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FEDERAL STUDENT AID: CAN WE SOLVE A PROBLEM WE DO NOT UNDERSTAND?

Deanne Loonin* and Julie Margetta Morgan**

I. INTRODUCTION

It is not hard to see that our nation's student loan program is in trouble. It is much harder to find ways to fix it. The Bipartisan Policy Center listed the following failings of student debt: "Too many students rely excessively on loans to finance their degrees, too few borrowers can afford to repay their loans once they leave school, and hundreds of billions of dollars in student debt are sitting on federal balance sheets."¹

A more comprehensive list would consider the program's failure to meet the broader goals of the federal government's investment in higher education, including:

- Failure to improve equal access to higher education: Despite billions of government dollars invested in student loans, the difference in college graduation rates between the top and bottom income groups has widened by nearly 50% over two decades.²

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¹ KENNETH MEGAN & SHAI AKABAS, BIPARTISAN POLICY CTR., AMERICA'S STUDENT DEBT EXPLOSION: UNDERSTANDING THE FEDERAL GOVERNMENT'S ROLE 3 (2017), <https://cdn.bipartisanpolicy.org/wp-content/uploads/2017/03/BPC-Higher-Education-Americas-Student-Debt-Explosion.pdf> [<https://perma.cc/5B4Y-RPJL>].

² Tami Luhby, *College Graduation Rates: Income Really Matters*, CNN: MONEY (Nov. 28, 2011, 3:10 PM), http://money.cnn.com/2011/11/21/news/economy/income_college/index.htm [<https://perma.cc/83NL-L53S>]. See also ALANNA BJORKLUND-YOUNG, JOHNS HOPKINS INST. FOR EDUC. POLICY, FAMILY INCOME AND THE COLLEGE COMPLETION GAP (Mar. 2016), <http://edpolicy.education.jhu.edu/family-income-and-the-college-completion-gap/> [<https://perma.cc/7WHR-KZTU>] (noting that college graduation rates amongst students from the lowest socio-economic backgrounds are 14% compared to 60% of students from high-socio economic backgrounds); Charles T. Clotfelter, *How Rich Universities Get Richer*, THE CHRONICLE REVIEW, Dec. 8, 2017, at B17 ("[C]olleges have performed much the same role in America that they have everywhere in modern societies; to educate the children of the ruling upper-middle class and, in effect, to reproduce those elites.").

- Failure to make college affordable for low-income students: College costs have continued to rise, forcing more students to turn to loans for support.³
- Failure to meet the American economy's need for an educated workforce: The nation's \$100 billion annual investment in loans to educate the next generation is not meeting our needs; by 2020, the United States will miss the mark on college-educated workers by five million.⁴

By almost any measure used to justify the government's investment in student loans—ensuring that all students have access to college, closing our country's wealth and opportunity gaps, or educating young people to compete in a global economy—the federal student loan program is failing. Furthermore, instead of moving our society forward, the student loan program is setting us back, leaving millions of students in default and forcing others to delay buying homes, saving for retirement, and participating fully in our economy.⁵

These failures are not evenly distributed—they fall squarely on the low-income, first-generation, historically underserved populations that the government was trying to assist in the first place. The failure to improve affordability deeply affects low-income families; for the lowest quintile of family income, the net price of attendance at a four-year public school is 64% of income, compared to 22% for middle income and 6% for high income.⁶ The burdens of taking on student loan debt are not evenly distributed either: African American students are far more likely to borrow than their white peers (70% vs. 57%), and, alarmingly, they are far more likely to default on those loans (49% vs. 21%).⁷

³ See COLLEGEBOARD, TRENDS IN COLLEGE PRICING 2017 7 (2017), https://trends.collegeboard.org/sites/default/files/2017-trends-in-college-pricing_1.pdf [<https://perma.cc/HJ7B-9EYR>]. Authors' calculations based on data from the Integrated Postsecondary Education Data System's Institutional Characteristics and Student Financial Aid Components show that, for the lowest quintile of family income (\$0-\$30,000), net price at a public 4-year college accounts for 64% of income. See *id.* at 20.

⁴ ANTHONY CARNEVALE ET AL., GEORGETOWN PUB. POL'Y INST.: CTR. ON EDUC. AND THE WORKFORCE, RECOVERY: JOB GROWTH AND EDUCATION REQUIREMENTS THROUGH 2020 2 (2013), https://cew-7632.kxcdn.com/wp-content/uploads/2014/11/Recovery2020.ES_Web_.pdf [<https://perma.cc/C9HZ-S8TP>].

⁵ See Ryan McCarthy, *The Student Debt Domino Effect: The CFPB's Rohit Chopra on How it's Holding Back Our Economy*, WASH. POST: WONKBLOG (June 10, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/06/10/the-student-debt-domino-effect-the-cfpbs-rohit-chorpa-on-how-its-holding-back-our-economy/?utm_term=.e1ab5a512dc9 [<https://perma.cc/F9V2-5VJ8>].

⁶ Authors' calculations based on Integrated Postsecondary Education Data System data. Includes both dependent and independent first-time, full-time students who are Title IV recipients. Low-income = \$0–30,000, middle-income = \$48,000–75,000, high-income = \$110,000 and up. See NAT. CTR. FOR EDUC. STAT.: INTEGRATED POSTSECONDARY EDUC. DATA SYS., <https://nces.ed.gov/ipeds/> [<https://perma.cc/4SM9-MPEG>] (last visited Apr. 9, 2018).

⁷ Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, CTR. FOR AM. PROGRESS (Oct. 16, 2017, 9:00 AM), <https://www.american>

Not surprisingly, policy wonks from across the political spectrum have weighed in with proposals on how to address these failures.⁸ With the Higher Education Act due for reauthorization, these proposals may get serious consideration over the next few years, and some may even become law. But the enthusiasm to jump in and provide solutions to fix the federal student loan system is premature, and experts are writing policy prescriptions without ever fully diagnosing the problem. We cannot assess or resolve the failures of the student loan program because we do not have sufficient information about one key facet of it: the way the program is governed and administered by the federal government and its contractors.

This Article argues that we have insufficient information to fully explore the problems in the student loan program, and that greater transparency into the program's administration is a necessary first step. Part II describes the gaps in existing information on student loans and the resulting gaps in policy prescriptions. Part III illustrates some of the available evidence suggesting that the Department of Education's policies and practices may be affecting the student loan program's success. Part IV argues that improved public access to information about the administration of the student loan program would enhance both policymaking and outcomes for student loan borrowers. Part V describes some of the available avenues for improving access to information on the student loan program, and Part VI considers some ways to use these tools more effectively.

II. GAPS IN EXISTING INFORMATION

In the last five years, higher education policy advocates have made a concerted effort to improve the availability of data on the state of higher education.⁹ These efforts have focused on student characteristics, progression, and outcomes data, all of which are essential to understanding how students fare in college, and the role that colleges play in determining students' outcomes and experiences.¹⁰ However,

[progress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/](https://www.progress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/) [https://perma.cc/3VZ6-K584].

⁸ See, e.g., BILL & MELINDA GATES FOUND., REIMAGINING AID DESIGN AND DELIVERY (RADD) REPORTS, <https://postsecondary.gatesfoundation.org/areas-of-focus/incentives/financial-aid/reimagining/> [https://perma.cc/3MLM-T29U] (last visited Apr. 9, 2018).

⁹ See INST. FOR HIGHER EDUC. POL'Y, POSTSEC DATA, <http://www.ihep.org/postsecdata> [https://perma.cc/W492-54T6] (last visited Apr. 9, 2018).

¹⁰ See JENNIFER ENGLE, BILL & MELINDA GATES FOUND., ANSWERING THE CALL: INSTITUTIONS AND STATES LEAD THE WAY TOWARD BETTER MEASURES OF POSTSECONDARY PERFORMANCE 2 (2016), <https://postsecondary.gatesfoundation.org/wp-content/uploads/2016/02/AnsweringtheCall.pdf> [https://perma.cc/PGX6-SHQH]; AMANDA JANICE ROBERSON ET AL., INST. FOR HIGHER EDUC. POLICY, A BLUEPRINT FOR BETTER INFORMATION: RECOMMENDATIONS FOR A FEDERAL POSTSECONDARY STUDENT-LEVEL DATA NETWORK 3 (2017), http://www.ihep.org/sites/default/files/uploads/docs/pubs/a_blueprint_for_better_information_ihep.pdf [https://perma.cc/G8TY-25HX].

these efforts largely miss out on data and other information that would reveal the role that the federal government and its contractors play in the success or failure of student aid programs.¹¹

At the national level, the public has three primary sources of information about student loans. First, the National Center for Education Statistics (“NCES”) posts data from the Integrated Postsecondary Data System (“IPEDS”), which is a series of surveys completed by institutions to report aggregate data on their students.¹² IPEDS offers the public a view into who gets student loans in a given year, how much, and the proportion of students repaying their debt, disaggregated by institution and by certain student characteristics.¹³ Second, NCES administers a set of national surveys, including the Baccalaureate and Beyond Longitudinal Study and the National Postsecondary Student Aid Study, which use representative samples of students to report data on borrowing, including cumulative debt and private loan debt, by certain student and institutional characteristics.¹⁴

Finally, the Department of Education publishes some information about the performance of student loans on its Federal Student Aid Data Center and associated Federal Student Aid (“FSA”) sites.¹⁵ Through the Data Center, the public can see information on the volume of applications and disbursement of federal student loans, as well as aggregate information about the student loan portfolio, including breakdowns by debt size, location, school type, loan status (in school, deferred, in forbearance, etc.), repayment plan, and delinquency status.¹⁶ The Data Center includes limited information on loans by servicer, including repayment status and repayment plan.¹⁷ Exploring FSA’s websites can provide a bit more information about the administration of student loans, including customer service scores for the major federal student loan servicers.

Together, these resources tell us little about how the student loan program actually functions. The data in these systems are fairly useful for illustrating student and borrower outcomes, but they do little to suggest why borrowers ended up the way they did, and what could be done to improve their results. The most obscure

¹¹ It is important to note that this Article is not a critique of student-level data efforts. The authors believe these efforts are valuable and should be continued; however, the authors believe that these efforts miss out on critical data and information necessary to understand the student loan program.

¹² See JAMEY RORISON & MAMIE VOIGHT, INST. FOR HIGHER EDUC. POLICY, PUTTING THE “INTEGRATED” BACK INTO IPEDS: IMPROVING THE INTEGRATED POSTSECONDARY EDUCATION DATA SYSTEM TO MEET CONTEMPORARY DATA NEEDS 3 (2016), http://www.ihep.org/sites/default/files/uploads/postsecdata/docs/resources/putting_the_integrated_back_into_ipeds.pdf [<https://perma.cc/DHQ8-A5JK>].

¹³ See *id.* at 6.

¹⁴ See NATIONAL CTR. FOR EDUC. STATISTICS, SURVEYS AND PROGRAMS, <https://nces.ed.gov/surveys/SurveyGroups.asp?group=2> [<https://perma.cc/5WUW-UGPD>] (last visited Apr. 9, 2018).

¹⁵ FED. STUDENT AID, DATA CTR., <https://studentaid.ed.gov/sa/data-center> [<https://perma.cc/5RY2-K8WL>] (last visited Apr. 9, 2018).

¹⁶ See *id.*

¹⁷ See *id.*

piece of the puzzle is the participation of the federal government and its contractors. Though the FSA Data Center offers some information on outcomes by servicer, there is not nearly enough detail to help the public understand whether servicers are implementing student loan policy in a way that increases borrowers' likelihood to repay or to seek repayment assistance when necessary.

Given that the data available at the state and federal level are so closely tied to students and institutions, it is likely not a coincidence that most of the proposed solutions to our student aid problems aim to change student and institutional behavior. Persistently high student loan delinquency and default rates are prime examples of this phenomenon. The most recent cohort default rate on federal student loans stands at 11.5%, meaning more than 11% of student loan borrowers fail to make payments for at least 360 days within the first three years of entering repayment.¹⁸ Data on loan repayment status show that the problem is bigger than that: about 20% of Federal Direct Loans are more than ninety days delinquent on their debt.¹⁹ Clearly, there is a problem with student loan repayment and default.

The prevailing wisdom in the D.C. policy community focuses on student and institutional responsibility for the default problem. Policy organizations suggest offering more robust and timely borrower counseling and repayment options that are more generous, easier to understand, or more reliant on automatic payments.²⁰ Some also propose giving schools more "skin in the game," or even giving institutions more discretion on how they dole out student loans.²¹ It is possible that adjustments to borrower behavior and college practices will improve repayment, but these policy suggestions are too often based on speculation rather than sound research and information.

There are other possible contributing causes of repayment and default problems. One often overlooked consideration is the impact of government and private servicers' practices on repayment. This would seem like a logical and important area of inquiry given that servicers are the borrower's primary point of contact. If servicer behavior is a contributing cause of the repayment and default

¹⁸ FED. STUDENT AID, OFFICIAL COHORT DEFAULT RATES FOR SCHOOLS, <https://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html> [<https://perma.cc/4HQS-N9AD>] (last visited Apr. 9, 2018).

¹⁹ FED. STUDENT AID, DIRECT LOAN PORTFOLIO BY DELINQUENCY STATUS (2018), <https://studentaid.ed.gov/sites/default/files/fsawg/datacenter/library/DLPortfoliobyDelinquencyStatus.xls> [<https://perma.cc/6TCE-6M56>].

²⁰ See BILL & MELINDA GATES FOUND., *supra* note 8.

²¹ See, e.g., BETH AKERS, BROOKINGS INSTITUTION, RISK-SHARING: AN EFFICIENT MECHANISM FOR FUNDING STUDENT LOAN SAFETY NETS (2016), <https://www.brookings.edu/research/risk-sharing-an-efficient-mechanism-for-funding-student-loan-safety-nets/> [<https://perma.cc/ZD3F-QVG6>]; LINDSAY AHLMAN ET AL., THE INSTITUTE FOR COLLEGE ACCESS AND SUCCESS, A NEW APPROACH TO COLLEGE ACCOUNTABILITY: BALANCING SANCTIONS AND REWARDS TO IMPROVE STUDENT OUTCOMES (2016), https://ticas.org/sites/default/files/pub_files/ticas_risk_sharing_working_paper.pdf [<https://perma.cc/4C87-VU3D>].

problem, as some limited studies conclude,²² this would suggest a completely different set of policy changes, centering on oversight and incentives for student loan servicers.

III. HOW DOES THE FEDERAL GOVERNMENT CONTRIBUTE TO THE PROBLEM?

The problems detailed above—failure to improve educational equity, lack of affordability, and poor outcomes for a substantial portion of borrowers—can have many causes. To date, the education policy community has focused on student, borrower, and institution-level solutions. But there are ample reasons to suspect that the federal government plays a role in these failures, and therefore should be considered as part of any solution. This Part will review some of the indicators that the federal government may be at least partly to blame for student aid’s failings.

A. *Canaries in the Coal Mine*

The first indicator that the federal government itself is adding to the problems inherent in the student loan program is the series of scandals that have occurred over time, suggesting that the Department of Education is, at the very least, failing to properly oversee its lending programs. A truncated list of incidents might include anything from sweetheart deals to school administrators who funneled students toward certain lenders,²³ deceptive lender marketing tactics²⁴ to illegal interest rates for members of the military,²⁵ and the failure to return millions of overpaid government funds.²⁶ The scandals each produced a minor uproar and, in some cases,

²² AMANDA JANICE & MAMIE VOIGHT, INST. FOR HIGHER EDUC. POL’Y, MAKING SENSE OF STUDENT LOAN OUTCOMES: HOW USING REPAYMENT RATES CAN IMPROVE STUDENT SUCCESS 14 (2016), http://www.ihep.org/sites/default/files/uploads/docs/pubs/ihep_repayment_rate_paper_6b.pdf [<https://perma.cc/ZD3F-QVG6>]; COLLEEN CAMPBELL & NICHOLAS HILLMAN, THE ASSOCIATION OF COMMUNITY COLLEGE TRUSTEES, A CLOSER LOOK AT THE TRILLION: BORROWING, REPAYMENT, AND DEFAULT AT IOWA’S COMMUNITY COLLEGES 30–32, (2015), https://www.acct.org/files/Publications/2015/ACCT_Borrowing-Repayment-Iowa_CCs_09-28-2015.pdf [<https://perma.cc/8TG3-4WPC>].

²³ Scott Jaschik, *Loan Scandal Escalates*, INSIDE HIGHER ED (Apr. 10, 2007), <https://www.insidehighered.com/news/2007/04/10/loans> [<https://perma.cc/5FKC-DUZY>].

²⁴ Jonathan D. Glater, *Another Student Loan Company Settles with New York*, N.Y. TIMES (Nov. 2, 2008), <http://www.nytimes.com/2008/11/03/business/03lend.html> [<https://perma.cc/4UFP-3R5N>].

²⁵ DEP’T OF JUST. OFF. OF PUB. AFF., NEARLY 78,000 SERVICE MEMBERS TO BEGIN RECEIVING \$60 MILLION UNDER DEP’T OF JUST, SETTLEMENT WITH NAVIENT FOR OVERCHARGING ON STUDENT LOANS (May 28, 2015), <https://www.justice.gov/opa/pr/nearly-78000-service-members-begin-receiving-60-million-under-department-justice-settlement> [<https://perma.cc/PPJ9-JKFH>].

²⁶ See generally Sam Dillon, *Whistle-Blower on Student Aid Is Vindicated*, N.Y. TIMES (May 7, 2007), <https://www.nytimes.com/2007/05/07/washington/07loans.html> [<https://perma.cc/3L4U-EE2P>] (describing student loan companies’ improper collection of hundreds of millions in federal loan subsidies); U.S. SENATE, HEALTH, EDUC., LAB. AND

legislative change, but none resulted in a full-scale examination of the Department's practices. These hints at broader problems in the administration of the student loan program are strong indicators that more work needs to be done to understand the government's role in administering student loans, the effects of its practices on borrowers, and the incentives or other drivers that affect the government's practices.

B. Unclear Goals, Mixed Incentives

Another reason to suspect that the federal government has a role in the nation's student loan problems is the fact that the program's goals create mixed incentives. It may seem obvious that the success of the student loan program would be measured primarily by how well it serves students, but this is not the case. As a government-sponsored, taxpayer-funded program, the student loan program is measured by both borrower outcomes and taxpayer outcomes. In many cases, the best outcome for a borrower conflicts with the best outcome for a taxpayer. For example, when schools defraud their students, the best result for the borrower is a full cancellation of the loan. But, at least in a short-sighted sense, the expense of cancellation is not in the taxpayers' best interest.²⁷

These unclear, mixed goals are not just an implicit part of lending government money to students—they are explicit in the structure of FSA, the body that administers the student loan program. FSA is the Department of Education's operating arm of the financial aid programs.²⁸ FSA became the government's first

PENSIONS COMMITTEE, REPORT ON MARKETING PRACTICES IN THE FEDERAL FAMILY EDUCATION LOAN PROGRAM, (June 14, 2007), <https://files.eric.ed.gov/fulltext/ED497127.pdf> [<https://perma.cc/GP6L-96GW>] (focusing on the preferred lender scandal and other marketing abuses); U.S. DEP'T OF JUST. OFF. OF PUB. AFF., JUSTICE DEPARTMENT REACHES \$60 MILLION SETTLEMENT WITH SALLIE MAE TO RESOLVE ALLEGATIONS OF CHARGING MILITARY SERVICE MEMBERS EXCESSIVE RATES ON STUDENT LOANS (May 13, 2014), <https://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging> [<https://perma.cc/AY24-V3EG>].

²⁷ Student Assistance General Provisions, 81 Fed. Reg. 75926, 76051 (Nov. 1, 2016) (“Borrowers who ultimately have their loans discharged will be relieved of debts they may not have been able to repay, and that debt relief can ultimately allow them to become bigger participants in the economy, possibly buying a home, saving for retirement, or paying for other expenses.”).

²⁸ U.S. DEP'T OF EDUC., OFF. OF FED. STUDENT AID, 2016 ANNUAL REPORT (2016), <https://studentaid.ed.gov/sa/sites/default/files/FY-2016-Annual-Report.pdf> [<https://perma.cc/X5A9-XY44>].

performance-based organization (“PBO”) in 1998.²⁹ The idea was to create a more efficient program that, in the words of former House Education Committee Chairman Bill Goodling, would be “run like a business” and “focus on bottom-line results.”³⁰

The potential for conflict existed from the start. What does it mean, for example, to focus on bottom line results in a government program that also includes mandatory flexible repayment options, discharges, and other types of borrower relief? The PBO statute lists a number of purposes for FSA, including: improving service to students and other participants in the student financial assistance programs; reducing costs of administering the programs; increasing accountability of the officials responsible for administering the programs; providing greater flexibility in the management and administration of the programs; and developing and maintaining timely data to ensure program integrity.³¹ The statute does not clarify which goals are most important or how to choose if, for example, limiting costs makes it impossible to improve services or provide mandatory relief to borrowers.³²

It is possible for policymakers and program administrators to pursue more than one goal and even to serve multiple constituencies. However, the lack of clarity about which goals and constituencies rank highest has contributed to the systemic failures and confusion in student aid policymaking and administration. It has also made it exceedingly difficult to measure effectiveness.

C. *Limiting Costs at All Costs*

FSA’s frequent emphasis on the stewardship of taxpayer funds in its decision-making also provides reason to wonder about whether it has exacerbated the failures of the student loan program. For example, when faced with the aftermath of closed fraudulent institutions, the Obama Administration’s reluctance to take on full relief, according to news reports, stemmed largely from wariness of the financial costs as well as the potential political fallout of bailing out tens of thousands of borrowers.³³ Current Education Secretary Betsy DeVos similarly cited conservation of

²⁹ THE WHITE HOUSE, CREATING THE GOVERNMENT’S FIRST PERFORMANCE-BASED ORGANIZATION TO MODERNIZE STUDENT AID DELIVERY (October 7, 1998), <http://govinfo.library.unt.edu/npr/library/news/pbofact.html> [https://perma.cc/D3ZZ-JQYQ].

³⁰ NATIONAL ASSOCIATION OF STUDENT FINANCIAL AID ADMINISTRATORS, IMPROVING OVERSIGHT AND TRANSPARENCY AT THE U.S. DEPARTMENT OF EDUCATION’S OFFICE OF FEDERAL STUDENT AID: NASFAA RECOMMENDATIONS, at 1 (May 2017), https://www.nasfaa.org/uploads/documents/NASFAA_FSA_Report.pdf [https://perma.cc/54Y2-ZVAV] [hereinafter NASFAA Report].

³¹ 20 U.S.C. § 1018(a)(2) (2018).

³² See *id.*

³³ Stephen Burd, *Borrower’s Remorse*, WA. MONTHLY (Sept.–Oct. 2017), <http://washingtonmonthly.com/magazine/septemberoctober-2017/borrowers-remorse/> [https://perma.cc/SA54-HWF4].

government funds as a primary reason for opposing full relief to defrauded students. Citing the cost of implementing proposed regulations, DeVos stated, “[w]hile students should have protections from predatory practices, schools and taxpayers should also be treated fairly as well.”³⁴

Another area in which stewardship of funds seems to trump all other interests is in student loan collections. FSA’s servicers employ ruthless tactics to collect on past due debts. In one case, FSA’s contractor blocked a bankruptcy claim by arguing that trips to McDonald’s constituted a “luxury” making a borrower undeserving of discharge.³⁵ Government officials might argue that Congress tied their hands by mandating extreme collection powers like wage and tax refund garnishment, Social Security offsets, limits on bankruptcy, and a lack of statute of limitations.³⁶ This ignores the fact that the government has discretion in the use of these powers—discretion that it rarely chooses to employ. For example, the Department has chosen to instruct its contractor ECMC to pursue highly aggressive and costly litigation tactics even against the poorest borrowers seeking bankruptcy relief.³⁷ Furthermore, the Department has consistently failed to comply with threshold legal requirements, including due process protections and borrower defense rights, when administering these collection powers.³⁸

The irony of all of this nickel-and-diming of distressed borrowers is that the federal government’s stance on collections only *looks* responsible. Ultimately, FSA is not really protecting taxpayers—at least, not as much as it could. If the Department of Education took a step back from its consuming focus on collection, it would see that the overall trends point to much bigger levers for ensuring the return on taxpayer dollars: better policing of low-quality schools that load students up with debt, higher quality servicing and counseling for borrowers, and more innovative approaches to funding higher education. Furthermore, increased consideration of the larger goals of

³⁴ Andrew Kreighbaum, *DeVos: Borrower-Defense Rule Offered ‘Free Money,’* INSIDE HIGHER ED (Sept. 26, 2017), <https://www.insidehighered.com/quicktakes/2017/09/26/devos-borrower-defense-rule-offered-%E2%80%98free-money%E2%80%99> [https://perma.cc/A43L-ZQZ9].

³⁵ Natalie Kitroeff, *Loan Monitor Is Accused of Ruthless Tactics on Student Debt*, N.Y. TIMES (Jan. 1, 2014), https://www.nytimes.com/2014/01/02/us/loan-monitor-is-accused-of-ruthless-tactics-on-student-debt.html?pagewanted=1&_r=1 [https://perma.cc/DJM6-Q9LV].

³⁶ See generally DEANNE LOONIN & PERSIS S. YU, STUDENT LOAN LAW 131–154 (National Consumer Law Center 5th ed. 2015) (detailing the full range of Department of Education collection powers); 20 U.S.C. § 1091a (2018) (eliminating statute of limitations for government student loan collection).

³⁷ Kitroeff, *supra* note 35.

³⁸ See, e.g., *Dieffenbacher v. DeVos*, 5:17-cv-00342-VAP-KK (C.D. Ca. Feb. 23, 2017) (challenging Department’s failure to consider defenses to repayment raised by former Corinthian student in response to wage garnishment action). More information about this case, including updates, is available at THE LEGAL SERV’S CTR. OF HARVARD LAW SCH., DIEFFENBACHER V. DEVOS, <http://www.legalservicescenter.org/get-legal-help/predatory-lending-and-consumer-protection-unit/project-on-predatory-student-lending/dieffenbacher-v-devos/> [https://perma.cc/98PD-7XY6].

the federal government's involvement in student aid, like preparing for a competitive economy or improving access to education, would also suggest a focus on improving institutional gatekeeping, counseling, and servicing rather than simply preservation of government funds.

D. Competing Constituencies and Agency Capture

The array of constituencies at FSA, many with interests at odds from both borrowers and taxpayers, is a significant reason to suspect that FSA plays a role in our student loan system's problems. FSA, by its very nature, has multiple constituencies, often with conflicting needs and goals, including the colleges that help distribute financial aid and the servicers and debt collectors that handle loans in repayment. Students and borrowers are just one of the groups to whom FSA is accountable—and often the least powerful. This is readily apparent from FSA's progress measurements in its Annual Report, which evaluate both FSA's ability to serve borrowers as well as its relationship with colleges and servicing and collections contractors.³⁹ Unlike students and borrowers, these other constituencies have their own lobbying juggernauts.

In some cases, servicers, collectors, and colleges hardly need to hire lobbyists to represent their interests to the Department of Education—they can count on staff on the inside. Agency capture and revolving door problems exist in nearly every government agency, but it can be particularly acute in the world of federal student loans given the complexity of the programs and the close working relationship between FSA and its contractors.⁴⁰ To give just a few examples, a number of top U.S. Department of Education officials in President George W. Bush's administration previously had worked for student lenders or related groups.⁴¹ In May 2017, when the head of FSA James Runcie abruptly resigned, former private sector servicer official Matt Sessa took over.⁴² Since the beginning of the Trump Administration,

³⁹ U.S. DEP'T OF EDUC., OFFICE OF FED. STUDENT AID: 2016 ANNUAL REPORT (2016), <https://studentaid.ed.gov/sa/sites/default/files/FY-2016-Annual-Report.pdf> [<https://perma.cc/X5A9-XY44>].

⁴⁰ "Agency capture" refers to the phenomenon of government agencies becoming susceptible to the influence and control of the corporate entities they are meant to regulate. The "revolving door" refers to the pattern of employees of regulated entities moving back and forth between public and private sector employment.

⁴¹ See generally Martha Graybow, *Revolving Door Eyed in Student Loan Scandal*, BOSTON.COM (Apr. 19, 2007), http://archive.boston.com/news/education/higher/articles/2007/04/19/revolving_door_eyed_in_student_loan_scandal/?rss_id=Boston.com+%252F+News [<https://perma.cc/VJ99-YZXM>].

⁴² Senator Elizabeth Warren raised concerns about Mr. Sessa even before he temporarily took over James Runcie's job duties. In questions submitted to the Department in July 2016, Senator Warren asked if the Department's ethics office specifically prohibited Mr. Sessa from participating in discussions of student loan servicing in light of his prior employment at student loan servicer PHEAA. Office of Senator Elizabeth Warren, *Questions for the Record: ESSA Implementations Update from the U.S. Secretary of Education on*

Senator Elizabeth Warren and other senators have written numerous letters to the Department voicing concerns about high level hiring of for-profit school industry executives, lender executives, and others.⁴³

When legislators and government administrators serve the loudest and richest constituencies, benefits flow to private companies and schools, often at the expense of borrowers and students. There is a lot of money to be made from the federal aid system. For example, the federal government has, in recent years, paid debt collectors close to \$1 billion annually.⁴⁴ A member of the debt collection industry characterized the Department of Education debt collection contract as “THE most sought after contract within this industry.”⁴⁵ It should not be a surprise that the same well-connected companies keep winning government contract competitions. In a revealing 2013 email exchange on a debt collection industry web forum, one participant discussing how to enter the government student loan debt collection market stated that “[g]etting student loans on contingency takes political connections, period.”⁴⁶ Another added, “You have to be a huge player in the game and have some type of connection to even get a piece of the pie from government backed loans.”⁴⁷

The revolving door can lead to corruption and conflicts of interest, but it can also more quietly undermine effective administration of government programs. As Steven Waldman notes in his history of the Clinton Administration’s national service and student aid bills, “[t]he problem with a community like higher education—where staff moves regularly from the Hill to the Department of Education to trade associations—is not corruption but, potentially, stale thinking and stasis.”⁴⁸ Waldman writes: “Objectivity in policymaking becomes more difficult. Does the Education Department staffer who knows he’ll be having drinks at the Front Page

Proposed Regulations (7/12/2016), https://www.warren.senate.gov/files/documents/2016-7-12_QFRs_for_ED.pdf [<https://perma.cc/6TMC-Q22U>].

⁴³ See, e.g., Letter from U.S. Senators Elizabeth Warren, Sherrod Brown, Richard Durbin, Richard Blumenthal and Sheldon Whitehouse to Dr. Julian Schmoke, Jr., Chief Enforcement Officer, Office of Federal Student Aid (Sept. 5, 2017), https://www.warren.senate.gov/files/documents/2017_09_05_Schmoke%20_letter.pdf [<https://perma.cc/K4DL-BQTP>].

⁴⁴ Shahien Nasiripour, *Americans Are Paying \$38 to Collect \$1 of Student Debt*, BLOOMBERG (May 19, 2017, 7:39 AM), <https://www.bloomberg.com/news/articles/2017-05-19/americans-are-paying-38-to-collect-1-of-student-debt> [<https://perma.cc/NSQ7-NSZX>].

⁴⁵ Mark Russell, *Student Loans: The ARM Industry’s New Oil Well?*, INSIDE ARM (Oct. 20, 2011, 7:57 AM), <https://www.insidearm.com/blogs/arm-in-focus/00008193-student-loans-the-arm-industrys-new-oil-w/> [<https://perma.cc/4UFP-3R5N>].

⁴⁶ *Looking to Move into Student Loan Collections*, INSIDE ARM (Aug. 2013) (on file with author).

⁴⁷ *Id.*

⁴⁸ STEVEN WALDMAN, *THE BILL: HOW THE ADVENTURES OF CLINTON’S NATIONAL SERVICE BILL REVEAL WHAT IS CORRUPT, COMIC, CYNICAL—AND NOBLE—ABOUT WASHINGTON* 132 (1995).

that Tuesday night with the college lobbyists want to sign off on a policy that will hurt the organization represented by his pal near the nachos?”⁴⁹

To properly gauge the extent of industry influences at the Department of Education, one needs to fully understand how those influences play out.

E. Lack of Accountability

For students who default on their federal loans, the accountability is relentless. . . . Where is that kind of accountability for Sallie Mae?

*-Senator Elizabeth Warren, Press Release December 2013*⁵⁰

Just as the PBO structure sets the government up for failure by establishing a set of competing and often conflicting purposes, it also makes it easier for the government to evade accountability. As the National Association for Student Financial Aid Administrators (“NASFAA”) explained in a 2017 report, the FSA Chief Operating Officer and other senior leaders are not confirmed by the Senate nor are they accountable to students, institutions, or taxpayers.⁵¹ There have been no penalties or consequences for FSA despite frequent reports of noncompliance with statutory planning and reporting duties.⁵²

The NASFAA report also highlights problems with FSA’s self-assessment model. According to NASFAA, self-assessments are a common way to begin a performance evaluation, but they are usually signed off on by a person or board with oversight responsibility. In the case of FSA, according to NASFAA, the self-assessments stand, “without pushback, oversight, or accountability, which too often easily allows the organization to excuse away failure to meet goals and targets.”⁵³ NASFAA concludes that while there are many talented and committed individuals working at FSA, “employee improvement and accountability cannot be achieved when failure truly isn’t an option.”⁵⁴

IV. THE NEED FOR MORE INFORMATION

The preceding Parts offer ample reason to suspect that the federal government itself plays a role in the failures of its student loan program. To fully diagnose the problem, however, requires more information, not only on student outcomes and institutional responsibility, but also on the government’s policies and practices in

⁴⁹ *Id.*

⁵⁰ Press Release, Senator Warren, Senator Warren Questions Treasury and ED on Accountability for Sallie Mae Rulebreaking and Violations (Dec. 12, 2013), https://www.warren.senate.gov/?p=press_release&id=245 [<https://perma.cc/KWC5-EEJS>].

⁵¹ NASFAA Report, *supra* note 30, at 1.

⁵² *Id.* at 2. Although these obligations have been in statute since 1998, the Government Accountability Office and the Department of Education’s Office of Inspector General have found repeated instances of noncompliance.

⁵³ *Id.* at 5.

⁵⁴ *Id.* at 6.

the administration of student loans. For example, there needs to be more complete answers on how and whether factors identified here, like pressure to preserve taxpayer dollars, or unclear goals and mixed incentives, play out in FSA's policies and practices. One should also be able to understand the effect Department of Education policies and practices have on borrower outcomes, and the factors that drive FSA behavior.

Improved information about the processes and outcomes of the student aid programs will directly support better policy development, but it will also support policy change by influencing the work of other audiences in the higher education policy ecosystem. First, it will give researchers and policy experts access to data and information they can use to evaluate the effects of current policies and the influences on them, and to model potential interventions. Second, it can improve individuals' ability to advocate for their rights in the student aid program by giving them information relevant to their own student loans, or by providing general information about an institution, servicer, or government process that would bear upon the repayment of their loans or their aid eligibility. Third, improved transparency will enhance accountability for the administrators of the student financial aid program by revealing undue influence or conflict of interest, as well as by allowing the public and policymakers to evaluate the efficacy of the implementation of student aid programs. Finally, improved transparency in federal student aid programs can increase participation in the policy conversation around student aid by allowing journalists, policymakers, and advocates to build a broader audience around issues like student lending, college access, and college affordability.

The provision of private collection agency handbooks, and the Obama Administration's 2010 decision to pull them from the Department of Education's website, provides one example of how information can be used for both policymaking and borrower services—as well as the harm caused when the government is allowed to act in the dark.⁵⁵ Although intended as a guide for collection agencies, the handbook was also one of the few ways in which borrowers and advocates could find guidance on how FSA administered key programs, such as loan rehabilitation.⁵⁶ The information it contained helped policy advocates better understand how those programs were administered, and it helped attorneys working on behalf of borrowers better understand their clients' rights. It had been public for many years, although fairly well hidden in an obscure section of the Department's website.

While writing a blog post, reporter Kim Clark called the Education Department to ask about updates to the handbook and according to Clark, officials there “freaked out.”⁵⁷ They told her “that if people find out that they can negotiate a debt reduction

⁵⁵ Ariel Wittenberg, *Education Department Pulls Student Debt Collectors Guide Off Website*, CTR FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <https://www.publicintegrity.org/2010/06/16/2644/education-department-pulls-student-debt-collectors-guide-website> [<https://perma.cc/U4MW-5KW3>].

⁵⁶ DEANNE LOONIN, *STUDENT LOAN LAW* § 6.3.3 (National Consumer Law Center 4th ed. 2010) (citing to private collection agency handbook in practice guide for attorneys).

⁵⁷ Wittenberg, *supra* note 55.

of 10 percent they will hold out for it, and all sorts of things like that,” adding that the Department of Education tried to convince her not to publish information from the manual.⁵⁸ After publishing her story, Clark said the “next thing I knew, the manual was off the site.”⁵⁹ This was over seven years ago. The government has not only failed to put the handbook back online, they have also aggressively fought various groups’ efforts to get an unredacted copy of the handbook through FOIA requests and other advocacy.⁶⁰

Researchers and policy experts would particularly benefit from the information in the handbook about the collection guidelines that the government offers its contractors, and the financial incentive structures under which those contractors operate. Individual borrowers need this information to help them understand the rules for key programs to escape default and get a fresh start. Public access to this information is also critical to hold the government accountable and to ensure that the public policy debate is based on real information about how the programs work.

This Article argues that more openness and transparency about student loan administration will improve policymaking, but, given the body of academic literature articulating the pitfalls and unintended consequences of government transparency, it is worth discussing the arguments against transparency. The push toward open government can be traced back to the Progressive Era of the early 1900s—including Justice Louis D. Brandeis’ famous quote, “[s]unlight is said to be the best of disinfectants.”⁶¹ But much of modern transparency law is rooted in the post-Watergate era of the late 1960s and early 1970s. At that time, openness was seen as a bulwark against the influence of industry on government, as well as a way to restore trust in government.⁶² Since the passage of FOIA in 1968, a vein of scholarship developed detailing unintended consequences from open government policies. One subset of these negative consequences has more to do with the mechanism of transparency—FOIA—than the core concept of government openness. FOIA is deeply flawed, and some of its limitations are discussed below, but the failures of this mechanism do not negate the overall benefits of seeking greater government transparency.

The other subset of critique deserves more careful consideration. To be clear, these critiques do not argue that complete government secrecy is preferable to openness.⁶³ Rather, critics essentially argue to be careful about two things: the way

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 5 U.S.C. § 552(b)(7)(E) (2012) (The Department often cites this section to exclude production of documents that would allegedly disclose techniques and procedures for law enforcement investigations or prosecutions). *See also* New York Legal Assistance Group, Inc. v. U.S. Dep’t of Educ., 2017 WL 2973976 (S.D.N.Y. July 12, 2017).

⁶¹ Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WEEKLY 10, 10 (Dec. 20, 1913).

⁶² *See* Sudha Setty, *The President’s Question Time: Power, Information, and the Executive Credibility Gap*, 17 CORNELL J.L. & PUB. POL’Y 247, 247 (2008).

⁶³ *See* David Frum, *The Transparency Trap: Why Trying to Make Government More Accountable Has Backfired*, THE ATLANTIC (Aug. 13, 2014), <http://www.theatlantic.com/>

that the calls for government transparency are framed, and the way they are implemented. First, calls for transparency can be framed in ways that are helpful to the cause of good governance, accountability, and curbing corporate influences. But when advocates call for transparency indiscriminately without tightly describing the proper uses of transparency, their calls can be coopted in ways that actually work against those noble purposes.

For example, transparency can be hijacked to actually increase industry influence, by focusing on publishing information that improves company's access to regulatory processes, or their competitive advantage.⁶⁴ Second, critics argue that when transparency initiatives are implemented without regard to their effect on the government's decisionmaking processes, they can have unintended consequences, like giving regulators an incentive to change their practices to increase secrecy, or bogging down administrative and regulatory procedures.

The authors recognize these criticisms, but nevertheless argue that they are not relevant to the issue of transparency around student loan administration. First, this Article primarily deals with expanded use of existing transparency mechanisms, and the criticisms described here are most relevant to the addition of new mechanisms for transparency, or to generic calls for greater government transparency. To the extent that the authors argue in subsequent Parts for more affirmative disclosures, these critiques are taken into account and addressed as much as possible. Second, it is clear that transparency is not an end in itself; rather, it is a means toward greater accountability, smarter regulation, and more effective student aid programs. Third, the transparency proposed here will act as a check on undue industry influence by focusing on information that promotes democratic participation and accountability for corporate actors like loan servicers and debt collectors. Finally, though there is some validity to the idea that too much emphasis on openness can have unintended negative consequences, it is important to evaluate the functions of a particular agency or program when determining what constitutes "too much." As described in previous Parts, the outcomes and functions of the student aid program are largely opaque, and therefore cannot be considered to be "transparent enough" in their current state.

Further, the administration of the student aid programs—particularly the student loan programs—contains an inherent conflict of interest between serving students and borrowers well, and protecting taxpayer investments. Though federal law could be tweaked to clarify administrators' responsibilities with respect to this, the conflict will always persist. In a case where administrators will always be seeking to balance the competing interests of two parties, greater transparency is a way to both maintain accountability and evaluate the state of the equilibrium.

magazine/archive/2014/09/the-transparency-trap/375074/ [https://perma.cc/S86R-6S8L]; Jason Grumet, *When Sunshine Doesn't Always Disinfect the Government*, WASH. POST (Oct. 2, 2014), http://www.washingtonpost.com/opinions/laws-aimed-at-transparency-have-hindered-serious-debate/2014/10/02/7c5eb022-48dd-11e4-b72e-d60a9229cc10_story.html?wprss=rss_opinions [https://perma.cc/BG9U-KXUL].

⁶⁴ See David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1112–17 (2017).

V. ACHIEVING GREATER PUBLIC INFORMATION ABOUT STUDENT FINANCIAL AID:
THE TOOLS IN THE TOOLBOX

If improved public access to information is essential to better policy and better outcomes, then one needs to figure out how to get that information out. This Part examines the transparency tools available to the public, and the ways advocates, researchers, and attorneys have typically used them. It also highlights the limitations of these approaches, and the potential for more effective measures in the future.

Those who wish to get information on federal student aid have a number of tools in their toolbox, each offering benefits and limitations in equal measure. David Pozen's 2017 article on the limitations of the Freedom of Information Act articulates a fairly comprehensive list of the ways in which the U.S. government offers transparency to the public; the authors adopt that list with some slight modifications.⁶⁵ FOIA requests, affirmative disclosure, and executive branch monitoring have all been used to glean information from the Department of Education.⁶⁶ This Article offers two additional pathways: ad hoc disclosure and disclosure pursuant to litigation.

A. FOIA Requests

The Freedom of Information Act, often considered a landmark advancement of government transparency and a key to accountability,⁶⁷ is an obvious tool for retrieving primary sources from government agencies. FOIA requires the government to respond to records requests from any person, so long as the requests do not fall into certain exempted categories.⁶⁸ Advocates and journalists often try to use FOIA to access sources, like FSA handbooks described in a previous Part, to help those interested in either changing policy or supporting individual borrowers to understand the rules of the game.

Consumer attorneys use FOIA to retrieve documents to fuel their work on behalf of student loan borrowers.⁶⁹ FOIA is less frequently used to push for policy reform, but there are some notable examples. In 2016, the Center for American Progress and the Century Foundation used a FOIA request to the Department of Education to compile a set of eligibility applications, compliance audits, and audited financial statements from institutions applying for continued access to federal student financial aid to evaluate the Department's oversight and monitoring

⁶⁵ *Id.* at 1102–10.

⁶⁶ For the sake of brevity, this Article excludes whistleblowing/leaking, because it is not a tool that is easily leveraged by advocates.

⁶⁷ John Moon, *The Freedom of Information Act: A Fundamental Contradiction*, 34 AM. U. L. REV. 1157, 1157–60 (1985).

⁶⁸ See 5 U.S.C. § 552(b) (2016) (outlining areas exempted from the Freedom of Information Act).

⁶⁹ See, e.g., *New York Legal Assistance Group, Inc. v. U.S. Department of Education*, No. 15 CIV. 3818 (LGS), 2017 WL 2973976, at *1 (S.D.N.Y. July 12, 2017).

structures.⁷⁰ And in 2014, the National Consumer Law Center used Department of Education debt collector ranking and evaluation documents, as well as Better Business Bureau and Federal Trade Commission complaints against Department of Education debt collectors, to reveal flaws in the contracting and oversight mechanisms for student loan debt collectors.⁷¹

For all of FOIA's potential, it has some significant drawbacks. It puts the burden on the requester to know what documents or records the government has. It is time consuming. In cases where the government denies a request, it is expensive. Also, the requester has no affirmative burden to share the results of a FOIA request, so much of the information retrieved sits in a file cabinet rather than building our collective knowledge base. Finally, its exemptions—particularly those for trade secrets and law enforcement—make it difficult to retrieve information that pertains to student loan servicing and debt collection.

B. Affirmative Disclosure

In some cases, either based on policy or simply historical practice, the government releases information affirmatively to the public. This Article cannot catalog all of the instances in which the Department of Education does this, but rather we will focus on instances in which the public has successfully pushed the Department to broaden its affirmative disclosures to include more useful information.

Between 2014 and 2017, the Department of Education responded to pressure from researchers, advocates, and members of Congress who identified a gaping hole in the knowledge about student loans. Prior to 2014, the Department published very little information on the performance of the student loan portfolio, leaving the public with almost no insight into the performance of loans by servicer, geography, delinquency status, or other key characteristics.⁷²

In a series of updates to the FSA Data Center, the Department of Education began releasing broader data, including breakdowns of the student loan portfolio by borrower age, debt size, state, and delinquency status, as well as information on loan status by servicer.⁷³ Although the release of this information was a huge step

⁷⁰ Bob Shireman et al., *Looking in All the Wrong Places: How the Monitoring of Colleges Misses What Matters Most*, CTR. FOR AM. PROGRESS (Apr. 12, 2016 12:14 PM), <https://www.americanprogress.org/issues/education/reports/2016/04/12/133263/looking-in-all-the-wrong-places/> [https://perma.cc/HXM8-SPMJ].

⁷¹ DEANNE LOONIN & PERSIS YU, NAT'L CONSUMER LAW CTR., POUNDING STUDENT LOAN BORROWERS: THE HEAVY COSTS OF THE GOVERNMENT'S PARTNERSHIP WITH DEBT COLLECTION AGENCIES 26 (2014), <https://www.nclc.org/images/pdf/pr-reports/report-sl-debt-collectors.pdf> [https://perma.cc/79CQ-LKYD].

⁷² Susan Dynarski, *We're Frighteningly in the Dark About Student Debt*, N.Y. TIMES (Mar. 20, 2015), https://www.nytimes.com/2015/03/22/upshot/were-frighteningly-in-the-dark-about-student-debt.html?_r=0 [https://perma.cc/7MLA-7CP8].

⁷³ See, e.g., U.S. DEP'T OF EDUC., FED. STUDENT AID POSTS UPDATED REPORTS TO FSA DATA CENTER (Mar. 17, 2016), <https://ifap.ed.gov/eannouncements/031716FederalStudent>

forward, portfolio-level data is insufficient to allow researchers and policy experts to truly understand the health of the student loan portfolio, as well as institutions' and servicers' role in influencing student outcomes—understanding the performance and risks to a loan portfolio requires the ability to “slice and dice” the data, which is not possible with static charts.⁷⁴ A group of researchers and advocates have banded together as the Postsecondary Data Collaborative to push for access to anonymized student-level (or borrower-level) data, including the release of existing data extracts like the Cost Estimation and Analysis Division's Statistical Abstract (“CEAD-STAB”), or the release of student loan data through the National Center for Education Statistics.⁷⁵

In some ways, affirmative disclosure is a better approach to government transparency than FOIA, because it reduces the burden on the public to extract information from the government, and it creates a culture of disclosure rather than secrecy. But there are some pitfalls, too. When disclosures are done based on administrative practice rather than a legal requirement, there is a risk that an agency will either change or completely reverse its practice of disclosure—particularly when there is a change in administration resulting from a presidential election. Even when Congress mandates affirmative disclosures, the resulting information may not be particularly useful for certain purposes. The disclosures currently mandated under the Higher Education Act pertaining to aggregate data may be helpful to consumers, and in some cases researchers, but they are not useful to borrowers seeking information about circumstances that are unique to their cases.

C. Executive Branch Oversight/Monitoring

Pozen identifies investigations and oversight by Congress as a means of transparency. This investigatory category is broadened to include monitoring by executive branch actors that have authority to investigate federal agencies, including the Government Accountability Office and the Inspectors General. In some cases,

AidPostsUpdatedReportstoFSADDataCenter.html [https://perma.cc/7FV7-BAUL]; U.S. DEP'T OF EDUC., FED. STUDENT AID, IFAP—ELECTRONIC ANNOUNCEMENTS (Sept. 21, 2017), <https://ifap.ed.gov/eannouncements/092117FSAPostsNewReportsToFSADDataCenter.html> [https://perma.cc/9FT4-Q2CH]; U.S. DEP'T OF EDUC., FED. STUDENT AID POSTS NEW REPORTS TO FSA DATA CENTER (Sep. 21, 2016), <https://ifap.ed.gov/eannouncements/082216FSAPostsUpdatedReportstoFSADDataCenter.html> [https://perma.cc/3PMJ-N7DK].

⁷⁴ See, e.g., COMPTROLLER OF THE CURRENCY ADM'R OF NAT'L BANKS, LOAN PORTFOLIO MANAGEMENT: COMPTROLLER'S HANDBOOK 29 (1998), <https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/loan-portfolio-management/pub-ch-loan-portfolio-mgmt.pdf> [https://perma.cc/NK5T-PMRP] (“If a bank lacks adequate data on each loan or does not possess a system to ‘slice and dice’ the data for analysis, management’s ability to manage the loan portfolio is compromised.”).

⁷⁵ MATTHEW SOLDNER & COLLEEN CAMPBELL, INST. FOR HIGHER ED POL'Y, USING—AND IMPROVING—FEDERAL STUDENT AID DATA SYSTEMS TO SUPPORT POLICY ANALYSIS 8 (2016), http://www.ihep.org/sites/default/files/uploads/postsecdata/docs/resources/using_and_improving_fsa_data_systems.pdf [https://perma.cc/L8JU-FUTG].

rather than requesting direct access to government data or primary sources, advocates and policymakers have leveraged internal government investigatory methods to get insight into the inner workings of federal student aid. In other words, instead of digging around in the Department of Education's files themselves, they have called upon the U.S. Government Accountability Office, the Department of Education Inspector General, members of Congress, or others to do the digging and compile reports that bring ED's actions into the public view.

There are many examples of this, but the oversight process around implementation of the Servicemembers Civil Relief Act ("SCRA") illustrates how several of these oversight mechanisms can play out. In 2014, the Department of Justice and the FDIC reached settlements with the student loan servicer Navient over Navient's alleged failure to provide interest rate reductions to service members in accordance with the SCRA.⁷⁶

Then Secretary Arne Duncan responded to public outcry by vowing to undertake his own investigation of Navient and other servicers, but just a few months later, the Department of Education renewed its contract with Navient without any investigation.⁷⁷ A year after the DOJ settlement, the Department of Education finally released its review of Navient and other servicer's compliance with SCRA, finding no wrongdoing on Navient's part.⁷⁸ The Department of Education's review included some of the data used to reach those conclusions, and several Senators took the opportunity to review that data for themselves, reaching very different conclusions that raised concerns about the impartiality of the Department's review. As a result, the Department of Education Inspector General reviewed the Department's report, and ultimately concluded that the Department of Education had misled the public.⁷⁹

⁷⁶ Press Release, U.S. Dep't of Justice, Justice Department Reaches \$60 Million Settlement with Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans: Settlement Resolves the Department's First Lawsuit Against Student Loan Owners and Servicers for Violating the Rights of Servicemembers (May 13, 2014), <https://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging> [<https://perma.cc/AY24-V3EG>].

⁷⁷ See Chris Carroll, *DOJ: Student Loan Entity Penalized for Cheating Veterans*, STARS AND STRIPES (May 13, 2014), <https://www.stripes.com/news/doj-student-loan-entity-penalized-for-cheating-veterans-1.282906> [<https://perma.cc/L2WV-3W4D>]; Shahien Nasiripour, *Elizabeth Warren Questions Education Department's Competence over Student Loan Fraud*, HUFFINGTON POST (Mar. 4, 2016, 6:50 AM), https://www.huffingtonpost.com/entry/elizabeth-warren-student-loans_us_56d8a6b9e4b0ffe6f8e89f66 [<https://perma.cc/L5U3-8NDX>].

⁷⁸ Press Release, U.S. Department of Education Completes Review of Major Student Loan Servicers (May 26, 2015), <https://www.ed.gov/news/press-releases/us-department-education-completes-review-major-student-loan-servicers> [<https://perma.cc/3M2M-WAEK>].

⁷⁹ Letter from Sens. Patty Murray, Elizabeth Warren, and Richard Blumenthal to Hon. Kathleen Tighe (Aug. 4, 2015), https://www.warren.senate.gov/files/documents/2015-8-5_ED_SCRA_Ltr.pdf [<https://perma.cc/CYB3-9W2L>]; Independent Examination by Hon. Kathleen Tighe (Feb. 29, 2016), <https://www2.ed.gov/about/offices/list/oig/misc/scrareport>

This example illustrates both how existing congressional and administrative oversight vehicles can be used to get information out to the public, and also the pitfalls of relying on a government agency to analyze data and publicize its conclusions.

D. Disclosures Pursuant to Litigation

Litigation affords parties the right to retrieve documents that would not necessarily be disclosed under FOIA or other public transparency methods. In addition to providing information to the attorney and clients themselves, the information retrieved through discovery can become public through the pleadings and dispositions of the cases. For example, the Consumer Financial Protection Bureau's litigation against loan servicers and for-profit colleges have yielded insights that would not otherwise have easily been obtained by advocates and policymakers.⁸⁰ Though discovery allows attorneys and their clients the opportunity for depositions and document review that can give a glimpse into records not otherwise available, there are a few obvious limitations. First, litigation can be hugely expensive, and therefore is not a reasonable tool for transparency alone, without some other reason for pursuing the case.⁸¹ Second, in many instances, a judge might issue a protective order prohibiting the party from publicizing the documents obtained through discovery, making it impossible to use the information for anything other than the litigation itself.

E. Ad Hoc Disclosure

With all of these formal methods of retrieving information from the government, it is easy to forget that one can simply ask for information from a government official. There are many instances in which the government has no affirmative requirement to disclose information to the public, but it also does not have any restrictions keeping it from doing so. Those with access to decision makers at the Department of Education can simply request information and receive it. One example is the disclosure of outstanding student loan volume by interest rate to the

02292016.pdf [<https://perma.cc/3R9F-ZG3X>]; Danielle Douglas-Gabriel, *Education Department Mised Public About Investigation of Loan Servicers, Says Watchdog*, WASH. POST (Mar. 1, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/03/01/education-department-mised-public-about-investigation-of-loan-servicers-says-watchdog/?utm_term=.1f1bae5524e7 [<https://perma.cc/8KCE-QLRD>].

⁸⁰ See, e.g., Complaint, Consumer Financial Protection Bureau v. Corinthian Colleges, Inc., 2015 WL 10854389 (N.D. Ill. Sept. 16, 2014) (No. 14 Civ.-7194); Complaint, Consumer Financial Protection Bureau v. Navient Corp., No. 3:17-cv-00101-RDM (M.D. Pa. Jan. 18, 2017), http://files.consumerfinance.gov/f/documents/201701_cfpb_Navient-Pioneer-Credit-Recovery-complaint.pdf [<https://perma.cc/S8B9-BJHR>].

⁸¹ Litigation of claims related to FOIA requests is, of course, a different story.

Center for American Progress (“CAP”) in 2013.⁸² This information was not available on Department of Education’s FSA data center, and the Department did not make it available to other organizations. CAP did not have to go through the rigorous process of a FOIA request—all it had to do was ask. The limitations to this tool are plain to see: it depends upon the Department’s willingness to assist, and the power of the requester’s network.

Taken together, these tools and tactics hold enormous promise for uncovering information about the administration of the student loan program, including better data on how borrowers fare; insight into the oversight of colleges, servicers, and collectors that participate in the program; information about college, servicer, and collector policies and practices; and information on the primary actors who influence the behavior of players in the student loan system.

VI. CONCLUSION

At over \$1 trillion, with more than 8 million borrowers in default, the federal student loan program is in trouble. There is no question that policymakers will do their best to fix it in the coming years. The only question is whether they will have the evidence they need to make informed judgments about what ails our student loan program, and what can cure it.

The publicly available evidence at this point is insufficient to fully understand the way that the federal government oversees and implements the student loan program, and what, if any, role the government has in determining the success or failure of the program. The limited information available on both the structure and the practices of FSA suggest that there is substantial reason to suspect that reforms to the administration of student loans are a necessary precondition to fixing the student loan program.

In the coming years, advocates, policymakers, and researchers should focus on gathering data and information on *all* possible causes of the failures in the student loan program. As the previous Part describes, the public has a number of tools at its disposal to procure more data and information. Individual organizations may, of course, use these tools on their own, but there are compelling reasons to think more broadly.

By pooling their capacity to make requests and sharing the results, advocates and researchers can move toward a broader base of information for the entire higher education policy field. A collective effort toward improved information on the student loan program might include a narrow set of “research” questions—or areas of inquiry—that organizations will pursue together, and an independent repository that stores the results of these inquiries in an easily searchable format.

⁸² ANNE JOHNSON & TOBIN VAN OSTERN, CTR. FOR AM. PROGRESS, IT’S OUR INTEREST: THE NEED TO REDUCE STUDENT LOAN INTEREST RATES 11 (2013), <https://www.scribd.com/document/125302109/It-s-Our-Interest-The-Need-to-Reduce-Student-Loan-Interest-Rates> [<https://perma.cc/6BRQ-X2U4>].