COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
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August 10, 2022

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Docket ID ED–2021–OPE–0077

Dear Secretary Cardona:

I write to share my views on the Department of Education's (Department's) Notice of Proposed Rulemaking (NPRM) to improve protections for students and taxpayers defrauded by unscrupulous institutions of higher education (IHEs).[1] Overall, I am encouraged by the Department's regulatory proposals to expand and improve loan relief programs. Please see detailed comments on each of these individual proposals below.

Borrower's Defense to Repayment

I am encouraged by the Department's proposals to improve the borrower's defense process for students. Borrower's defense to repayment is an important safeguard to protect student borrowers who were defrauded by their schools and provide them much needed student loan relief, including relief from default and wage garnishment. The new proposed rule makes several substantive changes, such as adding "aggressive and deceptive recruitment" as a basis for borrower's defense claims; clarifying what "omissions" and "misrepresentations of facts" about an institution or program could be a basis for borrower's defense claims; setting specific

[1] *See* "Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program," Proposed Rule, Docket ID ED–2021–OPE–0077, Fed. Reg. Vol. 87, No. 133, July 13, 2022, available at https://www.govinfo.gov/content/pkg/FR-2022-07-13/pdf/2022-14631.pdf (hereinafter "Student Loan NPRM").

timelines for adjudicating claims; restoring borrowers' ability to pursue appeals based on newly discovered evidence of fraud or misrepresentation; and permitting group claims and class action claims for similarly defrauded borrowers.

While all of these changes are important for providing student borrowers much needed relief from debt incurred under false or deceptive pretenses, I am concerned that the proposed rule for borrower's defense recoupment does not go far enough to ensure that both the Department and taxpayers can recover funds from these institutions. Accordingly, I request that the Department consider the following improvements to its borrower's defense proposals.

The Department should consider creating specific processes to recoup funds from the owners and executives of the institutions subject to borrower's defense claims.

The Department has authority under the *Higher Education Act of 1965* (HEA) to recover financial losses from individuals who "exercise substantial control" over education institutions, namely board members, the chief executive officer, other executives, or major owners.[2] Holding executives and owners personally liable, as authorized under the HEA, would produce two intended results: 1) reducing the burden on students and taxpayers for decisions made by these individuals that resulted in harm to students; and, 2) creating a deterrent effect on the owners, executives, and board members of these institutions.

In its proposed rule, the Department recognizes that it may be unsuccessful in recouping funds from the institutions that have closed or otherwise limited their liability. Too often, the Department is unable to recoup funds because institutions have filed for bankruptcy and do not have sufficient assets to cover their liabilities. This ignores the fact that in some of these cases, directors, officers, and owners have walked away from these closures with quite the windfall after they participated in and profited from the underlying fraudulent actions. The Department seems to recognize that it should consider recouping funds from persons affiliated with the school, but the proposed rule fails to include the processes necessary to ensure recoupment.[3] To address these realities, I urge the Department to adopt specific processes to facilitate the recoupment of funds from the owners and executives of institutions subject to borrower's defense claims, regardless of whether the school has closed.

The Department should limit exceptions to recoupment.

The Department should operate on a presumption of recoupment and collection from institutions that have defrauded borrowers. Under the Department's proposed rule, the Secretary has discretion to choose not to collect from an institution. Specifically, the proposed rule §685.409(b) lists two reasons why a Secretary might choose not to collect: 1) the cost of collection exceeds the amounts received, and 2) the claims were approved outside the statute of limitations. However, proposed rule §685.409(b) is descriptive as opposed to prescriptive. I

[2] *See* HEA §498(e)(1)(B), 20 U.S.C. §1099c(e)(1)(B).
[3] *See* Student Loan NPRM, *supra* n.1 at §685.409(a). Relatedly, in proposed §685.409(b), there is a cross-reference to current §668.174(b) to a definition of individuals who have an ownership interest, but it most likely should be a cross-reference to §668.174(c).

urge the Department to limit the exceptions to recoupment to only the two reasons currently listed, and, even in those instances, try to recoup as many funds as possible in the interest of making the taxpayer whole. As an alternative, if the Department seeks to preserve the current proposed flexibility, any exceptions to recoupment should be carried out via a documented exemption process requiring multiple levels of review and approval. Such an exception should not be granted via a single authority (i.e., only the Secretary or their delegate) and should be subject to robust conflict of interest checks prior to execution.

Pre-Dispute Arbitration and Class Action Waivers

The proposed rule's restoration of a prohibition on the use of mandatory pre-dispute arbitration agreements and class action waivers by institutions of higher education is greatly appreciated. While all students should have access to alternative dispute resolution, these processes and techniques must be a choice and not a mandate. Students who prefer to settle their disputes in court should not be barred from doing so. While I commend the Department for the restoration of these provisions, we encourage the Department to robustly enforce these requirements to ensure that all students benefit from these protections.

Interest Capitalization

I commend the Department for removing instances of interest capitalization not required by statute. By requiring accrued, unpaid interest to be added to the principal balance of a borrower's student loan without the directive of Congress, the Department was needlessly causing student loan balances to increase and making loans more expensive to repay. The Department will improve the chances for borrowers to eventually pay off their loans by removing instances of interest capitalization when a borrower enters repayment. Student borrowers' chances for repayment also would improve if interest was not capitalized upon the expiration of a period of forbearance, when a borrower defaults, when a borrower changes or leaves certain repayment plans, or annually during periods of negative amortization under certain repayment plans. These critical changes will prevent borrowers from experiencing surprise increases in the amount they owe and ensure that loan balances do not needlessly grow, solely to make them harder to repay. However, I encourage the Department to also remove the capitalization event that occurs when a borrower no longer qualifies for partial financial hardship under the Pay As You Earn (PAYE) repayment plan. Since this provision is not required in statute, I urge the Department to remove this additional instance of capitalization to align with the Department's goal of removing this harmful practice throughout regulation.

Closed School Discharge

I am encouraged by the Department's proposals to improve the closed school discharge (CSD) process, including: 1) establishing a 180-day window of CSD eligibility for students who withdrew before the school closed, and 2) expanding the list of examples of "exceptional circumstances" to include violations of state or federal laws and accreditor actions in addition to loss of accreditation.

I especially commend the Department's proposal to remove the requirement that a borrower affirm that they did not complete a "comparable program" at another school. Under the current regulations, borrowers who attended closed schools are ineligible for a CSD discharge if they transfer to another institution and pursue a "comparable program." As the Department's proposal already recognizes, many students affected by closed schools are not able to transfer to another institution to pursue and complete a "comparable program." However, even those students who do successfully transfer often face significant barriers to degree completion, including a loss of credits that can extend their time to degree and result in them paying significantly more toward their education than they otherwise would have had their institution not closed. For example, according to a 2017 Government Accountability Office (GAO) study, students who transferred their credits between schools lost on average 43 percent of those credits; students transferring among for-profit schools lost an average of 83 percent of credits; and students transferring from for-profit schools to public schools lost 94 percent of their credits.[4] Further, GAO found that 5 percent of students at closing schools transferred to other schools that subsequently closed before they graduated.[5] Additionally, GAO found that nearly 49 percent of students who attended a closed institution and transferred to a new institution did not graduate within 6 years of transferring to their new institution.[6] As such, I am pleased that the Department has improved the process for those students whose schools close and might still choose to continue pursuing an education, despite these considerable obstacles.

While the Department's proposal represents very important steps in the right direction, I am concerned that the current proposal does not do enough to immediately support student borrowers that are harmed by the closure of their institutions.

The Department should grant automatic closed school discharge relief to all students, regardless of transfer, immediately upon a school's closure.

At a September 2021 hearing before the Committee on Education and Labor, GAO provided testimony that raised serious concerns with the current CSD process.[7] Specifically, GAO found that, of the roughly 246,000 student borrowers who attended schools that closed between 2010 and 2020, only 81,000 borrowers have received a closed school discharge, either by applying themselves or through the automatic discharge process.[8] Of the borrowers who ultimately received an automatic closed school discharge, 73 percent had been struggling to repay loans that

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[4] *See* "Students Need More Information to Help Reduce Challenges in Transferring College Credits," Gov't Accountability Office, August 2017, pg. 15, available at https://www.gao.gov/assets/gao-17-574.pdf.
[5] *See* "College Closures: Many Impacted Borrowers Struggled Financially Despite Being Eligible for Loan Discharges," Gov't Accountability Office, Testimony Before the H. Comm. On Educ. and Labor, Subcomm. On Higher Educ. and Workforce Investment, 117th Cong. (2021), pg. 11, available at https://edlabor.house.gov/imo/media/doc/Emrey-ArrasMelissaTestimony093021.pdf (hereinafter "College Closures").
[6] *See id.*
[7] *See Protecting Students and Taxpayers: Improving the Closed School Discharge Process*, Hearing Before the H. Comm. on Educ. and Labor, Subcomm. On Higher Educ. and Workforce Investment, 117th Cong. (2021), available at https://edlabor.house.gov/hearings/protecting-students-and-taxpayers-improving-the-closed-school-discharge-process.
[8] *See* College Closures, *supra* n.5, at 14.

could have been discharged earlier, had they known to apply.[9] Additionally, 52 percent of such borrowers were in default, and 21 percent were delinquent for three or more months prior to receiving a discharge.[10] Furthermore, GAO found that more than 50 percent of borrowers who fell into default before receiving an automatic discharge did so within a year and a half of their college closing, which means that many borrowers were struggling to repay even within one year of their college closing.[11]

While I appreciate the Department's proposal to reimplement the automatic CSD process and shorten the timeframe to one year after closure, GAO's findings show that it is necessary to provide an automatic discharge immediately upon the school's closure in order to fully address the harm students face. While the one-year timeframe would provide relief to borrowers before they potentially default, delinquent loans are reported to credit agencies after 90 days, affecting a borrower's credit score and ability to borrow more generally. As a result, the current proposal would still leave thousands of borrowers struggling to repay loans that are already eligible for a discharge under the HEA. One year is simply too long for borrowers to wait for relief that they are entitled to under the law. To mitigate the consequences struggling borrowers can experience, automatic discharges should instead be granted to all affected borrowers within 90 days after a school closure.

Collectively, these findings show that an automatic CSD process, without a one year waiting period, is imperative to support student borrowers who too often struggle to transfer credits, complete degrees, and repay their loans. Such a policy would also align with the existing forbearance period of 90 days as well as the intent of the HEA, which gives the Secretary the authority to discharge loans received by a student for enrollment at "an institution at which the student was unable to complete a course of study."[12]

As an alternative, the Department should consider extending the time period for the suspension of collections and interest capitalization from the existing 90-day period to when the Department makes a determination as to a borrower's qualification for relief under the CSD process.

The Department should better address teach-out plans and teach-out agreements.

Teach-out plans and teach-out agreements are an important part of the closed school process, providing students with a modicum of order when their schools close, and they are trying to understand their options and next steps. As the Department recognizes, there are a wide range of teach-out plans, some of which do not always help students finish their program of study. For example, some teach-out plans simply provide students a way to access their transcripts and provide options for schools through which the student could complete their program of study. This is not always sufficient to result in students actually completing their programs of study. As such, the Department should consider clarifying in §685.214(d)(C) that the types of teach-out

[9] *See id.*
[10] *See id.*
[11] *See id.* at 15.
[12] *See* HEA §437(c)(1).

plans and teach-out agreements contemplated are those which would enable an average student to complete their program of study.

I will also highlight that the Department will need to improve its process for data collection from institutions and accreditors in order to properly implement the closed school discharge process, as highlighted by a recent GAO report on college closures.[13] Students who attempt to complete their programs of study through a teach-out plan or teach-out agreement are often unable to do so for reasons varying from instructional quality at the teach-out school to a significant change in commute which might not be practical for the student to continue the program of study at the new school. As the Department recognizes, it is important not to penalize students who try to finish their program of study despite a school closure, so more robust data collection is necessary to ensure the Department has the resources and tools to help students navigate to other programs and institutions to continue and finish their studies or to access the discharge.

The Department should consider additional factors that it considers "exceptional circumstances" to grant an extended look-back period for CSD discharges.

The Department has proposed expanding the list of examples of "exceptional circumstances"[14] which would permit the Secretary to extend the proposed 180-day look back period for CSD eligibility further to students who have been harmed by a closed school. The Department's current proposal includes violations of state or federal laws and additional accreditor actions beyond loss of accreditation. I commend the Department for making these common-sense additions.

In addition, the Department should consider adding more factors to its proposed list of "exceptional circumstances." First, the Department should consider evidence of material reductions in instructional expenses or student services by the institutions, which could be indicative of an institution's disinvestment in its students and programs and are predictive of a future closure.

Second, while the Department's proposal includes an "exceptional circumstance" of an institution's placement on heightened cash monitoring (HCM) under §668.162(d)(2) (known as HCM2), it is also important for the Department to consider heightened cash monitoring as defined in §668.162(d)(1) (known as HCM 1), if that status was not resolved prior to closure. While an institution could be placed on HCM1 for a host of reasons, some of those reasons are extremely serious, including "severe" findings in a program review or by the institution's auditor. By including HCM1 on the list of "exceptional circumstances," it provides the Department the impetus to consider the reasons why an institution was placed on HCM1 and still provides the Department flexibility to choose not to extend the look-back period if the reasons

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[13] *See* "College Closures: Education Should Improve Outreach to Borrowers about Loan Discharges," Gov't Accountability Office, August 2022, available at https://www.gao.gov/products/gao-22-104403.

[14] *See* Student Loan NPRM, *supra* n.1 at §685.214(h)(9). Relatedly, in section §685.214(d)(i)(B), there is a cross-reference to §685.214(i). There is no §685.214(i) provided, and it is most likely a cross-reference to §685.214(h). Additionally, in proposed §685.214(d)(ii)(B), there is a cross-reference to §685.214(d); it is most likely a cross-reference to §685.214(e).

for HCM1 do not rise to a sufficient level of concern. Additionally, the Department should also consider including placement on the reimbursement payment methodology, as defined in §668.162(c), as one of the factors on the list of "exceptional circumstances" since that is a significantly more serious financial responsibility status than HCM2.

Third, the Department should clarify what it considers "significant share of its academic programs" as currently proposed in §685.214(h)(9). It is unclear whether it simply means that 50 percent or more of an institution's programs were discontinued or whether a higher threshold must be met before it can be considered an "exceptional circumstance." Relatedly, I am concerned that there might be circumstances in which a significant share of programs might not have closed at an institution, but that a small number of programs, which capture the majority of students at that institution might be discontinued, which should rise to the level of an "exceptional circumstance." As such, I encourage the Department to also consider amending the language in §685.214(h)(9) to include the concept of when a majority of the students' attending the institution might be affected by a program discontinuation.

Lastly, the Department should consider including instances where an institution makes misrepresentations regarding financial health to students, shareholders, or any government agency to be included in the definition of "exceptional circumstance." These additional circumstances all suggest a clear and drastic reduction in a school's educational quality and value to its students as well as viability as an institution before the official closure date, and, as a result, should trigger the Department's consideration of extending the look-back period.

Total and Permanent Disability Discharge

I am pleased that the Department built upon its progress to improve the process for Total and Permanent Disability Discharge (TPD) and included additional changes in the proposed rule to ensure borrowers receive the discharges they are entitled to under the HEA. By expanding the set of disability statuses that qualify for discharge, making it easier to document eligibility, and eliminating the three-year income-monitoring period, the proposed regulations streamline and simplify student loan discharges for some of our most vulnerable borrowers. I commend the Department for making it a priority to further improve the TPD process.

False Certification Discharge

I am pleased that the Department built upon its progress to improve the process for those borrowers whose institutions led them to take on student loan debt under false pretenses, such as by signing loan agreements without students' knowledge or consent or by failing to disclose pre-requisite requirements for entering a program or to pursue credentials. The proposed rule expands the types of documentation the Department would consider when a borrower files an application for a false certification discharge, which will ease the burden on borrowers, given the information asymmetry between borrowers and the institutions that have defrauded them. The proposed rule also enables groups of borrowers who experienced the same behavior from their institutions to apply together. I commend the Department for making it a priority to further improve the false certification discharge process.

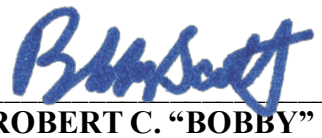
Public Service Loan Forgiveness

The Department took significant steps to improve the Public Service Loan Forgiveness (PSLF) program through a time-limited waiver which helped to restore the promise of the program. I appreciate that, through these proposed regulations, the Department is making significant progress to codify pieces of the waiver and make additional improvements to the program to simplify and streamline access to this valuable benefit to borrowers. I commend the Department for working to ensure that doctors in California and Texas working at non-profit hospitals who are currently prohibited under state law from being directly employed by such hospitals can access the benefits of PSLF. I further encourage the Department to expand this critical benefit to individuals working for for-profit early childhood education employers as defined in Section 103(8) of the HEA can participate in PSLF. This would expand access to a critical part of the early childhood workforce.

Conclusion

Two fundamental principles drive these proposed rules: protecting student borrowers and taxpayers and holding institutions accountable. I commend and support many aspects of the proposals the Department has put forward. As the Department works to finalize these regulations, I appreciate your consideration of these recommendations for both the closed school discharge and recoupment processes. I also encourage the Department to robustly enforce all the proposed requirements to ensure that all students benefit from these protections and that we continue to conduct robust oversight over institutions.

Sincerely,



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