LEXIS 199048, at *8–9 (finding the ED's interpretation to be persuasive).

70. Commentators predict that the issue of preemption for claims against federal student loan servicers is likely to be reviewed by the U.S. Supreme Court if different jurisdictions continue to make inconsistent decisions on the issue. Jillian Berman, *Clash Between Student Loan Companies and States Could Wind Up in the Supreme Court*, MARKET WATCH (Jan. 28, 2019 3:39 PM), https://www.marketwatch.com/story/we-may-soon-find-out-whether-student-loan-companies-have-to-follow-state-law-2019-01-28.

71. The Congressional Research Service has provided Congress with suggestions for resolving the split. *See* KEVIN M. LEWIS & NICOLE VANATKO, CONG. RESEARCH SERV., LSB10302, PREEMPTIVE STRIKE: DOES FEDERAL LAW DISPLACE STATE REGULATION OF STUDENT LOAN SERVICERS? (2019), https://fas.org/sgp/crs/misc/LSB10302.pdf.

72. Lauren Camera, *Devos Backs Away from Single Student Loan Servicer*, US NEWS (Aug. 2, 2017), https://www.usnews.com/news/education-news/articles/2017-08-02/betsy-devos-backs-away-from-single-student-loan-servicer.

ing that it would allow a company to become "too big to fail" and further lessen protections for consumers.[73] After significant criticism, Devos decided not to go through with this proposal.[74]

Instead, the ED decided to keep multiple servicers but plans to run a system where all of its servicers work under a single platform branded by the Department and Federal Student Aid Office.[75] This new proposal, known as "Next Gen," plans to consolidate multiple servicer websites into a single website where borrowers can receive their information.[76] Next Gen, which is set to launch in 2019, has bi-partisan support and is likely to be implemented.[77] While it could very much be a step in the right direction, it still lacks two fundamental features that will help ensure quality and competition. Similar to the traditional system, borrowers do not receive a choice for their servicer and are not provided with enough information to make informed decisions for a servicer.

The Next Gen solution offers an increased oversight of student loan servicers, but this will not be enough to motivate private servicers to change behavior. Opening the market to symbolize a free enterprise system will ensure consumers receive the most support and satisfaction. Choice and greater transparency are needed in the market to provide borrowers with the most quality service.

B. The Consumer's Lack of Choice in the Federal Student Loan Servicer Industry

Today, a student borrower with a direct loan from the government does not have a choice regarding which company services his student loan debt.[78] Instead, the ED uses a metric system based on a servicer's performance to assign borrowers to a particular servicer.[79]

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73. *Id.*
74. *Id.*
75. *Id.*
76. Colleen Campbell, *The Long Path to a New Student Loan Repayment System*, CTR. FOR AM. PROGRESS (Sept. 10, 2019), https://www.americanprogress.org/issues/education-postsecondary/news/2019/09/10/474254/long-path-new-student-loan-repayment-system/.
77. *Id.*
78. U.S. Dep't of Educ., *supra* note 35.
79. LOONIN ET AL., *supra* note 21, at 76.

Prior to September 2014, a servicer received new account assignments from the ED based on an equal consideration of customer satisfaction, school surveys, federal personnel surveys, the percentage of defaulted loans held by the server, and the monetary value of those defaulted loans.[80] Once the ED modified the contracts in September 2014, both the criteria for new assignments and the weight that each metric receives changed.[81] Under the new criteria, borrowers' surveys account for thirty-five percent and federal personnel surveys account for five percent of the ED's performance calculation, but the remaining sixty percent is calculated using the percentage of borrowers that are delinquent or in default (fifteen percent each) and the percentage of borrowers that are current on loan payments (thirty percent).[82] This change was "intended to create a greater incentive for servicers to keep borrowers current."[83] Ultimately, however, this change in criteria shifted the cumulative emphasis from metrics assessing satisfaction with the servicers' conduct to metrics focusing on the borrowers' ability or inability to repay their student loans.

C. The Consumer's Lack of Information within the Federal Student Loan Servicer Industry

Along with the failure to offer consumers a choice in servicer, there is also no consumer-friendly or accessible review system in place for consumers to check their servicer's prior history and customer service ratings. Without a review system in place for a consumer to access this information regarding different servicers, the consumer does not have the essential information needed to help her shop for a servicer.[84]

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80. Ben Miller, *Fixing the Finances, Not the Structure, of Student Loan Servicing*, NEW AMERICA (Sept. 4, 2014), https://www.newamerica.org/education-policy/edcentral/student-loan-servicing/.

81. *Id.*

82. *Id.*

83. LOONIN ET AL., *supra* note 21, at 77; Press Release, U.S. Dep't of Educ., U.S. Department of Education Strengthens Federal Student Loan Servicing (Aug. 29, 2014), https://www.ed.gov/news/press-releases/us-department-education-strengthens-federal-student-loan-servicing.

84. LOONIN ET AL., *supra* note 21, at 78. Where choosing a servicer is allowed during the process of consolidation, one problem mentioned with borrowers' choosing a servicer is that a borrower is not provided with information he needs to shop around. *Id.*

Although general information about federal student loan servicers is provided through the ED's website, the information is incomplete, obscure, and has not proven to be very reliable.[85] Borrower surveys conducted by the National Consumer Law Center speak to the servicers' performance, but these surveys are limited.[86] Surveys are not conducted by every student borrower and data is sparse on actual performance for accounts in default or delinquency.[87] The lack of access to information can negatively affect the consumer's choice of student loan servicer.

Unfortunately, the lack of regulations coupled with this lack of consumer choice and information has led to a market failure within the industry. Many borrowers have had negative and costly experiences with their federal student loan servicers and will continue to have poor service if nothing is done to empower consumers. Thus, the ED should empower consumers by providing them with a choice of servicer and greater transparency so that servicers will feel greater pressure and motivation to perform with a better quality of service.

III. PROPOSED SOLUTION: FREEDOM OF CHOICE AND A TRANSPARENT RATING & REVIEW SYSTEM THAT WILL INCREASE COMPETITION WITHIN THE INDUSTRY

The ED should focus on finding a solution which improves the customer service experience and discourages the predatory practices that create higher interest rates, more unnecessary debt, and mental stress. Regulations should be aimed at motivating servicers to provide quality service and dissuading the companies from engaging in unfair and deceptive business practices. Giving consumers a choice and expanding the market for the federal student loan servicer industry will provide stronger protections for student loan borrowers.

85. *Id.* at 77.

86. *Id.* ("[I]t is unclear how reliable the [borrower] surveys are in evaluating borrower satisfaction and whether borrowers are getting optimal outcomes.").

87. *Id.*

A. The Student Loan Servicing System Should be Redesigned to Promote Competition in the Market by Providing Consumer Choice

Society is at an extreme disadvantage when there is only a small group of businesses operating within an industry.[88] When the selection within an industry is highly concentrated, consumers become vulnerable to the effects of monopoly power.[89] If a business has greater market power, it has more incentive to reduce its output.[90] A company with too much market power has less motivation to provide a high quantity of product or perform with a higher quality of service.

In the present student loan industry, a very small number of major servicers[91] control a majority of the student loan debt. These four servicers dominate the market with almost monopolistic power. However, "monopoly power of each [servicer] will fall as the number of [servicers] increase."[92] If the ED provides consumers with the opportunity to choose their own servicer, it is more likely that new companies will enter the market to compete for business. Moreover, existing competitors will be incentivized to compete harder to attract customers.

Opening the market to non-profit loan servicers could also increase competition. The ED controls the number of market players that receive loan servicing contracts. A federal statue provides the Secretary of the Department with the power to award contracts for servicing to "the extent practicable" and so long as the services are provided at competitive rates.[93] It is unclear why the Department limits loan servicing contracts for the smaller non-profit servicers and instead awards

88. *See* Camera, *supra* note 72.

89. ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 381 (Pearson Prentice Hall eds., 7th ed. 2009) ("If a firm has significant monopoly power [or market power], it will profit at the expense of consumers.").

90. *Id.*

91. Although this Note discusses four servicers, two of the four servicers merged in 2018. *See* Nelnet, s*upra* note 37.

92. PINDYCK & RUBENFELD, *supra* note 89, at 367.

93. 20 U.S.C. § 1087f(a)(1) (2018).

the majority of the country's business to the major for-profit servicers.[94] Whatever the case may be, opening up the market could provide small companies with greater chances for growth and, therefore, increase competition.

This increased level of competition will be more efficient for society as competition encourages companies to maximize production.[95] Increased competition within the industry would provide companies with more incentive to offer better quality and performance to consumers.[96] Evidence within other industries, such as the cellphone and the supermarket industries, suggests that competition based on adequate consumer choice is beneficial for society.[97] In the supermarket industry, stores with more intense competition have much fewer shortfalls because the risk that customers will switch stores provides competitors with a strong incentive to invest in quality product.[98]

Similarly, federal student loan servicers need this same incentive to provide quality services to borrowers. When there is no external incentive or reward to provide better service, there is no motivation to improve on performance.[99] Major student loan servicers have lost their motivation to provide quality services because they do not have an incentive to do so. Because the ED alone assigns all student loans to a servicer, servicers will receive a customers' business regardless of

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94. It is possible the smaller non-profit services have less resources to handle a larger load.

95. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 18 (Harv. Univ. Press eds., 2005).

96. *See* Sander van der Linden, *The Psychology of Competition*, PSYCHOLOGY TODAY (June 24, 2015) https://www.psychologytoday.com/us/blog/socially-relevant/201506/the-psychology-competition.

97. *See generally* Julie Ask, *Competing in Smartphones Demands More than Greater Hardware—You Need a Strong Ecosystem*, FORBES (May 9, 2018), https://www.forbes.com/sites/forrester/2018/05/09/competing-in-smartphones-demands-more-than-great-hardware-you-need-a-strong-ecosystem/#561e57ac69bd (discussing the benefits of a consumer-focused approach to smartphone technology); David A. Matsa, *Competition and Product Quality in the Supermarket Industry,* 126 Q.J. OF ECON. 1539 (Aug. 3, 2011) (discussing the consumer benefits of competition within the supermarket industry).

98. Matsa, *supra* note 97, at 1539.

99. *See* Ask, *supra* note 97 (discussing how wireless carriers generally stifled innovation in the cellphone market until Apple forced other companies to improve the products offered to consumers).

whether the borrower likes the service.[100] A rating and review system focused on consumer choice and informed decision-making is necessary for market reform.

B. The Student Loan Servicing System Should be Redesigned to Promote Competition and Consumer Choice by Providing Consumers with a Multi-Dimensional Rating and Review System

With numerous allegations of unfair, deceptive, and abusive business practices among major federal student loan servicers, there is an obvious need to incentivize servicers to improve the quality of service that they provide to customers. The current metric system utilized by the ED when assigning new accounts to servicers weighs borrowers' surveys at thirty-five percent.[101] Although borrowers' surveys receive the most weight compared to the other performance metrics criteria, it is "unclear how reliable the surveys are in evaluating not just borrower satisfaction but also whether borrowers are getting optimal outcomes."[102]

A more efficient way to evaluate customer satisfaction and ensure that borrowers are getting optimal outcomes is for the ED to provide consumers with more choices and to establish an accessible review and rating system so that consumers can make informed decisions about which servicer to choose. Because unsatisfied consumers cannot pick their servicers, servicers are not incentivized to adhere to the needs of consumers. Providing borrowers with information and the freedom to choose their own servicer would effectively incentivize servicers to prioritize borrower satisfaction.

The ED can increase competition to optimize customer satisfaction first, by allowing for consumer choice, and second, by providing a platform with information so that consumers can make informed decisions. The ED should focus on providing an online, multi-dimensional rating system[103] for consumers to review and evaluate student loan ser-

100. *See* U.S. Dep't of Educ., *supra* note 35.

101. Miller, *supra* note 82.

102. LOONIN ET AL., *supra* note 21, at 77.

103. Unlike a single-criteria rating system, a multi-criteria (also referred to as multi-dimensional) rating system allows a consumer to express her opinions on different aspects of the product or service. Dietmar Jannach et al., Recommending Hotels

vicers. An online, multi-dimensional rating system will provide consumers with more information about the servicer. In turn, consumers' ability to share information regarding their experiences with the servicers will promote competition and consumer choice within the servicer industry. "Reviews by ordinary people have become an essential mechanism for selling . . . anything online," and a majority of consumers are influenced by online reviews.[104] The online rating and review system will thus motivate servicers to provide better customer satisfaction because the ratings and reviews of borrowers can directly affect their business.

Furthermore, it is essential that this multi-dimensional rating system provides information on different aspects of other consumers' prior experience with each student loan servicer.[105] Studies show that multi-dimensional rating systems are more effective in "enhance[ing] rating informativeness and provid[ing] implications for designing online rating systems that help consumers match their preferences with product attributes."[106] A competitive market is only efficient when a consumer is able to make informed decisions regarding the market. In contrast, market failure can occur if consumers "lack information about the quality or nature of the product and so cannot make utility-maximizing purchasing decisions."[107] To encourage a more successful and competitive market, consumers need a multi-dimensional ratings system to review the servicer. This system will allow consumers to make an informed decision when choosing which student loan servicer can best meet their needs.

Based on Multi-Dimensional Customer Ratings § 2.1 (2012) (unpublished manuscript), https://web-ainf.aau.at/pub/jannach/files/Conference_ENTER_2012.pdf. For example, in rating a hotel, the consumer can answer questions on different factors regarding her hotel experience such as "the friendliness of the hotel staff or the tidiness of the rooms." *Id.* In contrast, with single-criteria rating system, the consumer only provides her opinion based on her overall experience. *See id.* One example of a single-criteria rating system is a customer simply giving the hotel 4 out of 5 stars for her experience. *See id.* & fig.2.

104. Pei-Yu Chen et al., *The Value of Multidimensional Rating Systems: Evidence from a Natural Experiment and Randomized Experiments*, 64 MGMT SCI. 4629, 4629 (2017) (stating that "nearly 67% of consumers report that their purchasing decisions were influenced by online reviews").

105. *See id.*

106. *Id.*

107. PINDYCK & RUBENFELD, *supra* note 89, at 316.

Under the current system, The ED provides a Federal System Aid ("FSA") feedback system, which allows consumers to file complaints when they have an issue or discrepancy with their account balance.[108] Additionally, the Consumer Financial Protection Bureau ("CFPB") allows consumers to file complaints about their student loans online.[109] In a 2017 report, the CFPB reported 12,900 federal student loan complaints between September 1, 2016 and August 31, 2017.[110] Out of the thousands of complaints, seventy-one percent of the issues reported concerned difficulties that borrowers faced when dealing with their lender or loan servicer.[111]

Although the current complaint systems allow consumers a small opportunity to voice their frustrations, they are not very effective because lack sufficient narrowness to inform the consumer on the quality of the servicer. Thousands of complaints and reviews on various issues from thousands of people are not helpful for a consumer seeking information on a servicer. The complaint system is more likely to make searching for specific information an overwhelming task.

For the multi-dimensional rating system to work, there must be specific, defined, and consistent features for a consumer to rate and make effective reviews that actually mean something to the other consumer audience. The set of factors should depend on metrics that are the most applicable and appear to be of the most common importance for borrowers. Although there is not a set standard for the most common and most important features of the student loan servicer industry, customers generally evaluate service quality based on five factors: (1)

108. *See* U.S. Dep't of Educ., *supra* note 35.

109. *See Submit a Complaint*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/complaint/ (last visited Feb. 4, 2020).

110. CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN 2 (2017), https://files.consumerfinance.gov/f/documents/cfpb_annual-report_student-loan-ombudsman_2017.pdf. The number of 12,900 complaints does not reflect the total number of complaints received by the CFPB because "complaints handled by the Bureau are published in the public Consumer Complaint Database" only "after a company responds or after has had the complaint for 15 calendar days, whichever comes first." *Id.* at 8 n.2.

111. *Id.* at 8 fig.1.

reliability, (2) responsiveness, (3) assurance, (4) empathy and (5) tangibles, such as the appearance of communication materials.[112] A system where consumers can rate based on these performance factors—or something similar and closely applicable to the service offered—will greatly assist borrowers in determining which servicers work well and which servicers should be weeded out of the market for failure to keep up in ratings.

C. Implementing the Proposed Solution to Allow Consumer Choice and Offer Rating and Review System

This Note's proposed system, which allows consumers the freedom of choice and establishes a new rating system, could easily be implemented by the agency through its informal rulemaking process. The ED is a governmental entity that has the power to make this change as its primary function is to "establish[ ] policy for, administer[ ][,] and coordinate[ ] most federal assistance to education."[113] Under the HEA, Congress explicitly authorizes the ED's Secretary to enter into loan servicing contracts and establish data systems for record maintenance.[114] Congress intended to allow the ED to have control over the decision-making for student loans management by stating that "[t]he Secretary may enter into contracts for . . . [any] other aspects of the direct student loan program as the Secretary determines are necessary to ensure the successful operation of the program."[115] This provision of the HEA gives the ED very broad power to reform the servicing program in the best way it sees fit, and adding a component which allows consumer choice will be extremely beneficial to promote competition and its accompanying consumer protections.

Although possible to achieve, establishing a competitive market would take time. First, consumers will need to become more educated about the student loan servicer industry as a whole before having the

112. CHARLES W. LAMB ET AL., MARKETING 418 (12th ed. 2012); *See* Chris Arlen, *The 5 Service Dimensions All Customers Care About*, SERVICE PERFORMANCE INC. (Oct. 24, 2008), http://www.serviceperformance.com/the-5-service-dimensions-all-customers-care-about/, for definitions of each of the five service categories.

113. *An Overview of the U.S. Department of Education*, U.S. DEP'T EDUC. (Sept. 2010), https://www2.ed.gov/about/overview/focus/what.html.

114. 20 U.S.C. §1087f(b) (2018).

115. *Id.*

freedom to decide which servicer can best meet their needs. It will take time for major servicers to rebuild their reputation and for consumers to develop relationships with servicers that are comprehensive enough for consumers to rate them. Also, over time, some of the smaller not-for-profit servicers will have a better opportunity to prove themselves within the industry.[116]

Although there are some disadvantages—such as time and administrative expense—that accompany this freedom of choice,[117] the social and economic benefits outweigh any disadvantage.[118] Redesigning the student loan servicing industry to focus on consumer choice and competition provides greater protections for consumers as it seeks to avoid the need for civil suits and litigation expenses. Borrowers will feel less need to fight in court if they had more freedom to choose and switch servicers when things do not work out. Additionally, servicers will feel greater pressure to provide quality service to keep their business. Thus, a focus on consumer choice and competition is more effective and cost-friendly to private parties with lesser resources.

IV. CONCLUSION

Providing freedom of choice is the most cost-efficient way to end unfair business practices within the industry. The lack of motivation to improve among student loan servicers stems from a lack of a

116. The smaller not-for-profit servicers consist of the following companies which manage a minor fraction of the total national student loan debt: Cornerstone, Granite State Management & Resources, HESC/ ED Financial Services, Missouri Higher Education Loan Authority (MOHELA), and Oklahoma Student Loan Authority (OSLA). Brianna McGurran & Anna Helhoski, *Student Loan Servicers: Who They Are and What They Do*, NERDWALLET (Jan. 3, 2020), https://www.nerdwallet.com/blog/loans/student-loans/who-is-my-loan-servicer/.

117. *See* LOONIN ET AL., *supra* note 21, at 79 (stating that too much competition can confuse consumers).

118. To prevent customers' confusion, the ED should avoid expanding the number of servicers within the industry because the ED already has a sufficient number of contracts with several different loan servicers. The current contracts with nine different servicers represent a fair number, but the distribution of new borrower accounts among the existing servicers is substantially disproportional. Allowing consumers to choose their own servicer can potentially even out the playing field by allowing the smaller companies to have a chance to receive more business.

lack of competition and consumer choice.[119] Therefore, the ED should take action to allow consumers the opportunity to choose their own servicers. Furthermore, to make effective decisions in choosing a servicer, consumers should be provided with a multi-dimensional rating and review system so they can make informed decisions on a loan servicer that will best meet their needs.

119. LOONIN ET AL., *supra* note 21, at 78.

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