

United States Senate

WASHINGTON, DC 20510

November 3, 2024

Scott Giles
Executive Director and Chief Executive Officer
Higher Education Loan Authority of the State of Missouri (MOHELA)
633 Spirit Drive
Chesterfield, Missouri 63005-1243

Dear Mr. Giles:

We write to express our concerns regarding the Terms of Use (Terms) that the Higher Education Loan Authority of the State of Missouri (MOHELA) is imposing upon the over eight million borrowers who use the student loan servicer's website.¹ You appear to be attempting to lock users of your website into an agreement that restricts their legal rights and absolves MOHELA of liability for outrageous misbehavior — and doing so potentially without users' full knowledge and consent.

Under its website's Terms of Use, MOHELA disclaims its responsibility to provide borrowers with accurate information on their student loans, forces borrowers to waive their right to hold MOHELA accountable for harm created by MOHELA's errors, and imposes troubling restrictions on borrowers' ability to share basic information about their student loans. In this way, the Terms of Use appear to require borrowers to give up certain legal rights merely as a condition of entering and using MOHELA's website, when in fact those rights are protected under consumer financial laws. We are alarmed by the exploitative nature of these new Terms of Use — particularly given MOHELA's poor record supporting borrowers — and are concerned that they could potentially violate federal law.

MOHELA has consistently fallen short in providing basic servicing functions to borrowers. In March 2024, Senators Warren, Blumenthal, Markey, and Van Hollen released a report finding that MOHELA failed to send timely billing statements or sent the wrong bills to millions of borrowers during the return to repayment, leading 800,000 borrowers to become delinquent on their loans.² MOHELA is currently subject to two separate lawsuits about its repeated failures to properly service borrowers.³ And, in October 2024, the U.S. Department of Education issued a

¹ MOHELA, "Investor Presentation," February 2024, pp. 7, 13, <https://www.mohela.com/DL/common/publicinfo/investorInformation.aspx?idx=2709>; MOHELA, "MOHELA is Proud to Support the PSLF Program as over 1 Million Borrowers Receive Relief," press release, October 18, 2024, <https://newscenter.mohela.com/Content/pages/ViewMediaRelease.aspx?from=MR&article=10>.

² Office of Senator Elizabeth Warren, "Servicing Scandals: Student Loan Servicers' Failures During Return to Repayment," April 2024; CNBC, "Education Department penalizes Missouri lender for error that made 800,000 student loan borrowers delinquent," Annie Nova, October 30, 2023, <https://www.cnbc.com/2023/10/30/education-dept-penalizes-student-loan-servicer-mohela-for-errors.html>.

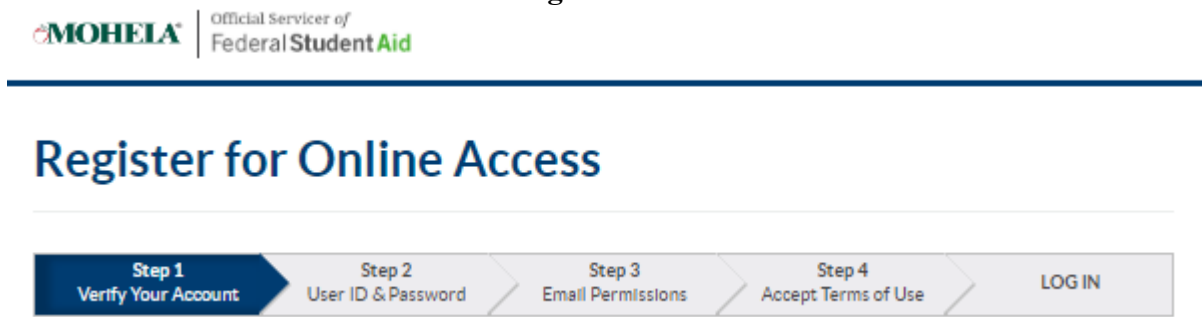
³ Student Borrower Protection Center, "MOHELA Lawsuit Factsheet," <https://protectborrowers.org/mohela-factsheet/>; Project on Predatory Student Lending, "Student Borrowers Sue MOHELA for Failing to Implement

contract violation notice to MOHELA, demanded a corrective action plan within 10 days, and stopped the assignment of new borrower accounts to MOHELA in response to the servicer’s servicing failures and egregious mismanagement of income-driven repayment plan applications.⁴ MOHELA’s exploitative Terms of Use are particularly concerning given the company’s atrocious track record as a student loan servicer.

MOHELA’s Terms of Use

Borrowers encounter MOHELA’s Terms of Use when registering for an account on mohela.studentaid.gov. After completing the initial steps of account registration, a borrower is shown the Terms of Use and required to accept the Terms of Use in order to complete account creation.⁵ (Figure 1)

Figure 1: Users of MOHELA’s Website Are Required to Accept the Terms of Use In Order to Register an Account



In addition, MOHELA’s Terms of Use are publicly viewable on its website as of October 2024, on a page titled “MOHELA Privacy Policy and Website Security.”⁶

MOHELA imposes its Terms of Use on any and all individuals who view or use the website — regardless of whether they are using the website to obtain basic information on student loan programs, check their balances, or make any other changes to their accounts.⁷ MOHELA even

Student Loan Discharges,” press release, September 5, 2024, <https://www.ppsl.org/news/student-borrowers-sue-mohela-for-failing-to-implement-student-loan-dischargesnbsp>.

⁴ Washington Post, “Student loan servicer MOHELA faces new punishment from Biden administration,” Danielle Douglas-Gabriel, October 16, 2024, <https://www.washingtonpost.com/education/2024/10/16/mohela-student-loans-punishment/>.

⁵ MOHELA, “Home Page,” <https://mohela.studentaid.gov/default.aspx>; Screenshot on file with Office of Senator Elizabeth Warren.

⁶ MOHELA, “Website Terms and Conditions of Use,” <https://mohela.studentaid.gov/DL/common/privacy/internetPrivacy.aspx> (as of October 2024).

⁷ This letter focuses on the Terms of Use present on MOHELA’s loan servicing website maintained on behalf of the U.S. Department of Education’s Office of Federal Student Aid. MOHELA also appears to be engaged in a similar scheme on its loan servicing websites maintained on behalf of big banks, including KeyBank (d/b/a Laurel Road) and SoFi. Letter from Student Borrower Protection Center and American Federation of Teachers to CFPB Director Rohit Chopra, October 10, 2024, <https://protectborrowers.org/wp-content/uploads/2024/10/FINAL-FOR-RELEASE-CFPB-MOHELA-Website-Waiver-Letter.pdf>.

attempts to impose this set of conditions on website users who do not log in but merely browse the website. According to the Terms of Use:

By entering or using of this website, you confirm that you have read and understand these Terms and agree to be bound by them. MOHELA requires all visitors to our website to agree and adhere to these Terms, without modification or limitation. If you do not agree to these Terms, you are not authorized to access or use this website.⁸

MOHELA attempts to impose these conditions without seeking the affirmative consent of website users. These Terms of Use seek to absolve MOHELA of a broad swath of liability for wrongdoing of all kinds, protecting the company but leaving borrowers at risk.

Predatory Conditions in MOHELA’s Terms of Use

First, MOHELA’s Terms of Use state that MOHELA “makes no warranty or guaranty that the website or the content of [the] website...will be accurate or reliable,” that “defects will be corrected,” or that “any services or items obtained through the website will otherwise meet your needs.”⁹ This is a stunning disclaimer. One of MOHELA’s core responsibilities as a federal student loan servicer is to provide accurate information to borrowers about their student loans. Errors and defects on MOHELA’s website may deprive borrowers of debt relief that they are legally entitled to or may result in borrowers being overcharged; in fact, two pending lawsuits against MOHELA allege that such errors, including on MOHELA’s website, have already financially harmed borrowers.¹⁰ The federal government has paid MOHELA over \$1.1 billion since 2011 to service borrowers’ loans and communicate with borrowers about loans in a timely and accurate manner.¹¹ But via this disclaimer, MOHELA is eschewing its obligation to perform those services responsibly.

Second, MOHELA’s Terms of Use seek to absolve MOHELA of any liability for harm that it causes to borrowers for any website-related problems, regardless of whether they are MOHELA’s fault or not. The Terms of Use assert that MOHELA “shall not be liable to the user” for any “damages of any kind arising out of ... your use of, or inability to use, the website or any content on the website.”¹² The Terms of Use explain that this limitation applies even if MOHELA “was grossly negligent” or “was advised of the possibility of such damages.”¹³ This section concludes that the “total liability of MOHELA to you for all claims arising from the use

⁸ MOHELA, “Website Terms and Conditions of Use,” <https://mohela.studentaid.gov/DL/common/privacy/internetPrivacy.aspx> (as of October 2024).

⁹ *Id.*

¹⁰ Student Borrower Protection Center, “MOHELA Lawsuit Complaint,” pp. 28-29, https://protectborrowers.org/mohela_lawsuit/; Project on Predatory Student Lending, “Student Borrowers Sue MOHELA for Failing to Implement Student Loan Discharges,” <https://www.ppsl.org/news/student-borrowers-sue-mohela-for-failing-to-implement-student-loan-dischargesnbsp>.

¹¹ Student Borrower Protection Center, “MOHELA Lawsuit Factsheet,” <https://protectborrowers.org/mohela-factsheet/>.

¹² MOHELA, “Website Terms and Conditions of Use,” <https://mohela.studentaid.gov/DL/common/privacy/internetPrivacy.aspx> (as of October 2024).

¹³ *Id.*

of this website is limited to one hundred dollars (\$100),” despite the fact that borrowers have previously been overcharged tens of thousands of dollars or more because of servicer errors.¹⁴ These Terms seek to deprive borrowers of the means to hold MOHELA legally accountable for its failures, no matter what harms borrowers actually experience.

Third, MOHELA’s Terms of Use prohibit borrowers from “republish[ing], publicly display[ing], [or] distribut[ing] ... website content.”¹⁵ Borrowers frequently need help with understanding their loans, and sharing screenshots from their servicers’ websites is a core way that they do so. As a result, this absurd restriction will likely discourage borrowers from seeking help with their loans, for fear of violating the Terms of Use by sharing basic information from MOHELA’s website. Given MOHELA’s history of allegedly displaying incorrect information related to borrowers’ loans and repayment options, this provision is even more concerning.¹⁶ MOHELA’s draconian prohibition against displaying website content may impede users’ efforts to discover and hold the loan servicer accountable for widespread errors or poor website design. By disallowing this activity, MOHELA is behaving in its self-interest at the expense of borrowers.

The exploitative nature of MOHELA’s Terms of Use is particularly insidious because borrowers do not have the choice to simply opt out. The Terms of Use assert that they apply to any individual that “enter[s] or us[es]” the website and state that the “sole remedy for dissatisfaction with this website is to stop using this website and/or those services contained on this website.”¹⁷ But once assigned a federal loan servicer, borrowers cannot simply choose a different federal servicer. Declining the website’s Terms of Use would deprive a MOHELA borrower of critical financial information on their own loans, making borrowers’ “sole remedy” under the Terms of Use an empty choice.

MOHELA’s Terms of Use May Be Unlawful

In addition to being predatory, MOHELA’s Terms of Use may be unlawful. Under the *Consumer Financial Protection Act (CFPA)*, a contract is considered “abusive,” and therefore unlawful, if it “takes unreasonable advantage” of “*unequal bargaining power* where, for example, consumers lack the practical ability to switch providers [or] seek more favorable terms.”¹⁸ Borrowers whose loans are serviced by MOHELA do not have the option to decline the Terms of Use if they want to use MOHELA’s website, or turn to competitors if they are dissatisfied by the Terms of Use. Thus, MOHELA may be improperly taking advantage of

¹⁴ *Id.*; U.S. Department of Justice, “Nearly 78,000 Service Members to Begin Receiving \$60 Million Under Department of Justice Settlement with Navient for Overcharging on Student Loans,” press release, May 28, 2015, <https://www.justice.gov/opa/pr/nearly-78000-service-members-begin-receiving-60-million-under-department-justice-settlement>.

¹⁵ MOHELA, “Website Terms and Conditions of Use,” <https://mohela.studentaid.gov/DL/common/privacy/internetPrivacy.aspx> (as of October 2024).

¹⁶ Student Borrower Protection Center, “MOHELA Lawsuit Factsheet,” <https://protectborrowers.org/mohela-factsheet/>.

¹⁷ MOHELA, “Website Terms and Conditions of Use,” <https://mohela.studentaid.gov/DL/common/privacy/internetPrivacy.aspx> (as of October 2024).

¹⁸ Consumer Financial Protection Bureau, “Policy Statement on Abusive Acts or Practices,” April 2023, <https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/>.

borrowers' lack of outside options by requiring them to agree to restrictive or exploitative Terms of Use.

In addition, the Terms of Use could be illegal if they violate the CFPA's prohibition on "unlawful and unenforceable contract terms."¹⁹ "Covered persons may violate the CFPA's prohibition on deceptive acts or practices if they include terms, including waiver provisions, in their consumer contracts that are rendered unlawful or unenforceable by federal or state law."²⁰ If the Terms' assertion that MOHELA "shall not be liable to the user" for any damages — even when behaving in a "grossly negligent" manner — is unenforceable because it requires consumers to waive their legal right to sue MOHELA, then MOHELA may have breached the CFPA.

Beyond the CFPA, other consumer financial laws prohibit financial firms from requiring consumers to waive rights guaranteed under federal law. For example, the *Electronic Funds Transfer Act* (EFTA) and its implementing regulation, Regulation E, establish specific rights and protect consumers from harmful industry practices when making electronic payments. EFTA states, "[n]o writing or other agreement between a consumer and any other person may contain any provision which constitutes a waiver of any right conferred or cause of action created by [EFTA]."²¹

The Consumer Financial Protection Bureau recently brought an enforcement action against the financial technology firm Chime (d/b/a Sendwave) for violations of EFTA, including for imposing an unlawful and unenforceable waiver on users who agreed to Sendwave's service agreement.²² As a student loan servicer that routinely processes electronic payments from student loan borrowers, MOHELA is obligated to comply with EFTA and Regulation E.²³ Thus, MOHELA's Terms of Use may also be an unlawful and unenforceable "waiver of any right," in violation of EFTA.²⁴

Conclusion and Questions

It is disappointing that MOHELA is attempting to impose a predatory Terms of Use agreement on any and all users of the company's website. MOHELA's website states that its mission statement is "to provide exceptional customer service to help ease the burden of financing higher education."²⁵ Unfortunately, MOHELA's Terms of Use blatantly contradict that commitment. In

¹⁹ Consumer Financial Protection Bureau, "Consumer Financial Protection Circular 2024-03: Unlawful and unenforceable contract terms and conditions," June 2024, <https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2024-03/>.

²⁰ *Id.*

²¹ 15 U.S.C. § 1693i

²² United States Consumer Financial Protection Bureau, in the Matter of: Chime, Inc., d/b/a Sendwave, File No. 2023-CFPB-0012 (2023).

²³ CFPB, "Education loan examination procedures," <https://www.consumerfinance.gov/compliance/supervision-examinations/education-loan-examination-procedures/>.

²⁴ For further discussion of the application of EFTA to MOHELA's current practice with respect to its Terms of Use, see Letter from Student Borrower Protection Center and American Federation of Teachers to CFPB Director. Rohit Chopra, October 10, 2024, <https://protectborrowers.org/wp-content/uploads/2024/10/FINAL-FOR-RELEASE-CFPB-MOHELA-Website-Waiver-Letter.pdf>.

²⁵ MOHELA, "Get to know MOHELA," <https://www.mohela.com/dl/common/about.aspx>.

light of MOHELA’s predatory and unfair Terms of Use, we request that you provide the following information by November 17, 2024:

1. To what extent does MOHELA interpret the Terms of Use agreement on its website to be legally binding on any and all individuals that enter or use the website?
 - a) How does MOHELA define the terms “entering or using” the website?
 - b) Does MOHELA believe that any individual who enters or uses the website has consented to the Terms of Use agreement?
2. Has MOHELA taken any action to enforce the Terms of Use agreement or use the Terms of Use to limit the rights of an individual who has had or has a dispute with MOHELA? If so, please list all such cases.
3. Has MOHELA implied or threatened to take any action to enforce the Terms of Use agreement or use the Terms of Use to limit the rights of an individual who has had or has a dispute with MOHELA? If so, please list all such cases.
4. Has MOHELA notified the U.S. Department of Education’s Office of Federal Student Aid of its decision to impose this Terms of Use on its customers? If so, did this notification occur before or after MOHELA’s servicing website changed from www.mohela.com to mohela.studentaid.gov?
5. Given that MOHELA operates a servicing website tied to the Office of Federal Student Aid’s main website (mohela.studentaid.gov), does MOHELA interpret the Terms of Use it imposes on its own customers to supersede the more general and permissive terms of use imposed by the United States government for all users of studentaid.gov?²⁶
6. When were the following clauses added to MOHELA’s Terms of Use? Why did MOHELA add those clauses?
 - a. *“You agree that you will not (i) use any device, software or any other mechanism or procedure to monitor the website content, (ii) republish, publicly display, distribute, modify, or copy website content.”*
 - b. *“MOHELA makes no guaranty or warranty that the website or the content of this website is error free or will operate uninterrupted and free of viruses or other items of a destructive nature, [or] will be accurate or reliable. That defects will be corrected, or that the website or any services or items obtained through the website will otherwise meet your needs or expectations.”*
 - c. *“MOHELA ... shall not be liable to the user or any third party for any loss of profits, loss of use, interruption of business, or any indirect, incidental, or consequential damages of any kind arising out of or in connection with your use*

²⁶ Office of Federal Student Aid, “Notices,” <https://studentaid.gov/notices> (as of October 2024).

of, or inability to use, the website or any content on the website, even if MOHELA was advised of the possibility of such damages or was grossly negligent.”

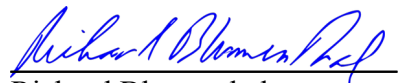
- d. *“Your sole remedy for dissatisfaction with this website is to stop using this website and/or those services contained on this website.”*
 - e. *“The total liability of MOHELA to you for all claims arising from the use of this website is limited to one hundred dollars (\$100).”*
7. The Terms of Use prohibit borrowers from distributing or publicly displaying website content. Would it violate the Terms of Use if:
- a) A borrower shared a screenshot of the MOHELA website with a third party (e.g., student loan expert, friend, union, Congressional office, lawyer) to seek help with their student loans?
 - b) A borrower posted screenshots of the website on a social media platform (e.g., Facebook, Twitter, Instagram, TikTok) in order to share potential errors on the website?
 - c) A borrower sent screenshots of the website to a journalist who is working on a story about student loan repayment?
 - d) A borrower shared the text of the Terms of Use agreement on a social media platform to inquire about whether the Terms of Use are legally enforceable?
8. The Terms of Use state that the “sole remedy” for a borrower’s “dissatisfaction” with MOHELA’s website is to stop using the website “and/or those services contained on this website.”²⁷ Given that millions of borrowers rely on MOHELA’s website to pay their student loans every month and to access up-to-date information on those loans, do you believe that this “sole remedy” is accessible to borrowers?
9. How did MOHELA arrive at the \$100 cap on liability for all claims arising from the use of its website? Has MOHELA paid any individual \$100 under this provision of the Terms of Use agreement?

Thank you for your attention to this important matter.

Sincerely,



Elizabeth Warren
United States Senator



Richard Blumenthal
United States Senator

²⁷ MOHELA, “Website Terms and Conditions of Use,” <https://mohela.studentaid.gov/DL/common/privacy/internetPrivacy.aspx> (as of October 2024).



Chris Van Hollen
United States Senator



Tammy Duckworth
United States Senator