Issue Paper #1: Total and Permanent Disability
Session 1: October 4-8, 2021

Issue: Improving the Process for Granting Total and Permanent Disability (TPD) Discharges

Statutory cites: §437(a) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 685.213

Summary of issues: Sections 437(a)(1) and (a)(2) of the Higher Education Act of 1965, as amended, provide for a total and permanent disability (TPD) discharge of Federal student loans for borrowers who are totally and permanently disabled. A total and permanent disability is defined in the statute as a medically determinable physical or mental impairment that prevents an individual from engaging in substantial gainful activity and that can be expected to result in death; has lasted for a continuous period of at least five years; or can be expected to last for a continuous period of at least five years. In addition, a borrower who has been determined by the Department of Veterans Affairs (VA) to be unemployable due to a service-connected disability qualifies for a TPD discharge.

Under current regulations, a borrower may receive a TPD discharge based on a disability determination by the Social Security Administration (SSA) or VA or based on a physician's certification of TPD. Borrowers who receive TPD discharges based on SSA documentation or a physician's certification are subject to a three-year post-discharge monitoring period. If a borrower fails to meet certain requirements during the three-year monitoring period, the discharged loan may be reinstated. The Department announced in March 2021 that it would be relaxing the monitoring period requirements during the national emergency and reinstating discharges for any borrower who had not responded to a request for earnings information.

The Department has identified several aspects of the TPD discharge process that could be improved through regulation:

- The three-year post discharge income monitoring period and it is documentation requirements are burdensome for affected borrowers. Since 2013, loans for more than half of the one million borrowers who received a TPD discharge were reinstated because the borrower did not respond to requests for income documentation, although an analysis conducted by the Department with Internal Revenue Service (IRS) data suggests that 92 percent of these borrowers did not exceed the earnings threshold and that these results are similar for borrowers whose discharge is based on the SSA or physician's certification process.
- Borrowers who currently qualify for TPD discharges based on SSA disability determinations must be in SSA's Medical Improvement Not Expected (MINE) category to qualify, although there are other SSA disability categories that may support a discharge.
- For borrowers applying for a TPD discharge based on a disability determination by the SSA, acceptable documentation for the TPD discharge is limited to the notice of award that the borrower receives from the SSA.
- For borrowers applying for a TPD discharge based on a physician's certification, only a doctor of medicine or a doctor of osteopathy may certify the TPD discharge form.

- The Department has limited ability to ensure the validity of physician's certifications on TPD discharge forms.

Solutions: The Department proposes the following solutions to the issues identified above for discussion with the negotiating committee:

Eliminate the three-year post discharge monitoring period. During the three-year post-discharge monitoring period, borrowers must furnish income information annually. Borrowers who do not respond to these requests for earnings information have their loans reinstated. This is an outcome that can undo years of hard work to obtain the proper approvals to receive the discharge. The vast majority of these reinstatements are occurring for borrowers who are low income. This places them at significant risk of going delinquent, defaulting, and facing the loss of Social Security benefits on debts that should have stayed discharged were it not for the paperwork burden. It is far more common for reinstatements to occur solely because a borrower did not respond to paperwork, not because the borrower earned more than the amount allowed under the regulations. Borrowers who receive TPD discharges based on disability determinations by VA are not subject to a post-discharge monitoring period.

Eliminating the income monitoring period would also create greater parity between borrowers who receive a TPD discharge based on a disability certification or an SSA determination with borrowers who receive a TPD discharge based on VA documentation and reduce the burden that disabled borrowers face in retaining their discharge.

Expand the number of SSA categories that would allow a borrower to qualify for a TPD discharge. Allow borrowers in the following three SSA categories or situations to qualify for TPD discharges, in addition to borrowers in the MINE category:

- **Compassionate allowance**—This is a status where the borrower has one of a predefined set of serious conditions that SSA fast tracks because the condition is highly likely to qualify for a disability determination.

- **A Medical Improvement Possible (MIP) status that has been renewed at least once**—SSA does not make distinctions among the severity of an individual's disability. Rather, it focuses on how long it expects that disability to persist. MINE, which is the only status the Department currently recognizes, requires an individual to be reviewed every five to seven years. MIP requires disability reviews within three years. A borrower who was approved for disability benefits in the MIP category once, and whose approval in the MIP category was subsequently renewed, will be in a disability status for at least six years. This is sufficient to meet the statutory definition of a condition that has lasted or is expected to last for at least five years.

- **Previously in a MINE status but aged into the retirement file**—Once a borrower in the MINE or MIP status hits retirement age they often move into SSA's retirement file and no longer show up as eligible for disability benefits. The Department would allow borrowers receiving SSA retirement benefits with a disability determination date at least five years in the past to qualify for a TPD discharge. (**Note:** The process of finding these individuals through our match with SSA will be different than our current SSA Match process. While SSA can report the date of disability determination, it cannot report who in the retirement file had a prior MINE status. That means

the Department will not be able to identify borrowers who had a MINE status but entered the retirement file prior to any of the matches conducted with SSA.)

Expand allowable SSA documentation. Amend regulations to reflect the current practice of allowing borrowers to submit a Benefit Planning Query (BPQY), which is another form of documentation produced by SSA that contains similar information to the notice of award and is easier to obtain.

Accept TPD certifications from certain health care professionals who are not physicians. Expand the list of eligible signers to include nurse practitioners and physician's assistants who are licensed to practice in the United States. (**Note**: The Department has identified an authoritative source for verifying licensure of nurse practitioners. However, we have not identified a source that would allow us to verify licensure status of physician's assistants. We would be interested in suggestions from negotiators of whether there is a similar database for physician's assistants so that we could include them.)

Provide greater protection around the physician's certification of the TPD discharge form. Add regulatory language stating that the Department will analyze physician's certification forms to verify any patterns that suggest potential cause for concern. This could include large numbers of forms from a single individual. The Department would have the ability to refer concerning practices to the Office of Inspector General and to decline to accept physician's certifications from that individual.

Proposed Regulations:

To assist the Committee in discussing these issues, the Department is providing draft revisions to the TPD regulatory language for the Direct Loan Program, incorporating the Department's proposals.

§685.213 Total and permanent disability discharge.

(a) *General.* (1) A borrower's Direct Loan is discharged if the borrower becomes totally and permanently disabled, as defined in §685.102(b), and satisfies the eligibility requirements in this section.

(2) For a borrower who becomes totally and permanently disabled as described in paragraph (1) of the definition of that term in §685.102(b), the borrower's loan discharge application is processed in accordance with paragraph (b) of this section.

(3) For veterans who are totally and permanently disabled as described in paragraph (2) of the definition of that term in §685.102(b), the veteran's loan discharge application is processed in accordance with paragraph (c) of this section.

(4) For purposes of this section, a borrower's representative or a veteran's representative is a member of the borrower's family, the borrower's attorney, or another individual authorized to act on behalf of the borrower in connection with the borrower's total and permanent disability discharge application. References to a "borrower" or a "veteran" include, if applicable, the borrower's representative or the veteran's representative for purposes of applying for a total and permanent disability discharge, providing notifications or information to the Secretary, and receiving notifications from the Secretary.

(b) *Discharge application process for a borrower who is totally and permanently disabled as described in paragraph (1) of the definition of that term in §685.102(b)*—(1) *Borrower application for discharge.* Except as provided in paragraph (d)(2) of this section, to qualify fora discharge of a Direct Loan based on a total and permanent disability, a borrower must submit a discharge application to the Secretary on a form approved by the Secretary. If the borrower notifies the Secretary that the borrower claims to be totally and permanent disabled prior to submitting a total and permanent disability discharge application, the Secretary—

(i) Provides the borrower with information needed for the borrower to apply for a total and permanent disability discharge;

(ii) Suspends collection activity on any of the borrower's title IV loans held by the Secretary, and notifies the borrower's other title IV loan holders to suspend collection activity on the borrower's title IV loans for a period not to exceed 120 days; and

(iii) Informs the borrower that the suspension of collection activity will end after 120 days and collection will resume on the loans if the borrower does not submit a total and permanent disability discharge application to the Secretary within that time.

(2) *Disability certification or Social Security Administration (SSA) disability determination.* The application must contain—

(i) A certification by a physician, who is a doctor of medicine or osteopathy legally authorized to practice in a State, that the borrower is totally and permanently disabled as described in paragraph (1) of the definition of that term in §685.102(b);

(ii) A certification by a nurse practitioner or physician’s assistant licensed by a State, that the borrower is totally and permanently disabled as described in paragraph (1) of the definition of that term in §685.102(b);

(iii) An SSA Benefit Planning Query (BPQY) or an SSA notice of award indicating that—

(A) The borrower qualifies for SSDI or SSI benefits and the borrower's next scheduled disability review will be within five to seven years;

(B) The borrower qualifies for SSDI or SSI benefits and the next scheduled disability review will be within three years, and that the borrower’s eligibility for disability benefits in the three-year review category has been renewed at least once; or

(C) The borrower qualifies for SSA compassionate allowance payments,

(iv) For borrower’s currently receiving SSA retirement benefits, documentation that prior to the borrower qualifying for SSA retirement benefits the borrower qualified for SSDI or SSI benefits with a disability review period of within five to seven years.

(3) *Deadline for application submission.* The borrower must submit the application described in paragraph (b)(1) of this section to the Secretary within 90 days of the date the physician certifies the application, if applicable. Upon receipt of the borrower's application, the Secretary—

(i) Identifies all title IV loans owed by the borrower, notifies the lenders that the Secretary has received a total and permanent disability discharge application from the borrower and directs the lenders to suspend collection activity or maintain the suspension of collection activity on the borrower's title IV loans;

(ii) If the application is incomplete, notifies the borrower of the missing information and requests the missing information from the borrower or the physician who certified the application, as appropriate, and does not make a determination of eligibility for discharge until the application is complete;

(iii) Notifies the borrower that no payments are due on the loan while the Secretary determines the borrower's eligibility for discharge; and

(iv) Explains the process for the Secretary's review of total and permanent disability discharge applications.

(4) *Determination of eligibility.* (i) If, after reviewing the borrower's completed application, the Secretary determines that the documentation described in §685.213(b)(2) supports the conclusion that the borrower meets the criteria for a total and permanent disability discharge, as described in paragraph (1) of the definition of that term in §685.102(b), the borrower is considered totally and permanently disabled—

(A) As of the date the physician, nurse practitioner, or physician’s assistant certified the borrower's application; or

(B) As of the date the Secretary received the SSA data described in . §685.213(b)(2)(iii) or (iv).

(ii) The Secretary will analyze certification from physicians, nurse practitioners, or physician assistants that suggest patterns of concern, such as large numbers of TPD applications certified by an individual, and may decline to accept the certifications at the Secretary’s discretion.

(iii) The Secretary may require the borrower to submit additional medical evidence if the Secretary determines that the borrower's application does not conclusively prove that the borrower is totally and permanently disabled as described in paragraph (1) of the definition of that term in §685.102(b). As part of the Secretary's review of the borrower's discharge application, the Secretary may require and arrange for an additional review of the borrower's condition by an independent physician at no expense to the borrower.

(iv) After determining that the borrower is totally and permanently disabled, as described in paragraph (1) of the definition of that term in §685.102(b), the Secretary discharges the borrower's obligation to make any further payments on the loan, notifies the borrower that the loan has been discharged, and returns to the person who made the payments on the loan any payments received after the date the physician, nurse practitioner, or physician’s assistant certified the borrower's loan

discharge application or the date the Secretary received the SSA data described in . §685.213(b)(2)(iii) or (iv).. The notification to the borrower explains the terms and conditions under which the borrower's obligation to repay the loan will be reinstated, as specified in paragraph (b)(7)(i) of this section.

(v) If the Secretary determines that the physician, nurse practitioner, or physician's assistant certification or the SSA data described in §685.213(b)(2)(iii) or (iv) provided by the borrower does not support the conclusion that the borrower is totally and permanently disabled, as described in paragraph (1) of the definition of that term in §685.102(b), the Secretary notifies the borrower that the application for a disability discharge has been denied. The notification to the borrower includes—

(A) The reason or reasons for the denial;

(B) A statement that the loan is due and payable to the Secretary under the terms of the promissory note and that the loan will return to the status that would have existed if the total and permanent disability discharge application had not been received;

(C) The date that the borrower must resume making payments;

(D) An explanation that the borrower is not required to submit a new total and permanent disability discharge application if the borrower requests that the Secretary re-evaluate the borrower's application for discharge by providing, within 12 months of the date of the notification, additional information that supports the borrower's eligibility for discharge; and

(E) An explanation that if the borrower does not request re-evaluation of the borrower's prior discharge application within 12 months of the date of the notification, the borrower must submit a new total and permanent disability discharge application to the Secretary if the borrower wishes the Secretary to re-evaluate the borrower's eligibility for a total and permanent disability discharge.

(vi) If the borrower requests re-evaluation in accordance with paragraph (b)(4)(iv)(D) of this section or submits a new total and permanent disability discharge application in accordance with paragraph (b)(4)(iv)(E) of this section, the request must include new information regarding the borrower's disabling condition that was not provided to the Secretary in connection with the prior application at the time the Secretary reviewed the borrower's initial application for total and permanent disability discharge.

(5) *Treatment of disbursements made during the period from the date of the physician, nurse practitioner, or physician's assistant certification or the date the Secretary received the SSA* data described in §685.213(b)(2)(iii) or (iv).*until the date of discharge.* If a borrower received a title IV loan or TEACH Grant before the date the physician, nurse practitioner, or physician's assistant certified the borrower's discharge application or before the date the Secretary received the SSA data described in §685.213(b)(2)(iii) or (iv)and a disbursement of that loan or grant is made during the period from the date of the physician, nurse practitioner, or physician's assistant certification or the receipt of the SSA data described in §685.213(b)(2)(iii) or (iv). until the date the Secretary grants a discharge under this section, the processing of the borrower's loan discharge request will be suspended until the borrower ensures that the full amount of the disbursement has been returned to the loan holder or to the Secretary, as applicable.

(6) *Receipt of new title IV loans or TEACH Grants after the date of the physician, nurse practitioner, or physician's assistant certification, or after the date the Secretary received the SSA* data described in §685.213(b)(2)(iii) or (iv).. If a borrower receives a disbursement of a new title IV loan or receives a new TEACH Grant made on or after the date the physician, nurse practitioner, or physician's assistant certified the borrower's discharge application or on or after the date the Secretary received the SSA data described in §685.213(b)(2)(iii) or (iv)and before the date the Secretary grants a discharge under this section, the Secretary denies the borrower's discharge request and resumes collection on the borrower's loan.

Issue Paper #2: Closed School Discharge
Session 1: October 4-8, 2021

Issue: Improving Borrower Access to Closed School Discharges

Statutory cites: §437(c)(1) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 685.214

Summary of issues: Under Section 437(c)(1) of Higher Education Act or 1965, as amended, the Secretary of Education is authorized to discharge the loans of certain borrowers when a school closes. To qualify for a closed school discharge, a borrower must have been enrolled at the institution on the date of its closure or have withdrawn no more than 120 days prior to its closure (180 days for loans made on or after July 1, 2020). They must not have graduated from the school or transferred their credits to complete the same or a comparable program at another school.

The Secretary may grant closed school discharges to borrowers who left the school more than 120 days or 180 days before its closure, as applicable, if the Secretary determines that exceptional circumstances justify such an extension. A non-exhaustive list of exceptional circumstances is provided in the regulations.

The Department's regulations also provide for automatic closed school discharges for borrowers who attended an institution that closed between November 1, 2013, and July 1, 2020, if the borrower did not subsequently re-enroll in any Title IV-eligible institution within three years of the date the school closed.

The Department is concerned that several aspects of the closed school discharge process have limited the ability of borrowers to receive closed school discharges:

- Final regulations published in the Federal Register on November 1, 2016, provided for automatic closed school discharges to borrowers who were eligible for a closed school discharge but did not apply for one, and who did not enroll elsewhere within three years of the institution's closure. Final regulations published on Sept. 23, 2019, eliminated this provision.
- For borrowers who withdrew from a school prior to the school closing, the discharge windows are not consistent across years. The Sept. 23, 2019, closed school discharge regulations set the closed school discharge window at 180 days for any loans made on or after July 1, 2020. Prior to that date, the window was 120 days.
- Under §685.214(c)(1)(i)(B), the Secretary may extend the closed school discharge window under "exceptional circumstances." The non-exhaustive list of exceptional circumstances provided in the regulations does not include many events that may occur on the path to closure and could reasonably be associated with closure. In addition, the Sept. 23, 2019, regulations removed some items that were included in the prior regulations, such as "a finding by a State or Federal government agency that the school violated State or Federal law."
- The term "comparable program" is not defined, nor are the standards for how many credits from a closed school would need to have been accepted by a transfer school to disqualify a borrower for a closed school discharge. For a borrower who attended a closed school and then enrolled in another school, this can create uncertainty as to whether a borrower qualifies for a closed school discharge and can discourage borrowers from applying for the discharge.

Solutions: The Department believes closed school discharges are an important benefit to help borrowers get a fresh start when their institution closes. To achieve the goals of this benefit we propose the following initial solutions for discussion with the negotiating committee to make closed discharges more automatic and the terms of the program easier for borrowers to understand:

Reinstate automatic closed school discharges. Reinstate the automatic closed school discharges for borrowers who do not enroll elsewhere when an institution closes but reduce the period before automatic discharges occur from three years to one year following a closure.

This one-year period was the consensus of the non-federal negotiators during negotiations for the regulations published on November 1, 2016. The one-year wait out period for an automatic closed school discharge ensures that borrowers who immediately enroll elsewhere do not receive an automatic discharge but reduces the likelihood that an eligible borrower would go into default before receiving the automatic discharge.

Establish a consistent window of eligibility for students who withdrew from a school before it closed. Standardize the window of eligibility, regardless of the disbursement date of the loan, to 180 days.

Define "comparable program" for purposes of a closed school discharge. Due to data limitations that have changed over time, the Department proposes addressing this issue based upon when the school closed.

- **Institutions that closed prior to July 1, 2014:** Due to data limitations, borrowers who enrolled at another school would not be eligible for an automatic discharge. These borrowers would have to attest on an application that they did not enroll in a comparable program, which we would define as a program at the same credential level and in the same field of study and which accepted most of the credits transferred from the closed school. (**Note:** Before 2014 the Department does not have data on the program a borrower attended so we cannot use such data to make administrative determinations that a program was comparable.)
- **Institutions that closed between July 1, 2014 and June 30, 2019:** Borrowers who enrolled at another school would receive an automatic discharge if they did not enroll in a program at the same level and with the same four-digit Classification of Instructional Program (CIP) code as the program that they were enrolled in at the closed school. A borrower who attended a program with the same CIP code and level could still receive a discharge by submitting an application and stating on the application that they did not transfer most of their credits.
- **Institutions that closed after July 1, 2019:** Borrowers who enrolled at another school would receive a discharge so long as they did not accept and complete an accreditor approved teach-out program. This would define a "comparable program" to only include programs that are designed to be continuations of the program that the borrower was enrolled in at the closed school. The completion requirement also ensures that borrowers who try a teach out are not penalized if the borrower does not complete the teach out. The clock on the automatic discharge window would be paused while the borrower is in the teach-out program and would restart after they leave the teach out if they do not finish.

Expand the list of examples of exceptional circumstances. We propose adding additional illustrative examples to the list of exceptional circumstances, while maintaining that the list is non-exhaustive.

None of these would be binding but they would send clearer signals about how the Secretary may use this authority going forward. The additional illustrative examples may include:

- **A finding by a State or Federal government agency that the school violated State or Federal law related to education or services to students:** To restore an earlier provision but stated in a slightly clearer manner.
- **Accreditor actions besides loss of accreditation:** The institution is or was placed on probation or issued a show-cause order or placed on an accreditation status that poses an equivalent or greater risk to its accreditation, by its accrediting agency for failing to meet one or more of the agency's standards.

Proposed Regulations:

To assist the Committee in discussing these issues, the Department is providing draft revisions to the closed school discharge regulatory language for the Direct Loan Program, incorporating the Department's proposals.

§685.214 Closed school discharge.

(a) *General.* (1) The Secretary discharges the borrower's (and any endorser's) obligation to repay a Direct Loan in accordance with the provisions of this section if the borrower (or the student on whose behalf a parent borrowed) did not complete the program of study for which the loan was made because the school at which the borrower (or student) was enrolled closed, as described in paragraph (c) of this section.

(2) For purposes of this section—

(i) A school's closure date is the date that the school ceases to provide educational instruction in all programs, as determined by the Secretary;

(ii) "School" means a school's main campus or any location or branch of the main campus, regardless of whether the school or its location or branch is considered eligible: and

(iii) "Comparable program" means—

(A) For schools that closed beforeJuly 1, 2014] a program at the same credential level and in the same field of study that the borrower was enrolled in at the closed school and which accepted most of the credits transferred from the closed school.

(B) For schools that closed on or afterJuly 1, 2014] and before June 30, 2019 a program at the same level and with the same Classification of Instructional Program (CIP) code as the program that the borrower was enrolled in at the closed school.

(C) For schools that closed on or after July 1, 2019] a program designed to be a continuation of the program that the borrower was enrolled in at the closed school.

(b) *Relief pursuant to discharge.* (1) Discharge under this section relieves the borrower of any past or present obligation to repay the loan and any accrued charges or collection costs with respect to the loan.

(2) The discharge of a loan under this section qualifies the borrower for reimbursement of amounts paid voluntarily or through enforced collection on the loan.

(3) The Secretary does not regard a borrower who has defaulted on a loan discharged under this section as in default on the loan after discharge, and such a borrower is eligible to receive assistance under programs authorized by title IV of the Act.

(4) The Secretary reports the discharge of a loan under this section to all consumer reporting agencies to which the Secretary previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan.

(c) *Borrower qualification for discharge.* (1) For loans first disbursed before July 1, 2020, to qualify for discharge of a loan under this section, a borrower must submit to the Secretary a completed application and the factual assertions in the application must be true and must be made by the borrower under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to—

(i) State that the borrower (or the student on whose behalf a parent borrowed)—

(A) Received the proceeds of a loan, in whole or in part, on or after January 1, 1986 to attend a school;

(B) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 180 calendar days before the school closed. The Secretary may extend the 180-day period if the Secretary determines that exceptional circumstances, as described in paragraph (i) of this section, justify an extension; and

(C) Did not complete the program of study or a comparable program througheither an institutional teach-out plan performed by the school or a teach-out agreement at another school, approved by the school's accrediting agency and, if applicable, the school's State authorizing agency.;

(ii) State whether the borrower (or student) has made a claim with respect to the school's closing with any third party, such as the holder of a performance bond or a tuition recovery program, and, if so, the amount of any payment received by the borrower (or student) or credited to the borrower's loan obligation; and

(iii) State that the borrower (or student)—

(A) Agrees to provide to the Secretary upon request other documentation reasonably available to the borrower that demonstrates that the borrower meets the qualifications for discharge under this section; and

(B) Agrees to cooperate with the Secretary in enforcement actions in accordance with paragraph (d) of this section and to transfer any right to recovery against a third party to the Secretary in accordance with paragraph (e) of this section.

(2) For loans first disbursed on or after July 1, 2020, to qualify for discharge of a loan under this section, a borrower must submit to the Secretary a completed application, and the factual assertions in the application must be true and made by the borrower under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to—

(i) Certify that the borrower (or the student on whose behalf a parent borrowed)—

(A) Received the proceeds of a loan, in whole or in part, on or after July 1, 2020 to attend a school;

(B) Did not complete the program of study at that school because the school closed on the date that the student was enrolled, or the student withdrew from the school not more than 180 calendar days before the date that the school closed. The Secretary may extend the 180-day period if the Secretary determines that exceptional circumstances, as described in paragraph (i) of this section, justify an extension; and

(C) Did not complete the program of study or a comparable program through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school;

(ii) Certify that the borrower (or the student on whose behalf the parent borrowed) is not continuing in the program of study or a comparable program through either an institutional teach-out plan performed by the school or a teach-out agreement at another school, approved by the school's accrediting agency and, if applicable, the school's State authorizing agency.

(d) *Cooperation by borrower in enforcement actions.* (1) In order to obtain a discharge under this section, a borrower must cooperate with the Secretary in any judicial or administrative proceeding brought by the Secretary to recover amounts discharged or to take other enforcement action with respect to the conduct on which the discharge was based. At the request of the Secretary and upon the Secretary's tendering to the borrower the fees and costs that are customarily provided in litigation to reimburse witnesses, the borrower must—

(i) Provide testimony regarding any representation made by the borrower to support a request for discharge;

(ii) Produce any documents reasonably available to the borrower with respect to those representations; and

(iii) If required by the Secretary, provide a sworn statement regarding those documents and representations.

(2) The Secretary denies the request for a discharge or revokes the discharge of a borrower who—

(i) Fails to provide the testimony, documents, or a sworn statement required under paragraph (d)(1) of this section; or

(ii) Provides testimony, documents, or a sworn statement that does not support the material representations made by the borrower to obtain the discharge.

(e) *Transfer to the Secretary of borrower's right of recovery against third parties.* (1) Upon discharge under this section, the borrower is deemed to have assigned to and relinquished in favor of the Secretary any right to a loan refund (up to the amount discharged) that the borrower (or student) may have by contract or applicable law with respect to the loan or the enrollment agreement for the program for which the loan was received, against the school, its principals, its affiliates and their successors, its sureties, and any private fund, including the portion of a public fund that represents funds received from a private party.

(2) The provisions of this section apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower (or student), limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(3) Nothing in this section limits or forecloses the borrower's (or student's) right to pursue legal and equitable relief regarding disputes arising from matters unrelated to the discharged Direct Loan.

(f) *Discharge procedures.* The discharge procedures in this paragraph (f) apply to loans first disbursed before July 1, 2020.

(1) After confirming the date of a school's closure, the Secretary identifies any Direct Loan borrower (or student on whose behalf a parent borrowed) who appears to have been enrolled at the school on the school closure date or to have withdrawn not more than 180 days prior to the closure date.

(2) If the borrower's current address is known, the Secretary mails the borrower a discharge application and an explanation of the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends any efforts to collect from the borrower on any affected loan. The Secretary may continue to receive borrower payments.

(3) If the borrower's current address is unknown, the Secretary attempts to locate the borrower and determines the borrower's potential eligibility for a discharge under this section by consulting with representatives of the closed school, the school's licensing agency, the school's accrediting agency, and other appropriate parties. If the Secretary learns the new address of a borrower, the Secretary mails to the borrower a discharge application and explanation and suspends collection, as described in paragraph (f)(2) of this section.

(4) If a borrower fails to submit the application described in paragraph (c) of this section within 60 days of the Secretary's providing the discharge application, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended.

(5) Upon resuming collection on any affected loan, the Secretary provides the borrower another discharge application and an explanation of the requirements and procedures for obtaining a discharge.

(6) If the Secretary determines that a borrower who requests a discharge meets the qualifications for a discharge, the Secretary notifies the borrower in writing of that determination.

(7) If the Secretary determines that a borrower who requests a discharge does not meet the qualifications for a discharge, the Secretary notifies that borrower in writing of that determination and the reasons for the determination.

(g) *Discharge procedures.* The discharge procedures in this paragraph (g) apply to loans first disbursed on or after July 1, 2020.

(1) After confirming the date of a school's closure, the Secretary identifies any Direct Loan borrower (or student on whose behalf a parent borrowed) who appears to have been enrolled at the school on the school closure date or to have withdrawn not more than 180 days prior to the closure date.

(2) If the borrower's current address is known, the Secretary mails the borrower a discharge application and an explanation of the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends any efforts to collect from the borrower on any affected loan. The Secretary may continue to receive borrower payments.

(3) If the borrower's current address is unknown, the Secretary attempts to locate the borrower and determines the borrower's potential eligibility for a discharge under this section by consulting with representatives of the closed school, the school's licensing agency, the school's accrediting agency, and other appropriate parties. If the Secretary learns the new address of a borrower, the Secretary mails to the borrower a discharge application and explanation and suspends collection, as described in paragraph (g)(2) of this section.

(4) If a borrower fails to submit the application described in paragraph (c) of this section within 60 days of the Secretary's providing the discharge application, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended.

(5) If the Secretary determines that a borrower who requests a discharge meets the qualifications for a discharge, the Secretary notifies the borrower in writing of that determination.

(6) If the Secretary determines that a borrower who requests a discharge does not meet the qualifications for a discharge, the Secretary notifies that borrower in writing of that determination and the reasons for the determination, and resumes collection.

(h) *Discharge without an application*. (1) If the Secretary determines based on information in the Secretary’s possession that the borrower qualifies for the discharge of a loan under this section, the Secretary may discharge the loan without an application from the borrower, if the borrower did not subsequently re-enroll in any title IV- eligible institution within a period of one year from the date the school closed.

(2) Notwithstanding paragraph (h)(1) of this section, a borrower who re-enrolled at another school does not qualify for a discharge without an application if the school the borrower was enrolled in—

(i) Closed before July 1, 2014] ;

(ii) Closed on or after July 1, 2014 and before June 30,2019 and the borrower re-enrolled in a program at the same level and with the same four-digit CIP code as the program that the borrower was enrolled in at the closed school; or

(iii) Closed on or after July 1, 2019 and the borrower accepted and completed an approved teach out program.

(i) *Exceptional circum*stances. For purposes of this section, exceptional circumstances include, but are not limited to—

(1) The revocation or withdrawal by an accrediting agency of the school's institutional accreditation;

(2) The revocation or withdrawal by the State authorization or licensing authority to operate or to award academic credentials in the State;

(3) The termination by the Department of the school's participation in a title IV, HEA program;

(4) A finding by a State or Federal government agency that the school violated State or Federal law related to education or services to students;

(5) The teach-out of the student's educational program exceeds the 180-day look-back period for a closed school discharge;

(6) The school responsible for the teach-out of the student's educational program fails to perform the material terms of the teach-out plan or agreement, such that the student does not have a reasonable opportunity to complete his or her program of study or a comparable program;

(7) the institution is or was placed on probation or issued a show-cause order, or placed on an accreditation status that poses an equivalent or greater risk to its accreditation, by its accrediting agency for failing to meet one or more of the agency's standards;

Issue Paper #3: Interest Capitalization
Session 1: October 4-8, 2021

Issue: Eliminate interest capitalization for non-statutory capitalizing events

Statutory cites: §428(e)(2) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 685.209(a)(2)(iv), 685.209(c)(2)(iv), 685.202(b)(4), 685.202(b)(3), and 685.220(f)(3)

Summary of issues: Section 428(e)(2) of the Higher Education Act of 1965, as amended, provides that interest capitalization occurs when any accrued, unpaid interest becomes part of the principal balance of a borrower's loan. Capitalization is triggered by designated "capitalizing events." Once interest is capitalized, it begins to accrue interest at the rate applicable to the loan. This ultimately increases the overall balance of the loan and typically increases the amount the borrower must repay. When capitalization occurs, borrowers see balances rise faster as interest accrues on interest.

Interest capitalization is not a common practice across other consumer financial products, at least in part because Federal student loans afford more opportunities to pause or reduce payments. Auto loans do not provide common occurrences for interest capitalization. Mortgage interest typically only capitalizes with certain modifications. In addition, there are federal and state laws that prohibit capitalization of interest on certain consumer financial products and under certain circumstances. While student loans are a very different kind of financial product, capitalization can be a frustrating experience for borrowers who are confused as to what triggered the capitalization or surprised by the higher amount owed.

The Department has identified the following capitalizing events in regulation where we are proposing to eliminate interest capitalization on a more permanent basis:

- Failure to recertify enrollment on an income-driven repayment (IDR) plan — Borrowers are required to recertify their participation in any income-driven repayment plan annually, but ED data presented at a 2015 negotiated rulemaking session indicates that over half of borrowers in an IDR plan fail to recertify on time. Additionally, researchers have suggested that recertification is a significant barrier for lower income borrowers.[1]

- Leaving an Income-Contingent Repayment (ICR) plan (PAYE, REPAYE, ICR) — While borrowers switching across other types of repayment plans, such as standard and graduated, do not have their interest capitalized, ICR borrowers do.

- Negative amortization under the ICR plan — Under the original ICR plan, borrowers whose payments do not cover accumulating interest see that interest capitalize annually until the capitalized interest reaches 10 percent or more of the original principal balance. Unpaid interest does not capitalize under the other IDR plans unless the borrower leaves those plans.

[1] https://www.urban.org/urban-wire/structural-changes-student-loan-repayment-could-make-forgiveness-work-better-struggling-borrowers

- Exiting forbearance — Borrowers often exercise forbearances because they are unable to afford their payments for a short period of time. Interest capitalization at the end of a forbearance period penalizes borrowers who are seeking to get on track.

- Entering repayment — When borrowers' loans enter repayment for the first time, interest currently capitalizes when borrowers' grace periods end.

- Default — For Direct Loan and ED-held FFEL loans the Department does not currently capitalize interest when a borrower defaults or exits default (unless the borrower consolidates to get out of default). For all commercially held FFEL loans, the guaranty agency managing a FFEL borrower's defaulted loan capitalizes the interest when it pays a default claim to a lender.

Solution: The Department is concerned that interest capitalization can significantly increase what a borrower owes and extend the time it takes to repay their loans. And there may be many circumstances in which borrowers are not even aware that capitalization may occur. The Department is proposing to eliminate capitalization events where it has the authority to do so, which are the instances identified above. In circumstances where interest capitalization is required by statute, the Department cannot end capitalization for borrowers. Instances where capitalization is required in statute include when the borrower exits a deferment period and when a borrower leaves the Income-Based Repayment plan.

Proposed Regulations:

To assist the Committee in discussing these issues, the Department is providing draft revisions to the regulatory language for the Direct Loan Program, incorporating the Department's proposals. (Conforming changes will be made to FFEL regulations.)

§ 685.202 Charges for which Direct Loan Program borrowers are responsible.

(b) *Capitalization.* (1) The Secretary may add unpaid accrued interest to the borrower's unpaid principal balance. This increase in the principal balance of a loan is called "capitalization."

(2) Notwithstanding § 685.208(l)(5) and § 685.209(d)(3), for a Direct Loan not eligible for interest subsidies during periods of deferment, the Secretary capitalizes the unpaid interest that has accrued on the loan upon the expiration of the deferment.

§ 685.209 Income-contingent repayment plans.

(a)(2)(iv) Except as provided in paragraph (a)(2)(iii) of this section, accrued interest is capitalizedwhen a borrower is determined to no longer have a partial financial hardship.

…

~~(b)(3)(iv) ***Limitation on capitalization of interest.*** If the amount of a borrower's monthly payment is less than the accrued interest, the unpaid interest is capitalized until the outstanding principal amount is 10 percent greater than the original principal amount. After the outstanding principal amount is 10 percent greater than the original amount, interest continues to accrue but is not capitalized. For purposes of this paragraph, the original amount is the amount owed by the borrower when the borrower enters repayment.~~

~~…~~

~~(c)(2)(iv) Any unpaid accrued interest is capitalized at the time a borrower leaves the REPAYE plan.~~

Issue Paper #4: Improving the Public Service Loan Forgiveness (PSLF) Application Process
October 4-8, 2021

Issue: Improving the PSLF Application Process

Statutory citations: §455(m) of the Higher Education Act of 1965, as amended

Regulatory citations: 34 CFR § 685.219

Summary of issues: Under section 455(m) of the Higher Education Act of 1965, as amended, the Secretary must cancel outstanding balances on eligible loans for borrowers who are employed full-time in a public service job after they make 120 qualifying payments. Very few borrowers who applied for PSLF have received forgiveness. Many borrowers seeking cancelation of their loans through PSLF have faced problems in the application process, including in counting payments and eligibility of FFEL loans. These issues have caused borrowers to not receive credit for all the payments they were expecting. Although the Department is concerned that only payments made on Direct Loans count toward PSLF, this is a statutory limitation for PSLF that we cannot change without Congressional action.

The Department has identified several areas in the regulations governing the application process that can be improved and further streamlined:

- To request loan forgiveness for PSLF, all borrowers, including Federal employees and servicemembers, are required to submit an application, even though the Department may be able to obtain this information and approve such borrowers without an application. The same could be true of individuals covered in future data matches established by the Department.
- Under 34 CFR 685.219(c)(1)(iii), a qualifying payment is defined as the full scheduled amount paid by the borrower within 15 days of the due date. This narrow definition has created challenges in which borrowers may not receive credit for many payments, such as payments that are a few weeks late, multiple partial payments, and lump sum payments. This provision makes it harder for borrowers to catch up and keep making progress on PSLF if they fall behind. It also makes the program more difficult to administer because it has payment counting rules that are stricter than those used for income-driven repayment.
- There are discrepancies between which payments count for PSLF and income-driven repayment (IDR), including certain deferments and forbearances.
- The clock toward forgiveness is reset when borrowers consolidate their loans, even if the underlying loans were Direct Loans on which qualifying PSLF payments may have been made.
- There is no specific requirement for a FFEL lender to inform borrowers about their eligibility for PSLF.
- There is no formal process to request reconsideration of decisions by the Department related to PSLF.

Solutions: The Department believes that Public Service Loan Forgiveness must better deliver on its promises. While the Administration is working on multiple pathways to address challenges in this program, improved regulations can make payment rules less confusing, ensure borrowers do not accidentally lose progress toward relief through deferments and forbearances and consolidation, and

give borrowers a clearer process for having decisions reconsidered. To accomplish these goals and address the issues identified above, the Department proposes the following initial for discussion with the negotiating committee:

Removing application requirements when the Secretary determines they do not need one. The Department is working to create data matches that would give us the information we would otherwise obtain from an application. Giving the Secretary flexibility to not require an application when it is not needed will assist in efforts to increase future automation in the PSLF program.

Payment Counting. The Department proposes to simplify regulations so that an amount paid by the borrower equal to the full scheduled payment due counts toward forgiveness, even if the payment is made in multiple installments or outside the 15-day payment window. This would also align the tracking of payments toward forgiveness between PSLF and IDR and would streamline payment-tracking overall. For borrowers on paid ahead status we would adopt the currently allowed practice of paying ahead up until the borrower's next recertification date on an income-driven repayment plan.

Allow certain deferments and forbearances to count as payments. The Department also proposes to count certain types of deferments or forbearances as payments, thereby aligning payments for PSLF and IDR. The Department proposes to expand the types of deferments and forbearances that qualify for PSLF to reflect two types of situations: (1) instances where status counts as qualifying employment and a qualifying payment and, (2) instances where the status counts as a payment if the borrower proves qualifying employment.

Stop the clock restart upon consolidation. The Department is considering whether to stop resetting the clock for Direct Loans when included within a consolidation loan for a borrower, including those that also include non-Direct Loans.

FFEL lender notifications to borrowers about PSLF eligibility. The Department proposes to require FFEL lenders to send annual disclosures to borrowers informing them of how they may access PSLF benefits, and to respond to any verbal or written questions about PSLF from borrowers. The disclosures would include information about consolidation and the steps to take if the borrower wishes to pursue consolidation.

PSLF Reconsideration Process. The Department proposes to codify a formal reconsideration process in the regulations that will allow borrowers to request an appeal of their application when they believe they have been wrongfully denied. A reconsideration process would include the following: the basis for which a reconsideration can be requested, reasonable timeframes to request reconsideration, and the provision of additional information.

Issue Paper #5: Public Service Loan Forgiveness (PSLF) Eligibility
Session 1: October 4-8, 2021

Issue: Employer Eligibility and Full-Time Employment

Statutory citations: 455(m) of the Higher Education Act of 1965, as amended

Regulatory citations: 34 CFR §685.219

Summary of Issues: Under section 455(m) of the Higher Education Act of 1965, as amended, the Secretary will cancel outstanding balances on eligible loans for borrowers who are employed in public service jobs. This issue paper explores employer eligibility of organizations that provide a public service as its primary function and clarifies the definition of full-time employment.

All levels of government and 501(c)(3) organizations are qualifying employers for public service loan forgiveness (PSLF). The statute also includes qualifying jobs at employers that are not government or 501(c)(3) organizations if they provide certain services, such as public health and public interest law services. Many of these services are undefined, and those that have definitions may be unclear to borrowers seeking to determine employer qualification. The Department is working to determine which other types of employers provide public service as a primary function of their organization and whether these organizations would be considered as qualifying employment for PSLF.

Under current regulations, full-time employment is defined as working in one or more jobs for the greater of an annual average of at least 30 hours per week (or an average of 30 hours per week for at least eight months for a contractual or employment period) or the number of hours certified by the employer as full-time if working for two or more employers.

The Department has identified several areas in the regulations governing eligibility issues that can be improved and further streamlined:

- It is difficult to determine if an organization should qualify as an employer for PSLF purposes if that organization does not have 501(c)(3) status but provides public service as its primary function. This lack of clarity creates confusion for borrowers.
- Under 34 CFR §685.219(b), employers have flexibility in defining full-time employment by the number of hours the employee works per week. This creates different eligibility thresholds standards when one employer considers 40 hours a week as full-time, and another employer considers 35 hours a week as full-time, even though the underlying requirement in the law is at least 30 hours.
- Individuals whose pay is based upon academic credit hours or courses taught, such as adjunct professors or contingent faculty, have trouble converting their course load into hours worked per week. Employers may also not know how to do that conversion, making them reluctant to certify employment. This can create a barrier for adjunct professors and similarly situated individuals to make progress toward receiving a discharge.
- A borrower's "annual average" hours must be full-time and should be recalculated on an ongoing basis to account for any fluctuations in hours worked that result in dropping from full-time to part-time employment.

Solution: The Department believes that Public Service Loan Forgiveness must better deliver on its promises. While the Administration is working on multiple pathways to address challenges in this program, improved regulations can make it easier for borrowers to understand and meet the requirements for the program and provide greater clarity to employers. To accomplish these goals and address the issues identified above, the Department proposes the following initial solutions for discussion with the negotiating committee:

Define the primary services of a private organization. The Department is currently seeking ideas on how best to define the primary service an organization provides if it is not a 501(c)(3) or government organization but seeks to qualify as a public service employer for PSLF purposes. The Department proposes to establish a primary service definition to ensure employers perform one of the public services included in the law as a primary function of the organization. The Department seeks ideas on what should be included in such a definition.

The Department would also like to query the Committee for ways to define what services must be provided to qualify as a public service employer. For example, are there existing definitions for these services used by other federal agencies that the Department could rely upon? Proposals related to this paragraph or the one above it that can be automated are especially welcome.

Clarify the definition of full-time employment. The Department proposes defining full-time as 30 hours for all borrowers, removing the criteria that set full-time employment at the greater of 30 hours or how the employer defines full-time employment. The Department also proposes to use a credits-taught-to-hours-worked conversion factor to help adjunct instructors. The Department recommends starting the suggested threshold at 2.5 work hours per credit hour because this aligns the federal student aid definition of full-time for a student (12 credit hours) with the 30-hour work requirement.

The Department would also incorporate existing operational practice into regulations by asking employers to certify the average hours worked for the time covered by an employment certification, instead of an entire year. This will help borrowers who work in seasonal eligible employment to be considered full-time for the months they are engaged in that work.

Issue Paper #6: Borrower Defense to Repayment
Session 1: October 4-8, 2021

Issue: Borrower Defense to Repayment – Adjudication Process

Statutory cites: §455(h) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 685.206(c) and (e)
34 CFR 685.222

Summary of issues: Section 455(h) of the Higher Education Act of 1965, as amended (HEA), requires the Secretary to specify in regulation which acts or omissions by an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. This includes a Federal Family Education Loan once it has been brought into the Direct Loan program either through consolidation or the new suggested claims process for lenders and guaranty agencies. This paper proposes changes to the borrower defense to repayment regulations, general definitions, group claims, and adjudication of claims.

Current regulations in 34 CFR 685.206(c) and (e), and 34 CFR 685.222 govern defenses to repayment. Those defense to repayment standards have changed multiple times in recent years. The Department first promulgated borrower defense regulations in 1995 which were subsequently amended in 2016 (81 FR 75926) and 2019 (84 FR 49788). The 2016 regulations, *inter alia*, laid out standards and processes for adjudicating borrower defense claims. The 2019 regulations changed these standards and processes, and effectively barred relief for many borrowers who would likely have received relief under the 1995 or 2016 borrower defense regulations, or both. This is due to requirements such as proving intent behind a substantial misrepresentation, preventing the use of common evidence, requiring the borrower to document the amount of harm suffered, and a strict three-year limitation period on filing a claim. While the Department has yet to adjudicate any claims under the 2019 rule because it only covered new loans first disbursed on or after July 1, 2020, the regulatory impact analysis of the 2019 rule estimated that billions of dollars of fewer discharges would occur due to that rule.

The Department has identified the following issues around borrower defense regulations:

- Current regulations tie the applicable standards for borrower defense claims to a loan's disbursement date. This requires the Department to apply three different sets of rules depending on loan disbursement dates and complicates adjudications because a single borrower with multiple loans may fall under multiple rules depending on a loan's disbursement date.
- There are other categories of acts by an institution that should give rise to a borrower defense claim and there are other examples of misrepresentations or omissions that would provide greater clarity about what could lead to a borrower defense claim. These reflect other acts and omissions that are covered under other State standards and makes the federal standard more comprehensive.
- Group claims are not allowed under current regulations and past regulations have resulted in individual adjudications of claims that may be better handled as group claims.
- The Department wants to create a faster approval process for borrower defense claims based upon findings that come from other Department processes. For example, findings from final program review determinations (FPRDs) could contain evidence that leads to an approved

borrower defense claim, and the process of generating the FPRD already includes an extensive fact-finding opportunity for the institution to respond to the Department's findings.

- Borrowers should have clearly defined protections from interest accumulation while their claims are being adjudicated.
- Different versions of the regulations impose limitations on when a borrower can submit a borrower defense claim to the Department and whether they can receive refunds if their claim is approved. These limitations periods can be prohibitively restrictive for borrowers who may not obtain evidence that would result in a successful borrower defense claim until after the limitations period. Moreover, these timeframes are inconsistent with other discharge regulations, such as closed school loan discharges, which do not limit when the borrower can submit a claim to the Department.
- Regulations do not require institutions to comply with the Department's requests for records and other relevant evidence. The different borrower defense regulations further complicate the institutional response process because the Department must determine which regulation govern the claim, based on the loan's disbursement date.
- The Department does not currently have any set processing and adjudication timelines for individual borrower defense claims.
- Borrowers with FFEL Program loans must take additional steps to receive a loan discharge even once their claim is approved.

Solutions: Borrowers should have a path to relief through the borrower defense to repayment process when they were subject to conduct such as substantial misrepresentations by their institutions. In improving this process, the Department is seeking to streamline multiple regulatory requirements into a single federal standard that will be easier for borrowers to understand and have clearer rules around what conduct could result in an approved borrower defense to repayment claim. This approach will also place a greater emphasis on adjudicating group claims, which recognizes that borrower defense approvals to date have all been based upon common evidence that applies across borrowers. To achieve these goals, the Department proposes the following solutions to the issues identified above for discussion with the negotiating committee:

Applicable regulations for the borrower and retroactivity. Develop a single federal standard for all borrower defense claims regardless of when the loan was first disbursed. This standard would be more generous by removing any limitations periods and by covering a broader range of conduct than the three existing rules. Borrowers would be able to request their claims be adjudicated under otherwise applicable specific State law through a reconsideration process if they are not satisfied with the outcome of the adjudication under the federal standard. The borrower would specify the State law and the basis for that specification. The Department notes that the new standard would only apply to institutional recoupment actions after the effective date of the new regulation. This difference would not add significant complexity because it is less complex than navigating multiple standards and processes based on disbursement date.

Evidentiary standard. The new single federal standard would continue to provide that a decision on the claim will be based on a preponderance of evidence. Borrowers would not be required to prove they relied upon the institutional wrongdoing if a reasonable person could have been expected to rely upon that wrongdoing. Allowing inferences on a reasonableness standard is appropriate because borrowers may not always understand the nuances of the BD application or process.

Categories of acts that could lead to a borrower defense claim. The Department would adopt five categories of acts that could lead to successful borrower defense claims. These are: (1) substantial misrepresentation, (2) omissions, (3) breach of contract, (4) aggressive recruitment, and (5) adjudications, which include court judgments and findings by the Department of Education. The first three categories have been included in prior regulations. The category of adjudications is a reinstatement and expansion of a category that was included in the 2016 regulation. The Department proposes adding aggressive recruitment because it is covered by many existing State standards and this results in a more comprehensive federal standard.

Revise the definition of misrepresentation. The Department proposes to adopt the current definition of misrepresentation under 34 CFR 668, Subpart F. The Department would expand the current non-exhaustive list of potential examples of potential topics where misrepresentation may occur to include:

- Job placement rates
- Program costs
- The tax status of the institution

Definition of omissions. The Department proposes defining a misleading or deceptive omission by an institution as an act that could lead to a successful borrower defense claim. It also provides examples of omissions that could be grounds for a borrower defense claim, such as:

- Significant exclusions from, or methodological problems with, job placement rates
- If additional education is needed in the field, such as obtaining additional credentials in a field that requires program completers to go into that line of employment
- If the academic program lacks certifications/approvals
- Transferability of credits

Emphasis on group process. A group process for adjudicating claims would be the default approach. The Department proposes to identify and define groups based on occurrences such as: actions by the federal government, State attorneys general, other State agencies or officials, or other law enforcement activity; lawsuits related to educational programs filed against institutions or judgments rendered against institutions; individual borrower defense claims with common facts; and requests by attorneys general or law enforcement organizations. Individual applications covered by a group process would be adjudicated through that group process. The Department would request additional information from institutions. Decisions on whether to approve claims associated with the group would be made by the Department, with institutional recoupment operating through a separate process.

Individual applications. Applications that are not covered by a group process would be considered once they are complete. Complete would be defined as stating a claim that the Department would be able to review, including requesting a response from an institution. Though not included in regulation, the Department will furnish additional examples of what it means to state a claim to assist borrowers in filing applications. This contrasts with current practice where claims that do not state a claim are just denied instead of being viewed as incomplete. From there, the claim form and information submitted by the borrower would be sent to the institution for a response and adjudicated based upon evidence from the institution, held by the Department, and provided with the application.

Evidence solely from applications — The past two instances of negotiated rulemaking raised questions about whether a borrower's application or a group of applications should be considered sufficient evidence to adjudicate a borrower defense claim on its own. The Department is guided by the principle that a borrower defense application is a form of evidence. Statements made by borrowers in a borrower

defense application could provide evidence for areas where the borrower would have knowledge of the issue (e.g.: the borrower's interaction with admissions staff). That said, the Department would want to seek evidence from the institution, the Department, and any other relevant sources and consider any of that evidence as applicable plus what is in the application. Multiple applications asserting similar claims could be grounds for a group process or additional forms of corroborating evidence.

Process based on prior Departmental action. Codify a process to consider information from existing Department findings as the basis of borrower defense claims. For example, if a Final Program Review Determination (FPRD) or Final Audit Determination (FAD) reveal that an institution misstated job placement rates, the Department may use those findings to grant borrower defense discharges to affected borrowers. In the case of findings based upon a FPRD or FAD the institution would not provide an additional response because they had already done so as part of the FPRD and FAD process.

Borrower status during and after adjudication. As a default option, the Department proposes that when a borrower initially files a borrower defense claim, their loans will be placed in forbearance if they were in repayment and stop collections if they were in default while the Department adjudicates their claim. Borrowers would be able to opt out of forbearance or stopped collections. This would apply to all of a borrower's loans, even if not all of them are related to the borrower defense claim. Claims in forbearance for more than 180 days would stop accumulating interest.

After adjudication, the Department proposes several options for borrowers' statuses. If the Department approves a claim, the borrowers' loans will stay in interest-free forbearance while the loan balance is discharged in accordance with the amount of relief provided. If the Department grants partial relief or denies the claim altogether, the borrowers' loans stay in forbearance or stopped collections for 90 days after the partial discharge to afford the borrower an opportunity to request reconsideration and to help ease the borrower back into repayment or collection activities. Borrowers who request reconsideration will remain in forbearance or stopped collections while the Department reviews the reconsideration request.

Limitation periods for borrowers. Eliminate limitations periods for borrowers to submit a borrower defense to repayment claim so long as they still have an outstanding Direct Loan associated with their claim. The Department also proposes to remove limitations periods on borrowers' ability to receive a refund on any amounts they paid on the outstanding Direct Loans associated with their claim.

Institutional response process. Develop a time-limited institutional response process that would be required of the institution. This process would be separate from the process used to adjudicate any assessment of liabilities to the institution.

Generally, the Department contemplates an institutional response process for both individual and group claims. Institutions would have 60 days to respond to the Department's requests for relevant evidence—the midpoint of the current timelines generally afforded for responding to program reviews. If the institution did not have evidence, it would provide an affidavit to that effect certified by the institution's leadership. If institutions waive the institutional response process or choose not to respond the Department would assume the institution does not contest the allegations made by the borrower.

Time to process and adjudicate applications. Provide a hold harmless period where interest stops accumulating on loans held by borrowers that have pending borrower defense claims for six months or

longer. This interest pause would then continue until the Department adjudicates the claim and then follow the post-adjudication proposals described in the second issue paper.

The Department strives for expediency and thoroughness in administering the borrower defense claim process. The Department solicits ideas from the committee on establishing reasonable timeframes for adjudication. Questions for consideration by the committee include:

1. What is a reasonable timeline to adjudicate borrower defense claims?
2. Would the timeline be the same or different for individual claims versus group claims?
    a. Should the clock stop or reset on an individual claim if it is captured within a group process before the Department issues an adjudication decision?
3. How should the Department treat evidence or cases that are in ongoing, unresolved, or settled litigation (*qui tam*, etc.)?

Treatment of FFEL Program Loans. Streamline the process for borrowers with FFEL Program loans. If a borrower's claim is approved, FFEL lenders would be required to execute the relevant amount of relief, which could include relieving the borrower from further repayment of their FFEL Program loan and issuing refunds to the borrower of amounts they paid. The lender would then submit a claim to the guaranty agency (GA) and the GA would submit a claim to the Department to repay the lender. This accomplishes the same outcome as if the borrower consolidated without requiring the borrower to go through that process.

Proposed Regulations:
To assist the Committee in discussing these issues, the Department is providing draft revisions to the borrower defense regulatory language for the issues described above and incorporating the Department's proposals.

§685.206 Borrower responsibilities and defenses. [forthcoming]

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Issue Paper #7: Borrower Defense to Repayment
Session 1: October 4-8, 2021

Issue: Borrower Defense to Repayment – Post-Adjudication

Statutory cites: §455(h) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 685.206(c) and (e)
34 CFR 685.222

Summary of issues: Section 455(h) of the Higher Education Act of 1965, as amended (HEA), requires the Secretary to specify in regulation which acts or omissions by an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. This issue paper generally covers post-adjudication treatment of borrower defense to repayment claims.

After adjudicating a borrower defense claim in accordance with the applicable regulations, the Department notifies the borrower of the Department's decision, including any amounts discharged, via decision letter.

The Department observed the following problems with the borrower defense post-adjudication process:

- Borrowers whose claims have been approved have not received sufficient relief; and,
- The 2019 regulations do not include a reconsideration process.

Solutions: As part of improving the borrower defense to repayment process, the Department wants to provide greater clarity about how the Department determines the amount of relief for approved claims, including establishing a rebuttable presumption of full relief, and to design a structured process for reconsidering decisions. To accomplish this goal and address the issues identified above, the Department proposes the following initial solutions for discussion with the negotiating committee:

Relief amounts. The Department proposes to adopt a presumption of full relief for an approved borrower defense claim. This presumption may be rebutted by evidence showing that the harm to the borrower is less than what they would receive from a full discharge. This evidence could be held by the Department or provided by an institution or other party.

Reconsideration process. Establish a reconsideration process that the borrower may pursue if a borrower defense claim is denied or if partial relief is granted. To be eligible for reconsideration, the borrower would have to provide additional evidence or request adjudication under a specific State standard that they specified and specify the basis for using the State standard instead of the federal standard. The Department would establish timeframes by which it must receive a request for reconsideration from individuals or groups. While the Department processes the reconsideration request, the borrower's loans would remain in forbearance and/or the Department would cease enforced collections. Borrowers would be able to opt out of forbearance.

The Department would review the reconsideration request and issue a decision. If, after the reconsideration process, a borrower's claim is still denied or still receiving partial relief, the borrower would not enter repayment until 90 days after adjudication of their reconsideration request to give the borrower adequate time to re-enter repayment.

Issue Paper #8: Borrower Defense to Repayment
Session 1: October 4-8, 2021

Issue: Borrower Defense to Repayment – Recovery from Institutions

Statutory cites: §455(h) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 685.206(c) and (e)
34 CFR 685.222
34 CFR 668.87

Summary of issues: Section 455(h) of the Higher Education Act of 1965, as amended (HEA), requires the Secretary to specify in regulation which acts or omissions by an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. This issue paper covers recovery from institutions for the amount of relief granted to borrowers under a successful borrower defense (BD) claim.

The Secretary has the right to recover from institutions the amount of relief granted to borrowers under a successful BD claim. The 2016 rules established the general framework for recovery proceedings, and 2017 regulations [82 FR 6257] detailed the process for the Secretary to initiate recovery proceedings through the Office of Hearings and Appeals (OHA), though the Department has not yet pursued recovery proceedings through this channel.

The original 1995 regulations provided that the Secretary may initiate a proceeding to collect the discharged loan amount from the institution and included a general timeframe that aligned to the record retention period (see 34 CFR 685.309(c)) unless the institution received notice of the claim during that period. The 2016 regulations limited the timeframe to recover from an institution to the later of: three years from when the student last attended, the timeframe permitted under State law, or at any time if the institution received notice of the claim. The 2019 regulations also allowed for institutional recoupment with a limitations period of five years after the date of final determination.

The Department wants to clarify how the recoupment process would work and adopt a clearer limitations period.

Solutions: The Department believes it is critical that a borrower defense rule contain a process for recouping funds from institutions for the cost of approved claims. In doing so, the Department strives to balance reasonable adjudication timeframes for borrowers with sufficient due process for institutions. To accomplish this goal and address the issues identified above, the Department proposes the following initial solutions for discussion with the negotiating committee:

Recovery from institutions. The Department must maintain the ability to recoup funds from institutions with approved borrower defense claims. This serves as an important deterrent and, in some cases, limits the cost to the government as a result of institutions' misconduct.

The Department proposes separating the process of institutional recoupment from the borrower approval process. This proposed separation balances delivering adjudication decisions for borrowers in a reasonable time period while still affording sufficient time for institutional due process. It also recognizes that collecting from institutions after the fact instead of stronger accountability upfront will

often be unsuccessful, because institutions may have closed, settlements may have limited liability, statutes of limitations may have expired, or other factors. The recoupment process would apply to new loans issued after the effective date of the rule.

The Department proposes a recovery process that affords due process to institutions and leverages existing Departmental processes. After approving borrower defense claims, the Department would determine whether to seek recoupment from institutions and the amount it would seek to recoup. This amount could be no greater than the amount of approved discharges but could also be less. If the Department decides to recoup from the institution, it will generate a Program Review Report (PRR) based upon the evidence in its possession, evidence from borrower defense applications, any institutional response, and any other relevant information. This will include a liability amount. The institution will then have the opportunity to respond to that report much as they would for any other program review. The process will then follow the one used for other program reviews. The Department will take the institution's response into account and issue a final program review determination (FPRD). Institutions may then appeal any liabilities from the FPRD to OHA and then to the Secretary, as applicable. In cases where borrower defense claims stem from an already issued FPRD, the Department will not conduct another round of institutional response.

Limitations period. The Department proposes adopting a six-year limitations period. This clock would stop when the institution is notified of claims during the institutional response process.

Issue Paper #9: Predispute Arbitration and Class Action Waivers
Session 1: October 4-8, 2021

Issue: Predispute Arbitration and Class Action Waivers

Statutory cites: §454(a)(6) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 685.300

Summary of issues: The Higher Education Act of 1965, as amended (HEA), gives the Secretary the authority to impose conditions on institutions that wish to participate in the William D. Ford Direct Loan (Direct Loan) Program. Institutions that participate in the Direct Loan Program must enter into a program participation agreement (PPA). Specifically, Section 454(a)(6) of the HEA authorizes the Secretary to include in that PPA "provisions that the Secretary determines are necessary to protect the interest of the United States and to promote the purposes of" the Direct Loan Program.

In 2016, the Department added specific provisions to the PPA related to student claims and complaints based upon an institution's acts or omissions that were: (1) related to the making of a Direct Loan or the provision of educational services for which the Direct Loan was provided; and, (2) could form the basis of borrower defense claims. Specifically, the Department prohibited institutions participating in the Direct Loan Program from using certain contractual provisions regarding dispute resolution processes, such as predispute arbitration agreements or class action waivers, and to require institutions to notify and disclose their use of arbitration. In 2019, the Department rescinded the prohibition of predispute arbitration agreements and class action waivers.

The Department observed the following issues and problems around predispute arbitration and class action waivers:

- Institutions may use arbitration clauses in enrollment agreements to effectively discourage students from pursuing complaints. This enables an institution to avoid financial risk associated with its wrongdoing and shift the risk to the taxpayers and federal government through subsequent borrower defense discharges;
- Borrowers cannot have their day in court because some enrollment agreements prevent their ability to participate in lawsuits, including class action litigation. This further insulates institutions from the potential financial risk of their wrongdoing; and,
- Lack of transparency surrounding institutions' arbitration requirements and limits on class actions.

Solution:
The Department believes that students should have an opportunity to have their day in court or pursue other pathways for resolving their complaints that are related to conduct that could result in a borrower defense claim. The Department also believes that keeping such information hidden from public view may hinder the Department's ability to investigate quickly when there are patterns of student complaints. To accomplish these goals, the Department proposes the following initial solutions to the issues identified above for discussion with the negotiating committee:

Prohibit Direct Loan-participating institutions from using certain contractual provisions regarding dispute resolution processes, and to require certain notifications and disclosures by institutions regarding their use of arbitration. The Department proposes to restore the 2016 regulations and prohibit institutions from obtaining, through the use of contractual provisions or other agreements, a predispute agreement for arbitration to resolve claims brought by a borrower against the institution that could form the basis of a borrower defense claim. The Department proposes to restore prohibitions on institutions obtaining an agreement, either in an arbitration agreement or in another form, that a borrower waive his or her right to initiate or participate in a class action lawsuit regarding such claims and from requiring students to engage in internal dispute processes before contacting accrediting or government agencies with authority over the school regarding such claims. The Department also proposes requiring institutions to notify the Department and to disclose to students the institution's use of arbitration on acts or omissions related to the making of a Direct Loan or the provision of educational services for which the Direct Loan was provided, and to provide judicial and arbitral records to the Department, which will be shared with the public.

Proposed Regulations:
To assist the Committee in discussing these issues, the Department is providing draft revisions to the regulatory language for the issues described above and incorporating the Department's proposals.

§685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.

(a) General. Participation of a school in the Direct Loan Program means that eligible students at the school may receive Direct Loans. To participate in the Direct Loan Program, a school must—

(1) Demonstrate to the satisfaction of the Secretary that the school meets the requirements for eligibility under the Act and applicable regulations; and

(2) Enter into a written program participation agreement with the Secretary.

(b) Program participation agreement. In the program participation agreement, the school must promise to comply with the Act and applicable regulations and must agree to—

(1) Identify eligible students who seek student financial assistance at the institution in accordance with section 484 of the Act;

(2) Estimate the need of each of these students as required by part F of the Act for an academic year. For purposes of estimating need, a Direct Unsubsidized Loan, a Direct PLUS Loan, or any loan obtained under any State-sponsored or private loan program may be used to offset the expected family contribution of the student for that year;

(3) Certify that the amount of the loan for any student under part D of the Act is not in excess of the annual limit applicable for that loan program and that the amount of the loan, in combination with previous loans received by the borrower, is not in excess of the aggregate limit for that loan program;

(4) Set forth a schedule for disbursement of the proceeds of the loan in installments, consistent with the requirements of section 428G of the Act;

(5) On a monthly basis, reconcile institutional records with Direct Loan funds received from the Secretary and Direct Loan disbursement records submitted to and accepted by the Secretary;

(6) Provide timely and accurate information to the Secretary for the servicing and collecting of loans—

(i) Concerning the status of student borrowers (and students on whose behalf parents borrow) while these students are in attendance at the school;

(ii) Upon request by the Secretary, concerning any new information of which the school becomes aware for these students (or their parents) after the student leaves the school; and

(iii) Concerning student eligibility and need, for the alternative origination of loans to eligible students and parents in accordance with part D of the Act;

(7) Provide assurances that the school will comply with requirements established by the Secretary relating to student loan information with respect to loans made under the Direct Loan Program;

(8) Accept responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement;

(9) Provide for the implementation of a quality assurance system, as established by the Secretary and developed in consultation with the school, to ensure that the school is complying with program requirements and meeting program objectives;

(10) Provide that the school will not charge any fees of any kind, however described, to student or parent borrowers for origination activities or the provision of any information necessary for a student or parent to receive a loan under part D of the Act or any benefits associated with such a loan;

(11) Comply with the provisions of paragraphs (d) through (i) of this section regarding student claims and disputes;

(12) Comply with other provisions that the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of part D of the Act; and

(13) Accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts discharged by the Secretary pursuant to §§685.206, 685.214, 685.215, 685.216, and 685.222.

(c) Origination. A school that originates loans in the Direct Loan Program must originate loans to eligible students and parents in accordance with part D of the Act. The note or evidence of the borrower's obligation on the loan originated by the school is the property of the Secretary.

(d) Borrower defense claims in an internal dispute process. The school will not compel any student to pursue a complaint based on allegations that would provide a basis for a borrower defense claim through an internal dispute process before the student presents the complaint to an accrediting agency or government agency authorized to hear the complaint.

(e) Class action bans.

(1) The school will not seek to rely in any way on a predispute arbitration agreement or on any other predispute agreement with a student who has obtained or benefited from a Direct Loan, with respect to any aspect of a class action that is related to a borrower defense claim, including to seek a stay or dismissal of particular claims or the entire action, unless and until the presiding court has ruled that the case may not proceed as a class action and, if that ruling may be subject to appellate review on an interlocutory basis, the time to seek such review has elapsed or the review has been resolved.

(2) Reliance on a predispute arbitration agreement, or on any other predispute agreement, with a student, with respect to any aspect of a class action includes, but is not limited to, any of the following:

(i) Seeking dismissal, deferral, or stay of any aspect of a class action.

(ii) Seeking to exclude a person or persons from a class in a class action.

(iii) Objecting to or seeking a protective order intended to avoid responding to discovery in a class action.

(iv) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action.

(v) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action after the trial court has denied a motion to certify the class but before an appellate court has ruled on an interlocutory appeal of that motion, if the time to seek such an appeal has not elapsed or the appeal has not been resolved.

(vi) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action after the trial court in that class action has granted a motion to dismiss the claim and, in doing so, the court noted that the consumer has leave to refile the claim on a class basis, if the time to refile the claim has not elapsed.

(3) Required provisions and notices:

(i) The school must include the following provision in any agreements with a student recipient of a Direct Loan for attendance at the school, or, with respect to a Parent PLUS Loan, a student for whom the PLUS loan was obtained, that include any agreement regarding predispute arbitration or any other predispute agreement addressing class actions and that are entered into after the effective date of this regulation: “We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a

member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Direct Loan or the provision by us of educational services for which the Direct Loan was obtained. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

(ii) When a predispute arbitration agreement or any other predispute agreement addressing class actions has been entered into before the effective date of this regulation and does not contain a provision described in paragraph (e)(3)(i) of this section, the school must either ensure the agreement is amended to contain the provision specified in paragraph (e)(3)(iii)(A) of this section or provide the student to whom the agreement applies with the written notice specified in paragraph (e)(3)(iii)(B) of this section.

(iii) The school must ensure the agreement described in paragraph (e)(3)(ii) of this section is amended to contain the provision specified in paragraph (e)(3)(iii)(A) of this section or must provide the notice specified in paragraph (e)(3)(iii)(B) of this section to students no later than the exit counseling required under § 685.304(b), or the date on which the school files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment.

(A) Agreement provision. "We agree that neither we nor anyone else who later becomes a party to this agreement will use it to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit in court even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

(B) Notice provision. "We agree not to use any predispute agreement to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

(f) Predispute arbitration agreements.

(1)

(i) The school will not enter into a predispute agreement to arbitrate a borrower defense claim, or rely in any way on a predispute arbitration agreement with respect to any aspect of a borrower defense claim.

(ii) A student may enter into a voluntary post-dispute arbitration agreement with a school to arbitrate a borrower defense claim.

(2) Reliance on a predispute arbitration agreement with a student with respect to any aspect of a borrower defense claim includes, but is not limited to, any of the following:

(i) Seeking dismissal, deferral, or stay of any aspect of a judicial action filed by the student, including joinder with others in an action;

(ii) Objecting to or seeking a protective order intended to avoid responding to discovery in a judicial action filed by the student; and

(iii) Filing a claim in arbitration against a student who has filed a suit on the same claim.

(3) Required provisions and notices:

(i) The school must include the following provision in any predispute arbitration agreements with a student recipient of a Direct Loan for attendance at the school, or, with respect to a Parent PLUS Loan, a student for whom the PLUS loan was obtained, that include any agreement regarding arbitration and that are entered into after the effective date of this regulation: “We agree that neither we nor anyone else will use this agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit for such a claim or you may be a member of a class action lawsuit for such a claim even if you do not file it. This provision does not apply to lawsuits concerning other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.”

(ii) When a predispute arbitration agreement has been entered into before the effective date of this regulation that did not contain the provision specified in paragraph (f)(3)(i) of this section, the school must either ensure the agreement is amended to contain the provision specified in paragraph (f)(3)(iii)(A) of this section or provide the student to whom the agreement applies with the written notice specified in paragraph (f)(3)(iii)(B) of this section.

(iii) The school must ensure the agreement described in paragraph (f)(3)(ii) of this section is amended to contain the provision specified in paragraph (f)(3)(iii)(A) of this section or must provide the notice specified in paragraph (f)(3)(iii)(B) of this section to students no later than the exit counseling required under § 685.304(b), or the date on which the school files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment.

(A) Agreement provision. “We agree that neither we nor anyone else who later becomes a party to this predispute arbitration agreement will use it to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit for such a claim or you

may be a member of a class action lawsuit for such a claim even if you do not file it. This provision does not apply to other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

(B) Notice provision. "We agree not to use any predispute arbitration agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit regarding such a claim or you may be a member of a class action lawsuit regarding such a claim even if you do not file it. This provision does not apply to any other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Direct Loan or the provision of educational services for which the loan was obtained."

(g) Submission of arbitral records.

(1) A school must submit a copy of the following records to the Secretary, in the form and manner specified by the Secretary, in connection with any claim filed in arbitration by or against the school concerning a borrower defense claim:

(i) The initial claim and any counterclaim.

(ii) The arbitration agreement filed with the arbitrator or arbitration administrator.

(iii) The judgment or award, if any, issued by the arbitrator or arbitration administrator.

(iv) If an arbitrator or arbitration administrator refuses to administer or dismisses a claim due to the school's failure to pay required filing or administrative fees, any communication the school receives from the arbitrator or arbitration administrator related to such a refusal.

(v) Any communication the school receives from an arbitrator or an arbitration administrator related to a determination that a predispute arbitration agreement regarding educational services provided by the school does not comply with the administrator's fairness principles, rules, or similar requirements, if such a determination occurs.

(2) A school must submit any record required pursuant to paragraph (g)(1) of this section within 60 days of filing by the school of any such record with the arbitrator or arbitration administrator and within 60 days of receipt by the school of any such record filed or sent by someone other than the school, such as the arbitrator, the arbitration administrator, or the student.

(h) Submission of judicial records.

(1) A school must submit a copy of the following records to the Secretary, in the form and manner specified by the Secretary, in connection with any claim concerning a borrower defense claim filed in a lawsuit by the school against the student or by any party, including a government agency, against the school:

(i) The complaint and any counterclaim.

(ii) Any dispositive motion filed by a party to the suit; and

(iii) The ruling on any dispositive motion and the judgment issued by the court.

(2) A school must submit any record required pursuant to paragraph (h)(1) of this section within 30 days of filing or receipt, as applicable, of the complaint, answer, or dispositive motion, and within 30 days of receipt of any ruling on a dispositive motion or a final judgment.

(i) Definitions. For the purposes of paragraphs (d) through (h) of this section, the term -

(1) “Borrower defense claim” means a claim that is or could be asserted as a borrower defense as defined in § 685.222(a)(5), including a claim other than one based on § 685.222(c) or (d) that may be asserted under § 685.222(b) if reduced to judgment;

(2) “Class action” means a lawsuit in which one or more parties seek class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23;

(3) “Dispositive motion” means a motion asking for a court order that entirely disposes of one or more claims in favor of the party who files the motion without need for further court proceedings;

(4) “Predispute arbitration agreement” means any agreement, regardless of its form or structure, between a school or a party acting on behalf of a school and a student providing for arbitration of any future dispute between the parties.

Issue Paper #10: Creating a new income-driven repayment plan
Session 1: October 4-8, 2021

Issue: Creating a new income-driven repayment plan

Statutory cites: §455(d) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 685.209

Summary of issues: Federal student loan borrowers increasingly rely upon income-driven repayment (IDR) plans to navigate loan repayment. These are a set of plans in which the borrower's monthly payment is set based upon their income and any remaining balances are forgiven after a certain number of years. There are currently several different IDR plans. Some, such as two versions of income-based repayment (IBR), are fully spelled out in statute. Others, such as Income-Contingent Repayment (ICR), Pay As You Earn (PAYE), and Revised Pay As You Earn (REPAYE), stem from Section 455 of the Higher Education Act of 1965, as amended, which authorizes the U.S. Secretary of Education to create repayment plans based upon the income of the borrower, paid over a period not to exceed 25 years. These plans are only available on Direct Loans held by borrowers. Currently, Parent PLUS loans may only be repaid through the ICR plan if they are part of a consolidation loan.

While the Department believes that IDR is a crucial payment option for millions of borrowers across the country, it has identified the following challenges with these plans:

- Most IDR plans offer payments equal to 10 or 15 percent of a borrower's discretionary income, defined as their income above 150 percent of the poverty line based upon their household size. While this formula results in lower payments for borrowers, many lower-income borrowers are still not able to afford these amounts.
- Although IDR plans can reduce monthly payments, borrowers who pay less than the rate of accumulating interest see their balances grow, sometimes significantly.
- The IDR plans offer forgiveness of remaining balances after 20 or 25 years. While this may be appropriate for those with higher balances, that could be too long to repay for borrowers who have low loan amounts or who have low incomes for long periods of time.
- Despite the presence of IDR plans, many low-income or lower-balance borrowers still end up delinquent or default on their loans, suggesting that these plans are not doing enough to ensure the borrowers most at risk of negative repayment outcomes enroll and stay enrolled.
- The variety of IDR plans and their differing terms and benefits may create tradeoffs that complicate which IDR plan provides the strongest protections and best repayment option for borrowers and may make it difficult for borrowers to choose among them.

Solution: The Department is interested in creating a new IDR plan using the ICR authority that could address the challenges identified above. In crafting this plan, we are interested in feedback from negotiators on the following questions:

1) There have been proposals to lower the percentage of income that must be paid for undergraduate borrowers. Should the Department reduce payments to 5 percent of discretionary income? If so, which types of borrowers should be eligible for payments set at 5 percent? Should the percent of income devoted to student loan payments rise as income increases?
2) Does exempting income up to 150 percent of the federal poverty level based upon family size protect enough income for borrowers, particularly low- and middle-income ones? If not, what is the appropriate level to protect sufficient income?
3) How should the Department think about the interaction between changes in the share of income devoted to payments and changes in the amount of income protected in terms of ensuring plans are affordable for low- and middle-income borrowers?
4) Existing IDR plans either use the same time to forgiveness or vary the time based upon whether a borrower has any graduate school loans. Should the Department consider other bases for variations in time to forgiveness, such as whether a borrower is consistently low income, whether the borrower has lower loan balances, or any other factors?
5) A lot of borrowers raise concerns about how interest accumulation results in them owing more after years in repayment. How should the Department address this, and should that approach vary based upon factors such as borrower income?
6) Data show that underserved populations and communities of color face higher rates of student loan struggles than others. What design factors and changes can better support equitable access and success in repayment?
7) Observers note that existing IDR plans may not be optimally designed to reduce delinquency and default. Borrowers at the highest risk of delinquency and default are typically non-completers who owe low balances, yet who do not enroll in existing IDR plans at a high rate. What design factors and changes can better support borrowers at high risk of delinquency and default or otherwise encourage enrollment in IDR plans that match their financial circumstances and loan balances?
8) There are currently several IDR plans available to borrowers. How can the Department use this rulemaking to reduce borrower confusion and make it easier for borrowers to access IDR? What should the Department do with other plans created in regulation if it establishes this new plan?
9) In 2019, the Government Accountability Office released a report about verifying income data and family size for IDR programs. How can regulations address the fraud and error concerns raised in that report?