BDR Comment Period Filings: Period Ending August 12, 2022

August 12, 2022

submitted via the Federal eRulemaking Portal at Regulations.gov
The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

ATTN: Jean-Didier Gaina

RE: Docket ID: ED-2021-OPE-0077

Dear Secretary Cardona:

CASE Comment

My name is Gerard Scimeca and I am the Chairman of Consumer Action for a Strong Economy ("CASE"), the nation's foremost non-profit, non-partisan organization devoted to the singular cause of promoting consumer interests through the advancement of free-market principles. I submit this comment to express my concerns with the proposed changes to the Borrower Defense to Repayment Rule.

CASE has previously expressed concern that the Borrower Defense to Repayment Rule could be transformed into a back-door means to issue blanket student loan forgiveness without a vote by Congress.[1] As we have explored in detail,[2] the Borrower Defense to Repayment Rule was originally written as a stop-gap, precautionary measure when the Department took over direct student lending to provide the Secretary of Education the power to grant loan relief to students based on "acts or omissions of an institution of higher education." In the first 20 years of its existence, just five claims were filed. Since then, the scope and use of the program has expanded considerably, with relief being granted to thousands of students, increasingly without regard to any merit or in the absence of a formal complaint.

We are deeply concerned that the U.S. Department of Education is reconstructing this rule in a manner that will expedite the approval of thousands of BDR claims, *en masse*, without appropriate review, at the expense of, and in dereliction of, their duty to the American taxpayer. We articulate our concerns below.

I. Comment Period

As an initial matter, we are concerned with the very limited amount of time made available to provide public comments on these proposed regulations. The NPRM was published in the *Federal Register* on July 13, 2022, and the public comment period closes on August 12, 2022. The proposed changes to the BDR provisions in the 2022 NPRM are significant and would benefit from a longer comment period that

[1] *See*, https://www.realcleareducation.com/articles/2021/11/19/biden_using_backdoor_rule_to_pass_free_college_agenda_110672.html#!.
[2] See, https://www.collegeloanfairness.com/wp-content/uploads/2021/11/BDR-White-paper-collegeloanfairness.pdf.

provides commenters the opportunity to fully review and consider the implications of the proposed rule. In fact, a longer comment is consistent with the authorities referenced by the Department.

In the "Invitation to Comment" Section of the 2022 NPRM, the Department references Executive Orders 12866 and 13563. USDE invited the public to assist the Department "in complying with the specific requirements" associated with those two EOs. Specifically, in Executive Order 13563, "Improving Regulation and Regulatory Review," the documents states that "each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, *with a comment period that should generally be at least 60 days.*" (Sec. 2(b))[*emphasis* added] For this reason, we request that the Department extend the comment period window an additional 30 days.

II. Expansion of the Program Violates the FCCA and Harms the American Taxpayer

The Department's proposed regulations would provide for loan forgiveness based upon borrower defense claims on a mass scale in such manner as would threaten the fiscal integrity of the student aid program and violate the Department's statutory duty to oversee and manage the program. Taken together, the proposed regulations expand the grounds for borrower defense claims and encourage the Department to create and grant groups of borrower defense claims without sufficient substantiation. Specific examples of such improper expansion in the proposed regulations include the Department's presumption of individual group member reliance (proposed § 685.406(b)(2)) and the creation of a presumption that borrowers are eligible for full discharges (proposed § 685.408).

The Federal Claims Collection Act ("FCCA") requires that federal agencies "try to collect a claim of the United States Government for money . . . arising out of the activities of, or referred to, the agency[.]"[3] Federal student loans constitute "claims" of the U.S. government. 31 U.S.C. § 3701(b)(1)(A). Section 3711(a)(2) authorizes the Department to "compromise a claim of the Government of not more than $100,000 (excluding interest)" without Attorney General approval, but this limited authority only applies to a single *claim* and does not extend to the group borrower defense discharges totaling millions – and perhaps even billions – of dollars that the Department's proposed regulations permit.[4]

Further, the Department's proposed regulations expanding the methods and grounds for discharging loans beyond the limited scope of statutory authority for borrower defense claims (e.g., by permitting automatic forgiveness under section 685.406(f)(7) and group discharges under section 685.402) implicates appropriations issues and the Antideficiency Act.[5]

As we stated above, we are concerned that the Department has put forth the proposed rule at the expense of the American taxpayer. We, therefore, ask the Department to provide an explanation as to how the proposed BDR rule comports with the FCCA and the Antideficiency Act.

III. Expansion of the Definition of Substantial Misrepresentation

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[3] *See,* 31 U.S.C. § 3711(a)(1); *see also* 34 C.F.R. § 901.1(a) ("Federal agencies shall aggressively collect all debts arising out of activities of, or referred or transferred for collection services to, that agency.").

[4] *See,* 31 U.S.C. § 3711(a)(2).

[5] *See,* U.S. Const., art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); 31 U.S.C. § 1341, *et seq.*

The initial Borrower Defense to Repayment rule was initially meant to help students who had been truly defrauded, or who had attended schools that closed due to some form of malfeasance or mismanagement. In proposed § 685.401(b),[6] the Department proposes expanding the definition of substantial misrepresentation, which it defines as when a borrower was told misleading or false statements by a higher education institution about its characteristics such as class size, faculty-student ratios, job placement rates, the ability to transfer credits, or the guarantee of a job after graduation. The Department would expand this definition to include "false, erroneous, or misleading statements concerning institutional selectivity rates or rankings as a form of misrepresentation. The Department proposes removing the requirement that the borrower demonstrate that the misrepresentation was intentional. The proposed new federal standard – at sections 685.401(b)(1) and (2) – is arbitrary, vague, and overbroad because it incorporates flawed definitions of "misrepresentation" and "omissions of fact" as proposed in 34 C.F.R. part 668, Subpart F.

Further, it is not sufficiently clear that the borrower must have relied upon the "misrepresentation." The previous rule required that the borrower demonstrate financial harm as a result of the institution's misrepresentation. The new proposed language replaces that requirement with one that only requires that the borrower relied on that misrepresentation when taking out the loan. This means, in practical terms, that students who received a degree and pursued a successful career could receive loan forgiveness under BDR. The proposed language is not sufficient. We recommend that the Department revise the proposed sections 685.401(b)(1) and (2) to state that the borrower "relied on" the misrepresentation or omission of fact.

This decision to expand the scope of students who are eligible to file BDR claims comes weeks after the Department proposed a settlement agreement to Judge Alsup[7] to swiftly settle thousands of BDR claims it had not previously processed. In the time since that decision was handed down, over 60,000 additional BDR claims have been filed.[8] It is unclear to us how the Department plans to properly adjudicate the avalanche of new claims that are now possible under the expanded pool of students that now find themselves eligible for relief under this program, but recent returns suggest they'll simply approve them all. As Nicholas Kent, Chief Policy Office at Career Education Colleges and Universities notes, in recent court filings, the Biden administration admits that since March 2021, it has provided borrower defense relief to over 800,000 students, and in that time, not one student has received less than 100 percent loan forgiveness.[9] In a majority of these cases, students did not even request student loan relief.

IV. The Expedited Review Process for Group Claims Incentivizes Litigation Abuse and Government Waste

[6] *See,* https://www.federalregister.gov/d/2022-14631/p-136

[7] See, *Sweet v. Cardona*, Case 3:19-cv-03674-WHA, Document 246-1, Filed 06/22/22.

[8] *See,* https://www.politico.com/newsletters/weekly-education/2022/07/05/inside-the-deal-that-could-revamp-loan-forgiveness-for-defrauded-borrowers-00043893.

[9] *See,* https://twitter.com/NicholasKentEd/status/1542291400116637696.

The Department owes a duty to students who were victims of fraud, but it also owes a duty to the American taxpayer. The Department's inability to adjudicate claims in a timely manner under more narrow eligibility standards is well documented and was the subject of a recent judicial rebuke.

The new standard would not only expand the scope of allowable claims, it would eliminate the responsibility of the borrower to prove that they were harmed.

The Department has proposed the following two processes for pursuing group claims in new § 685.402. Under the first process, the Department reserves the right to determine if a group of borrowers it identifies have a common defense to repayment at the same institution, including multiple campuses of the same institution. Under such a Department-initiated group process, the Department would have the discretion to create a group based on any of the following borrower defense basis: actions by the Federal Government, State attorneys general or other State agencies and officials or law enforcement authorities; class action lawsuits related to educational programs at one institution; or State or Federal judgments against institutions awarded to several borrowers for reasons related that could give rise to a defense to repayment claim; or a group of individual borrower defense claims.

Under the second process, the Department may initiate a group process upon appeal from a State requestor, on the condition that the State requestor submit an application and other required information to the Department to determine if it should form a group. Such an application ensures the Department has a consistent and clear process for addressing requests to form a group but does not confer the ability of the State requestor to otherwise represent the group during the Department's process of reviewing and adjudicating the claims. The Secretary would further be able to consolidate multiple group applications related to the same institution or institutions. The proposed provision would require the Department to respond to a materially complete State requestor's submission within 365 days. That response would indicate whether the Department decided to form the requested group and, if not, would provide the State requestor an opportunity to seek reconsideration of the group formation decision.

In both group processes, the Department would include any individual claims submitted by a borrower, under the proposed § 685.403, if that borrower is deemed part of the group. That borrower's claim would then be treated as part of the group claim, including with respect to timelines for adjudication.

The Department explains that it is reversing the 2019 policy that limited group claims on the grounds that all BDR claims be subject to highly individualized review. That process required students to show that the borrower made a misrepresentation with the knowledge that the statement was "false, misleading, or made with reckless disregard for the truth." The Department applies the same faulty logic it applied in its rationale for changing the meaning of "substantial misrepresentation" here. Under the new proposed rule, the borrower has no burden to prove that the organization acted to intentionally misrepresent itself. This means that under the new rule, parties who would seek to collect, in some cases, tens of thousands of dollars as individuals, or as part of multi-billion dollar group settlements, need not be burdened with showing that they were harmed.

As Tom Lee, Data and Policy Analyst at the American Action Forum notes in his analysis of the proposed rule, under the proposed streamlined process, many students would now be able to cite prior alleged instances of substantial misrepresentation which might not have been sufficient grounds for loan forgiveness through BDR under the current regulations. These changes, including the ability to adjudicate group claims, could allow ED to extend federal student loan forgiveness very broadly through BDR. Finally,

if these proposed changes were finalized, future administrations would be able to do the same.[10] As an example, Lee posits:

> "ED could theoretically attempt to use borrower defense for students of non-profit public and private universities, as well. For example, Columbia University, commonly regarded as one of the top Ivy League universities in the United States, has been stripped of its #2 ranking from U.S. News and World Report because the university allegedly submitted false and erroneous data to bolster its score in that ranking. With a broad interpretation, current and former students of Columbia University could receive forgiveness through BDR by claiming they relied on the false ranking of the university under Standard One, substantial misrepresentation."

Scenarios like this are not difficult to imagine under the proposed regulation, but they should illustrate the absurd perversion of this rule.

It is our opinion that these proposed changes will open up the floodgates for frivolous claims and group claims driven by loan forgiveness organizations who have no real cause to claim injury by their institution. This could not come at a worse time for the Department, which, as we previously stated, recently settled with thousands of students because it was incapable of processing claims.

The new proposed rule amounts to a surrender, inviting all comers to file claims, regardless of value, and to be made whole at great expense to the American taxpayer. The 2019 standard provided a safeguard, by eliminating these opportunistic group claims and ensuring that the Department properly vet claims to ensure that they are valid. The Department should keep the 2019 standard in place. If it wishes to reform that process, it should first show that it is capable of administering it.

V. The Proposal for the Issuance of Automatic Discharges as to Stale Applications is Arbitrary and Invites Government Waste of Taxpayer Funds.

The Department's proposed regulation providing for automatic discharge of older borrower defense applications exceeds the Department's statutory authority and is a misappropriation of taxpayer dollars. The HEA's borrower defense provision requires the Department to identify the acts or omissions of the schools upon which a borrower may assert a defense to repayment.[11] The Department's proposed regulations, at section 685.406(f)(7), would provide automatic loan discharges by proclaiming loans that are the subject of stale discharge applications to be "deemed unenforceable," without any connection to the student's underlying borrower defense allegations or to the merits of such claims. This automatic discharge proposal is contrary to the statute authorizing borrower defenses to repayment, which provides only for the discharge loans on the basis of prescribed acts or omissions by the school.[12] If the Department relies on different statutory authority for this distinct and arbitrary "staleness" measure of loan

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[10] *See*, https://www.americanactionforum.org/insight/the-department-of-educations-newly-proposed-regulations-increase-eligibility-for-student-loan-forgiveness/#ixzz7aoX3dvjL.
[11] *See,* 20 U.S.C. § 1087e(h).
[12] *See,* 20 U.S.C. § 1087e(h).

cancellation, the Department should identify the authority. Further, the automatic nature of discharges under section 685.406(f)(7) does not preserve the right for an institutional response.[13]

The language of the proposed regulation itself is vague and unsustainable. Section 685.406(f)(7) states that the loans would be deemed "unenforceable," but that term is not defined. "Regulations so vague that people of common intelligence must guess at their meaning and application do not provide adequate notice." *Nat. Indus. Constructors. v. O.S.H.R.C.*, 583 F.2d 1048, 1054 (8th Cir. 1978); *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 286 (4th Cir. 2013) ("[S]tatutes are unconstitutionally vague when they fail to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited'") (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)). The NPRM states that "[a]n institution would not face a recoupment action for the cost of a loan being deemed unenforceable under this Requirement."[14] However, the Department should further clarify and confirm that institutions will face no adverse consequences, monetary or otherwise, for debts automatically discharged under section 685.406(f)(7), and that such discharges present no basis for any third party regulator or private party to assert noncompliance or wrongdoing on the part of any institution. Moreover, the Department should state accordingly in this regulation and should further explain how or why automatic discharges on this basis are within the scope of the Secretary's authority and how they can be reconciled with the Department's statutory obligation to service and collect its federal loan portfolio.

Further, it is unclear the extent to which this regulation has retroactive effect. This proposed section 685.406(f)(7) is under Subpart D which "applies to borrower defense applications pending with the Secretary on July 1, 2023, or received by the Secretary on or after July 1, 2023."[15] The language leaves open the question whether the proposed regulation would provide for potential automatic discharges of older applications pending for 2 years or longer as of the moment that the new regulations take effect. Any such consequence caused by the confusing retroactivity provision of section 685.400 could lead to sweeping automatic debt cancellation based on unreviewed and unsubstantiated borrower defenses and would subject the borrowers' educational institutions to retroactive application of inapplicable standards for adjudication. Any such retroactive action would far exceed the limited statutory authority for borrower defense relief and would be arbitrary, capricious, and otherwise contrary to law. We ask the Department to clarify this regulation accordingly.

VI. <u>The Proposed Group Process Rules are Contrary to the Statute, Arbitrary, and Otherwise a Waste of Taxpayer Funds.</u>

The Department's proposed regulations permitting borrower defense loan discharges on a group basis exceeds statutory authority.[16] As noted above, the HEA's borrower defense provision at 20 U.S.C. §

[13] *Note,* The proposed provisions for providing notice to schools attended by borrower defense claimants at section 685.405 make no provision for notice to the schools of a pending automatic discharge.
[14] NPRM at page 41904.
[15] *See,* 34 C.F.R. § 685.400.
[16] *See,* 34 C.F.R. § 685.402.

1087e(h), requires the Department to specify the acts or omissions that "a borrower" may assert as a defense to repayment. The plain text of the statute refers to a single borrower, "a borrower," and not to a group of borrowers. Similarly, the statute specifies that "a borrower may assert" such defenses to repayment, not so-called "State requestors," as defined in section 685.401(a). The plain text of the statute does not permit the discharge of loans on a group basis, especially not where the borrowers holding the loans did not even apply for discharges. Therefore, the Department's entire process allowing for borrower defense discharges on a group basis exceeds statutory authority under the HEA and would not withstand judicial review.

To the extent the Department relies on authority for loan discharges on a group basis under the Department's general powers to "compromise, waive, or release any right, title, claim, lien, or demand, however acquired. . . ." under 20 U.S.C. § 1082(a)(6), the Department's Office of General Counsel has previously stated that section 1082(a)(6) "is best construed as a limited authorization for the Secretary to provide cancellation, compromise, discharge, or forgiveness only on a case-by-case basis and then only under those circumstances specified by Congress."[17] For all the reasons above regarding the problems inherent in the Department's existing and proposed "group process" for borrower defense loan discharges, the Department's indication that group process is the "default" approach is especially inappropriate. [18]

The Department has also eliminated the right of borrowers who are identified as a group to receive notice that they are members of a group and to have the opportunity to opt-out of such a group before such claims are adjudicated on a group basis. Any borrower eligible for group process should receive notice and the ability to opt-out of such a group. The Department has no statutory authority under 20 U.S.C. § 1087e(h) to discharge debt for students who have never asserted any defense to repayment, much less filed an application for such discharge. The borrower should be the master of his or her defense; it would be unfair, for example, for the Department to grant only partial relief to a student as part of a group discharge when that student would have been positioned to make a case for full relief on an individual basis.

Moreover, the Department should not be allowed to avoid its duty to fully adjudicate the elements of borrower defense claims by applying "a rebuttable presumption that each member of the group relied on the act or omission. . . ." 34 C.F.R. § 685.406(b)(2). The Department should not be allowed in regulation to omit critical elements of borrower defense claims, such as the requirement that borrower claimants show individualized reliance and harm. These required elements should be included in the Department's proposed definitions in section 685.401(a) and federal standard proposed in section 685.401(b).

We are concerned that the proposed language surrounding group discharges is arbitrary and greatly expands the pool of loans to be discharged in violation of the statutory authority and in abdication of the Department's fiduciary duty to the taxpayers.

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[17] *See,* OGC Legal Opinion at 4: Memorandum to Secretary of Education Betsy Devos from U.S. Department of Education General Counsel Reed Rubinstein regarding Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority (Jan. 12, 2021), available at https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf ("OGC Legal Opinion").

[18] See, Issue Paper #6, Session 1: October 4-6, 2021 ("A group process for adjudicating claims would be the default approach.").

VII. The Proposed Presumption of Full Relief is Unlawful and Contrary to the Best Interests of Taxpayer Funds.

The Department's proposed "rebuttable presumption of full relief," first announced by the Department in an August 24, 2021 electronic announcement, is now codified in the proposed regulation at 34 C.F.R. § 685.408(a).[19] In the proposed regulation, however, the Department exchanged the word "rebuttable," for a requirement of a showing of "a preponderance of evidence to the contrary." This standard is arbitrary and should be removed from the proposed regulations. The burden of proving the measure of harm in connection with a borrower defense claim should be on the borrower, not the school to disprove the harm, especially given the Department's other proposed regulations to further separate schools from the adjudication process.[20]

Section 685.408(b) states that the Department official "may" rebut the presumption, so it actually creates no additional duty for the Department to do so. The Department already must respond to the presentation of a preponderance of contrary evidence. Further, the only three situations in which the Department may rebut the presumption that the borrower is eligible for full discharge are much too narrow.[21] The new presumption also contradicts existing regulations that require the Department to "determin[e] the appropriate amount of relief to award the borrower."[22] Section 685.222(i)(2) already defines the Department's methodology for determining the amount to award borrowers with respect to different kinds of approved borrower defenses. After approving borrower defense application alleging a substantial misrepresentation, for example, the Department must:

> "[F]actor the borrower's cost of attendance to attend the school, as well as the value of the education the borrower received, the value of the education that a reasonable borrower in the borrower's circumstances would have received, and/or the value of the education the borrower should have expected given the information provided by the institution, into the determination of appropriate relief."[23]

For the approval of substantial-misrepresentation borrower defenses, therefore, the Department cannot award "full relief" based solely upon a presumption that fails to consider the borrower's cost of attendance and the value of the education the borrower did receive, would have received, or should have expected to receive. Similarly, existing regulations provide that for a borrower defense claim based on breach of contract, "relief will be determined according to the common law of contracts," which applicable state's law may not permit an award of "full relief."[24] The Department has the burden to investigate and measure the appropriate amount of relief for borrowers with approved borrower

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[19] *See,* FED. STUDENT AID, Rescission of Borrower Defense Partial Relief Methodology (EA ID: GENERAL-21-51, Aug. 24, 2021).

[20] *See, e.g.*, 34 C.F.R. § 685.407 (no right of school to initiate reconsideration process); 685.404(b) (no notice to school or right for school to respond to borrower defense adjudications based on Prior Secretarial Final Actions).

[21] *See,* proposed 685.408(b)(1-3).

[22] Current § 685.222(i).

[23] Current § 685.222(i)(2)(i).

[24] Current § 685.222(i)(2)(iii).

defenses and cannot avoid that responsibility by asserting a so-called presumption of full relief. Neither can the Department shift its burden to the subject school. The presumption encourages borrowers to submit little or no evidence or information in support of his or her damages claims, leaving the responding school with little or no evidence or information to rebut in defense. Instead, and in accordance with existing federal regulations, the Department's award to borrowers with approved defense claims must be commensurate with the actual adjudicated borrower defense.

VIII. Conclusion

CASE believes it is in the best interest of the Department to act to protect students from predatory institutions that would mislead them and deprive them of educational opportunity. BDR remains an important part of helping victims recover when this happens, and the Department should act to weed out bad actors wherever they are found. We applaud the Department for applying this regulation to all schools after years of using it to attack career and proprietary institutions.

However, the new proposed regulations lower the standard of misrepresentation such that it makes every institution of higher education a target for unverified and frivolous claims. The action contemplated by this proposed expansion of BDR far beyond its initial scope are massive. The Federal Reserve[25] estimates that there is 1.75 trillion dollars in outstanding debt in this country. The authority to forgive any significant portion of that should not be conferred lightly. We believe the proposed changes would open up the floodgates, allowing claims on the narrowest of grounds to be made and granted at the Secretary's discretion with hardly any standards for review. Hardworking Americans, including the many who did not attend college, deserve better oversight.

We recommend that:

(1) The Department not expand the scope of what constitutes substantial misrepresentation so that institutions can have a clear path to ensuring that they are in compliance.

(2) In line with BDR's stated purpose, the Department maintain policies that require the student borrower to show intentional misrepresentation and actual harm, so that the program adheres to its original purpose: to help students who were truly defrauded and suffered harm.

(3) The Department, in line with the 2019 standard, prohibit group claims, and adhere to a high standard of review, to ensure that BDR claims are properly reviewed and adjudicated, and to protect against, waste, fraud, abuse, and the rubber stamping of claims.

We appreciate the opportunity to submit comments and hope that you will give thoughtful consideration to our recommendations.

Sincerely,

[25] *See,* https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html

Gerard Scimeca

Chairman

Consumer Action for a Strong Economy