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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex C)
Washington, DC 20580

**RE: FTC Competition and Consumer Protection in the 21st Century Hearings
FTC Project Number P181201
Responses to Questions 1 and 10**

Dear Commissioners:

These comments are submitted on behalf of the Student Loan Servicing Alliance (“SLSA”), a non-profit, membership organization of student loan servicers and software providers supporting borrowers in the federal student loan programs and in connection with private education loans. SLSA has 20+ servicer members that together service approximately 95 percent of all outstanding federal and private student loans.

SLSA commends the Commission for initiating this series of public hearings and requests for comments on its competition and consumer protection priorities and policies. We appreciate the opportunity to comment on several of the topics under consideration. **Specifically, SLSA makes the following three recommendations for FTC action in response to questions 1 and 10 of the public notice:**

- Continue and expand enforcement efforts, such as *Operation Game of Loans*, to expose and root out unscrupulous student loan debt relief companies that are scamming student loan borrowers.
- Support the federal government’s exclusive role in administering and regulating federal student loan programs; and

- Support efforts to protect consumers by focusing limited judicial and agency resources on addressing concrete harms and preventing class action abuses.

I. The State of Antitrust and Consumer Protection – The FTC Should Continue to Focus Its Student Loan Enforcement Efforts On Unscrupulous Debt Scammers Through Programs Like *Operation Game of Loans*

A. Federal Student Loan Servicers Work to Protect Borrowers from Defaulting on Their Education-Related Debts

Student loans are instrumental in allowing students and their families access to higher education in the U.S. Forty-four million Americans have borrowed over \$1.5 trillion in student loan financing.¹ Federal student loan servicers play a special role as an intermediary between the Americans who made a prudent investment in their educations and the American taxpayer from whom they borrowed to make the investment. Servicers help student loan borrowers successfully repay their debt and avoid the negative consequences of default. They help borrowers navigate the complex array of repayment options as they work towards successfully repaying their loans. For example, servicers have helped increase enrollment in income-driven repayment plans by 295 percent between 2013 and 2017.² This service is particularly important to delinquent borrowers and others who are at high risk of default. As of September 2017, servicers have helped to reduce default rates by 22 percent in the past two years and serious delinquency rate by 24 percent over the past three years.³

Federal student loan servicers **do not** (1) set or influence the interest rates, terms or penalties for federal student loans; (2) engage in telemarketing or sales calls; or (3) engage in unlawful spoofing.

B. The FTC Should Continue Pursuing Enforcement Action Against Student Loan Debt Relief Scammers to Protect Vulnerable Borrowers and Support Legitimate Student Loan Servicing Activities

Borrowers are more likely to get themselves into financial difficulties when they *don't* engage with their federal student loan servicer. Servicers report that as many as 90 percent of borrowers who default did not respond to servicer contact, despite multiple methods of outreach.⁴ Borrowers often turn instead to unscrupulous debt relief companies as an alternative

¹ See New York Federal Reserve, Quarterly Report on Household Debt and Credit, 2018:Q1 (released May 2018), available at https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2018Q1.pdf (last visited July 31, 2018).

² See SLSA Facts on Student Loan Borrowers 1, <https://bit.ly/2vi1Zp4> (last visited July 31, 2018) (citing U.S. Dep't of Ed., Federal Student Aid Data Center (July 2017)).

³ *Id.*

⁴ *Id.* at 2 (citing Comments of Navient Corp., CFPB Request for Information Regarding Student Loan Borrower Communications, Docket No. CFPB-2016-0018 at 1 (filed June 12, 2016)).

to servicing their loans, thinking that they are offering a legitimate solution. These companies often tell borrowers not to work with their loan servicers, and that their loan servicers do not have access to the loan forgiveness programs that the debt relief companies do. Many of them also pretend to be working for the U.S. Department of Education. Legitimate loan servicers' ability to work with borrowers and prevent default is strengthened if debt relief scammers are not preying on vulnerable borrowers.

SLSA first began reporting seeing unscrupulous practices by debt relief companies in 2012, at which time we began informing the Department of Education and the Bureau of Consumer Financial Protection of the existence of these companies. We met with Commission staff a year or so later and were heartened by the efforts that they were beginning to undertake in this area. In May of this year, FTC staff participated in a Borrower Protection Summit sponsored by two SLSA members, Great Lakes Higher Education Corp. and MOHELA. And SLSA has created a Borrower Protection Workgroup so that its members can keep abreast of the latest developments in this area. We intend to invite the FTC staff to address the group from time to time, and also to pass along to the FTC new information on debt relief companies in order to aid the Commission's efforts in this area.

SLSA is grateful for the FTC's efforts to combat unscrupulous companies, such as the debt relief scams addressed in Operation Game of Loans. We have also encouraged regulators such as the FCC to continue to enforce its rules against scammers and other bad actors.⁵

Unfortunately, some stakeholders have conflated legitimate student loan servicing activities with unlawful attempts to scam and defraud borrowers. For example, the National Consumer Law Center regularly conflates communications from scammers and unwanted telemarketing calls, which Congress passed legislation to protect against, with communications from legitimate student loan servicers working on behalf of the federal government.⁶ Servicers of federal student loans act pursuant to strict performance requirements established by government contract. They have no involvement in setting interest rates or establishing penalties for default. The FTC should focus its enforcement efforts on actual bad actors (and not servicers acting to help borrowers and protect taxpayer funds).

II. Harmonization of State and Federal Statutes and Regulations – The FTC Should Support the Exclusive Role that the Federal Government Plays in Administering Federal Student Loans and Support Efforts to Prioritize Relief for Concrete Harms

Students, servicers and state and local consumer protection agencies would all benefit from FTC guidance supporting the federal government's exclusive role in administering and regulating federal student loan programs. Additionally, the FTC should support efforts to limit

⁵ See, e.g., Consolidated Reply of Great Lakes Higher Education Corp., *et al.*, CG Docket No. 02-278 at 9-10 (filed Feb. 13, 2017).

⁶ See, e.g., Reply Comments of the Student Loan Servicing Alliance; Navient Corp.; Nelnet Servicing, LLC; and Pennsylvania Higher Education Assistance Agency, CG Docket Nos. 18-152 & 02-278 at 12-13 (filed June 28, 2018).

class action abuses and help ensure that limited judicial (and agency) resources are appropriately administered to remedy concrete harms.

A. Federal Law Preempts Conflicting State and Local Student Loan Management and Oversight Regulations

Congress, through the Higher Education Act, vested the Department of Education with the authority to regulate federal student loan programs. The federal government, not states or servicers, sets the interest rates, eligibility criteria, and repayment terms for federal student loans. The federal government hires contractors to service federal student loans and establishes extensive rules for servicers to follow.

Servicers “stand in the shoes” of the federal government in performing required actions under federal loan programs when acting pursuant to their contractual obligations. Courts have recognized that “subjecting the federal regulatory standards [for student loans] to the potentially conflicting standards of fifty states on contract and consumer protection principles would stand as a severe obstacle to the effective promotion of the funding of student loans.”⁷ The FTC should also support the federal government’s exclusive oversight role for federal loan collection.

B. The FTC Can Help Protect Consumers by Supporting Efforts to Focus Limited Judicial and Agency Resources on Addressing Concrete Harms

Abusive class action litigation. Student loan servicers are frequently the targets of vexatious and costly litigation, including for alleged statutory damages where no showing of concrete harm is made by the plaintiff. Ultimately, such claims often enrich plaintiffs’ attorneys at the expense of consumers, with little recovery provided directly to the plaintiff consumers. The FTC should support efforts to prioritize enforcement and litigation resources on protecting consumers from concrete, not theoretical, harms, and should also support efforts to reform class action abuses.

Cy pres awards. Courts also often use the doctrine of *cy pres* to allocate class action funds when the money is either unclaimed or difficult to disburse among the covered class.⁸ Unfortunately, the rule as currently applied in the context of loan servicing perversely harms the very consumers it was intended to benefit. *Cy pres* awards have frequently been given to entities that bring TCPA complaints, which gives them the incentive to expand the scope of their complaints (whether meritless or not) and favor rules that create ambiguity rather than certainty. As the U.S. Chamber of Commerce has explained, the current rules have spawned an entire “*cy pres* industry.”⁹ *Cy Pres* awards also increase class counsel’s personal stakes in litigation (at the

⁷ See *Chae v. SLM Corp.*, 593 F.3d 936, 950 (9th Cir. 2010).

⁸ See Ted Frank, *Cy Pres Settlements*, FEDERALIST SOCIETY CLASS ACTION WATCH (Mar. 2008), <https://fedsoc.org/publications/detail/cy-pres-settlements>.

⁹ Brief of Chamber of Commerce of the United States of America as Amicus Curiae in Support of Neither Party at 20-21, *Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017), *cert. granted*, 2018 WL 324121 (U.S. Apr. 30, 2018) (No. 17-961) (noting that “[s]tate and local bar associations, for example, have published manuals encouraging members to steer *cy pres* funds to their legal services

expense of class members) and compel class members to support speech with which they may disagree.¹⁰ The Supreme Court has agreed to review the *cy pres* award regime to determine whether, and in what circumstances, class action proceeds are “fair, reasonable, and adequate” as required under the Federal Rules of Civil Procedure.¹¹ SLSA urges the FTC to closely review the pending Supreme Court case and, if appropriate, weigh in formally or informally with either the Court or with the Administration to express support for protecting consumers from abuses of the *cy pres* process. The FTC’s input on this problem could be influential in stemming the abuses of the *cy pres* doctrine that create these significant consumer harms.

Thank you for the opportunity to provide comments to help inform the upcoming hearings on FTC Competition and Consumer Protection in the 21st Century. We thank the FTC for its efforts through *Operation Game of Loans* to thwart scammers in the student loan space and we look forward to continuing to work with the Commission on this and other issues to protect student loan borrowers.

Sincerely,

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departments. Law school clinics have appeared at settlement hearings and “requested that a portion of the unexpended funds be set aside to fund their clinics.” And class counsel have not neglected the opportunity to use *cy pres* settlement funds—supposedly provided to recompense injured class members—as pots of money for dispensing gifts to favored causes”) (citations omitted).

¹⁰ See Brief of the Cato Institute and Americans for Prosperity as Amici Curiae in Support of Petitioner at 16-18, 29-34, *Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017), *cert. granted*, 2018 WL 324121 (U.S. Apr. 30, 2018) (No. 17-961); Brief of Center for Individual Rights as Amicus Curiae in Support of Petitioners at 3-6, *Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017), *cert. granted*, 2018 WL 324121 (U.S. Apr. 30, 2018) (No. 17-961)).

¹¹ See *Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017), *cert. granted*, 2018 WL 324121 (U.S. Apr. 30, 2018) (No. 17-961).