DELIVERING DISTRESS

How Student Loan Companies Cheat Borrowers Out of Their Rights

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PROTECTBORROWERS.ORG

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UNIVERSITY OF CALIFORNIA

Student Loan Law Initiative

ABOUT THE STUDENT BORROWER PROTECTION CENTER

The Student Borrower Protection Center is a nonprofit organization focused on eliminating the burden of student debt for millions of Americans. We engage in advocacy, policymaking, and litigation strategy to rein in industry abuses, protect borrowers' rights, and advance racial and economic justice.

ABOUT THE STUDENT LOAN LAW INITIATIVE

The Student Loan Law Initiative is a partnership between the Student Borrower Protection Center, the University of California, Irvine School of Law and the University of California, Berkeley School of Law to develop a body of rigorous research around how to address the student loan crisis.

CONTRIBUTING ORGANIZATIONS

Authors who contributed articles to this paper series hail from a diverse array of advocacy organizations and academic institutions. Authors are not speaking on behalf of their institutions, nor do authors necessarily endorse any piece in the compendium aside from their own.

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FOREWORD

Attorney General Brian Schwalb
District of Columbia

Foreword

As the District of Columbia's Attorney General, I am acutely aware of how the current divisive and hyper-partisan national political climate has impacted student borrowers. Addressing the student loan crisis should not be about pitting those who have outstanding loans versus those who have paid their loans off. Rather, we need to candidly and in good faith address the adverse impacts that escalating costs of higher education and debilitating levels of debt have on individuals, families, and communities.

In the District of Columbia, we are not immune from the tremendous burdens that outstanding student loan balances can create. DC residents have the highest average student loan debt in the country. Approximately 20 percent of District residents owe outstanding amounts on the loans they took out to fund their educations. We witness firsthand how much student loan debt exacerbates preexisting economic and racial disparities. We see how crushing student debt obligations impact DC residents' ability to save for retirement, buy a home, pay for childcare, or meet other essential needs.

The return to repayment this Fall is going to be difficult for everyone—obviously for borrowers who cannot afford their payments, but also for borrowers who will have to rework their budgets to be able to afford their loan payments. Given the impact of the COVID-19 pandemic, many borrowers will be making their very first repayments, and may be confused about what their rights and responsibilities are.

The following papers shed light on challenges borrowers are facing when payments resume, and we are fully committed to working with the Administration and with organizations like the Student Borrower Protection Center to ensure that borrowers have access to the critical information and resources necessary to know their rights and address their student loan debts. We will continue our mission to safeguard the rights and interests of student loan borrowers here in the District of Columbia and across the country, including through vigilant and aggressive enforcement of our consumer protection law, and holding servicers accountable should they fail to treat borrowers legally and fairly.

INTRODUCTION

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Introduction

After a three-and-a-half-year-long hiatus, the U.S. Department of Education began charging interest to student loan borrowers last month. The government's student loan debt collection machine resumed sending bills and will gradually ramp up penalties over the next year for borrowers who cannot pay. The next 12 months mark the end of an extraordinary experiment—the federal government's willingness to use the policy levers that determine families' financial obligations to maximize economic stability and preserve household wealth.

Sadly, this experiment will conclude without the sweeping structural changes to the student loan system once promised by President Biden. The right-wing majority on the U.S. Supreme Court blocked an historic effort to cancel the debts in full for more than 20 million student loan borrowers and substantially reduce loan balances for tens of millions more. The effects of this policy would have been life-changing for those who benefited. They would also have had an important second-order effect on the student loan system—vastly shrinking the portfolio of loans that would have been forced to re-enter repayment.

Instead, the student loan system is struggling under the weight of the extraordinary task ahead. Many borrowers report hours-long waits to receive basic support from the student loan servicers hired by the government to manage borrowers' student loan accounts and administer the transition back into repayment. The government itself acknowledges that as many as half of all borrowers who attempt to contact their loan servicer give up before getting help. Those fortunate enough to reach someone on the phone report receiving bad or conflicting information. Others describe long wait times for paperwork to be processed, lost documents, and endless red tape.

Taken together, the problems that have surfaced in the first weeks since the conclusion of the payment pause are cause for alarm—particularly for the millions of borrowers who still have a right to have their debts cancelled through programs that pre-date the broad debt relief initiative struck down by the Supreme Court.

Returning to repayment without delivering debt cancellation is a fool's errand. The following papers, written by some of the smartest student loan lawyers and advocates in the country, make the compelling case that the return to repayment will be disastrous for millions of borrowers who in the wake of a global pandemic do not have the financial resilience to absorb this resurgent obligation.

Three years ago, we published a series of papers by many of the same authors, making an urgent case to use the full weight of the law to deliver debt relief to as many people as possible, as quickly as possible. Two years ago, we revisited these proposals and urged the Biden Administration to finish the job. Today, we are proud to report that the ideas, plans, and actions first outlined in 2020 have delivered the promise of total debt cancellation for nearly 3.6 million people—debt relief that remains a binding commitment from the government, untouched by the Supreme Court.

When a private-sector loan servicer, hired by the federal government, elects to send bills to borrowers rather than executing on these borrowers' right to debt cancellation, it may be acting unlawfully. Here, servicers' motives may be purely financial: identifying eligible borrowers and offering the support and customer service necessary to deliver debt relief is costly. But this is a core part of the job of a servicer. The student loan servicing industry cannot be allowed to enrich itself at the expense of millions of people with a right to have their debts cancelled.

In the weeks to come, state and federal lawmakers, state and federal consumer protection officials, and the student loan industry will have to address the mounting evidence of mismanagement and abuse that have plagued the restart of loan payments. They will have to reckon with the financial injury that returning payment obligations cause to millions of borrowers. The following collection of papers offers damning evidence that supports bold action to protect borrowers.

DELIVERING DISTRESS TO LOW-INCOME, LOW-BALANCE BORROWERS

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Background

When Congress passed the first of the modern Income-Driven Repayment (IDR) plans in 1992, it made a promise to borrowers that federal student loan payments would be affordable, and that through eventual cancellation, student loans would not be a lifetime burden. Even the current Administration now acknowledges[1] the IDR plans of the past two decades have failed to deliver on that promise.

Prior to a series of emergency executive actions taken by the Biden Administration, data from the U.S. Department of Education (ED) revealed that, as of early 2021, only 32 IDR borrowers had successfully cancelled their loans,[2] even though 4.4 million borrowers had been in repayment for 20 years or longer.[3] A year later, a scorching report by the U.S. Government Accountability Office (GAO) revealed that the number had only increased to 132 borrowers.[4]

The historical failures of IDR are several-fold. For one, for many borrowers who are struggling to make ends meet, IDR payments are not, in fact, affordable.[5] Secondly, many borrowers who could take advantage of IDR have had trouble accessing these plans, especially in the long term, due to poor and often abusive servicing practices.[6] In fact, according to research by JP Morgan Chase, those who need IDR the most are the least likely to be enrolled in IDR.[7]

Finally, the duration and the all-or-nothing structure of IDR cancellation after 20 or 25 years is psychologically and financially overwhelming—particularly for borrowers with relatively low balances. After years of jumping through bureaucratic hoops and struggling to make payments, many low-income borrowers have historically seen their balances grow ever larger.[8] While the Administration's changes will prevent borrowers' balances from growing in the future—if these borrowers are able to access the new IDR program—for borrowers who have been in repayment for many years, the damage has been done. More than just feeling hopeless, the result is financially devastating if the borrower defaults and faces seizure of wages or public benefits to repay a far higher balance than when they started.

> Prior to a series of emergency executive actions taken by the Biden Administration, data from the U.S. Department of Education (ED) revealed that, as of early 2021, only 32 IDR borrowers had successfully cancelled their loans.

As the Administration noted both in its IDR Notice of Proposed Rulemaking (NPRM) and in the preamble to the final rule, 63 percent of borrowers in default had original loan balances of $12,000 or below.[9] Although lower balances equate to lower loan payments, the research shows that many borrowers with lower balances either did not complete a postsecondary program or obtained only a certificate.[10] Thus borrowers with lower balances likely received lower financial returns and demonstrably are more likely to struggle with repaying their loans. This is particularly true for borrowers who still have balances after 10 years. The fact that they still have a loan balance despite having lower payments is an indication of some financial distress.

As will be discussed in the next section, the Biden Administration has taken a number of steps designed to address a number of these historical failures—much of which will result in desperately needed relief for potentially millions of federal student loan borrowers. Following the implementation of the Administration's newest IDR plan, potentially millions of low-balance borrowers, in particular, will be eligible for immediate debt cancellation. However, the restart of the federal student loan system before some of these changes can be implemented has the potential to jeopardize the financial well-being of these low-balance borrowers in particular. On September 1, 2023, the federal student loan payment pause officially ended; interest started accruing for the first time in nearly three and a half years and tens of millions of borrowers started receiving bills.

The goal of this paper is to examine the impact of starting collection on borrowers who have older loans and low balances, when these loans will be cancelled upon implementation of the new IDR rule. This paper will examine both the effect on the borrowers and the liability that servicers may face by sending these borrowers bills.

How the Biden Administration Promised Student Debt Relief to Borrowers With Low Balances

On the same day as the Supreme Court struck down President Biden's plan to provide $10,000 or $20,000 in debt relief to 40 million student loan borrowers, the President announced the newest IDR plan—dubbed the Saving on a Valuable Education or SAVE plan.[11] Through the SAVE plan, President Biden has promised to remedy some of the failures with IDR for some Direct Loan borrowers. For example, the SAVE plan lowers borrowers' payments by increasing the discretionary income threshold to 225 percent of poverty (based upon the borrower's family size) and by reducing the percentage of income taken from 10 percent to five percent for undergraduate debt.[12] The SAVE plan also attempts to remedy the problem of runaway debt by not charging borrowers for the amount of interest that is not covered by the IDR payment.[13]

For low-balance borrowers, the SAVE plan has the potential to provide cancellation much sooner. Under the SAVE plan, borrowers who have original balances that total $12,000 or less will have those loans cancelled after making 120 or ten years of qualifying payments. For every additional $1,000 in total original principal balance above $12,000, borrowers will need to make an additional year's worth of qualifying payments in order to see cancellation—with 20 or 25 years as the maximum amount of time towards cancellation.[14]

Notably, this provision of the new IDR plan counts not just future qualifying payments, but also past qualifying time. This means that borrowers with original principal balances that total less than $12,000 who have more than 10 years of qualifying payments (or the equivalent for borrowers with another year for every additional $1,000 of original principal) will be eligible for cancellation immediately upon the implementation of this portion of the rule. Unfortunately, while some components of the new SAVE plan have been implemented early, the Administration does not plan to implement the changes to the cancellation time until July 2024.[15]

When taken in conjunction with other actions taken by this Administration, this change in IDR cancellation time is truly significant. In addition to developing a new IDR plan, in April 2022 the Administration announced an executive action, dubbed the IDR Account Adjustment.[16] The IDR Account Adjustment was announced immediately following a GAO report which found that ED and its servicers had "trouble tracking borrowers' payments and hasn't done enough to ensure that all eligible borrowers receive the forgiveness to which they are entitled."[17]

> This means that borrowers with original principal balances that total less than $12,000 who have more than 10 years of qualifying payments ... will be eligible for cancellation immediately.

In addition to addressing the problems outlined by the GAO, the IDR Account Adjustment was also intended to be a remedy for the decades of servicer incompetence and malfeasance which has prevented borrowers from accessing IDR.[18]

Similar to its predecessor, the Public Service Loan Forgiveness Waiver, the Account Adjustment works by reclassifying all time in repayment as a qualifying payment towards IDR cancellation.[19] However, to address the chronic problem of forbearance steering, it also counts some time in deferments and forbearances towards IDR cancellation where the borrower either used more than 12 consecutive months of forbearances or 36 cumulative months.[20] The IDR Account Adjustment is only being applied to loans held by ED. However, borrowers with commercially-held Federal Family Education Loan Program (FFELP), Health Education Assistance Loan (HEAL), and Perkins Loans can also have their time in repayment adjusted if they consolidate into the Direct Loan program by the end of 2023.[21]

Despite evidence showing that forbearance steering led many borrowers to delinquency and default, ED chose not to include time that borrowers spent in default in the IDR Account Adjustment.[22]

Most borrowers do not yet have a complete count of their adjusted payments; however, the Administration announced that approximately 804,000 borrowers received total cancellation of their loans as of July 2023 as a result of the IDR Account Adjustment.[23]

Borrowers With Low Balances Eligible for Debt Relief May Face Unjust Debt Collection

Borrowers with low balances who have accumulated more than 120 qualifying IDR payments are being thrust back into repayment despite the fact that they will have their loans cancelled on July 1, 2024. After the federal student loan system was shut off for the past three and a half years, the payment pause ended on September 1, 2023. Interest is now accruing for borrowers with ED-held loans and servicers are starting to send borrowers bills for payment. This puts borrowers with low balances who have more than the requisite number of qualifying payments in a precarious position. Servicers are sending these borrowers bills telling them that they still have outstanding loan balances and need to start making payments.

The return to repayment is going to cause significant financial harm for millions of borrowers. But there is no reason for borrowers whose loans will be cancelled in July to be making payments. These borrowers have the legal option to use a forbearance until July without any legal or financial downside. In fact, because of the "on-ramp" period—in which borrowers will not be considered delinquent if they miss a payment during the first year of the return to repayment—borrowers do not even need to take action to put their loans into a forbearance.[24]

Borrowers lack sufficient information to know whether they are going to have their loans cancelled. Servicers do not provide borrowers with counts of IDR qualifying payments and given the many historical problems with servicing, few borrowers trust that they can figure out their payment count on their own. Failures of the student loan system have shown that the onus should not be on borrowers to navigate this complicated system. Yet even if it *were* fair to put the onus on borrowers, borrowers are not going to have sufficient information to make an informed decision about their own finances.

Borrowers with lower original principal balances who still have outstanding balances after 10 years are likely to be lower-income and likely have completed less education.[25] On the whole, this population will likely have a harder time entering back into repayment. Under the IDR rules, borrowers should get a refund for any overpayments they make—this refund may be insufficient to protect borrowers from immediate financial harm. Many borrowers may feel pressured to make payments and may sacrifice other necessities in order to pay their student loans.

ED has not released the number of borrowers that it expects to receive cancellation when the new regulations take effect, nor does it publish information about loan original balances by age.[26] Though ED data and the GAO report suggest that very few borrowers have been consistently enrolled in an IDR plan for 10 or more years, because of the IDR Account Adjustment, implementation of the shorter cancellation time will likely result in a significant number of borrowers getting cancellation. In 2021, ED released data to Senator Elizabeth Warren with information about borrowers by current loan balance and age of the loan.[27] Extrapolating from this data and from data published in ED's data center,[28] roughly two million or more borrowers should get cancellation as soon as the new SAVE cancellation timeline goes into effect.[29]

Looking outside of the Direct Loan portfolio, there are many FFELP borrowers who, if they consolidate their loans into the Direct Loan program before the IDR Account Adjustment deadline—December 31, 2023—will be eligible to have their loans cancelled. But instead of facilitating this consolidation, FFELP lenders and servicers are sending these borrowers bills.

> ...[R]oughly two million or more borrowers should get cancellation as soon as the new SAVE cancellation timeline goes into effect.

There are three discrete categories of FFELP borrowers who are just one step away from cancellation. The first category are FFELP borrowers with older loans. Borrowers who have more than 20 or 25 years of qualifying repayment time[30] but have commercially-held FFELP loans could have their loans cancelled immediately upon consolidating their loans regardless of their original loan balance.

The next two categories are the borrowers who would be eligible for early cancellation under SAVE, but for the fact that they have FFELP loans.

Borrowers who have made 120 payments in the Income-Based Repayment (IBR) plan and/or the 10 year Standard Repayment Plan and originally borrowed less than $12,000 can have their loans cancelled following July 2024, but only if they consolidate first. Because the new SAVE rules count qualifying time prior to consolidation towards IDR cancellation, these borrowers have sufficient qualifying payments without utilizing the IDR Account Adjustment.[31] These borrowers can get cancellation if they consolidate prior to December 31, 2023, or after July 1, 2024, when the new rules take effect.[32]

The last category of borrowers are the remaining FFELP borrowers who have been in repayment for 10 years but were not enrolled in IBR. Like borrowers with 20 or 25 years of repayment, FFELP borrowers who originally borrowed less than $12,000 with 10 or more years of repayment should be eligible for cancellation starting in July 2024.[33] However, they must consolidate before the end of 2023 to have all their eligible time count under the IDR Account Adjustment.

The categories of FFELP borrowers who need the IDR Account Adjustment in order to qualify for cancellation will lose out on the ability to have their loans cancelled if they do not consolidate into the Direct Loan program by the end of 2023. If they do not consolidate by this deadline, they will pay significantly more for longer.

The number of borrowers who will potentially lose out on this relief is significant. The FFELP loan program stopped originating loans in 2010. Thus, the vast majority of FFELP borrowers will have been in repayment for more than 10 years. This is especially true for borrowers with lower balances who typically attended school for a shorter period of time.

Collecting Student Debt Delivers Distress to Low-Balance Borrowers and Exposes Student Loan Companies to New Lawsuits

The asymmetry of information that exists between borrowers and their servicers puts low-balance borrowers who will have their loans cancelled in July 2024 at risk. Sending these borrowers bills which affirmatively state a loan obligation and the requirement of payments while failing to take steps to inform borrowers that they will have their loans cancelled likely constitutes a violation of their rights under Dodd Frank and state consumer protection laws.[34]

At least three states prohibit misrepresenting or omitting the "nature, or terms of a fee or payment due or claimed to be due" on a student loan.[35] Sending borrowers bills stating that they owe a loan balance and have payments due, while withholding the fact that the balance will be cancelled materially misrepresents the nature of the amount that is due. It is reasonable for a borrower who sees a loan bill with an outstanding balance and a payment amount with a due date to think that they need to make that payment. But in reality, borrowers whose loans will be cancelled upon implementation of the cancellation provisions do not need to make a payment. While it may be true that the balance has not yet been cancelled, for this subset of borrowers, servicers have the information necessary to know for certain that the loan balances will be cancelled and that no further action is needed from borrowers.[36] Therefore, telling those borrowers that they need to make payments is both inaccurate and harmful.

For many borrowers, especially, low-income borrowers, making that payment will have negative financial consequences. Some borrowers will need to cut back on basic necessities in order to make their loan payments as payments resume.[37] However, the consequences of defaulting on a federal student loan are severe and borrowers may feel compelled to make that financial sacrifice in order to avoid the negative consequences of failing to make a loan payment. Few, if any, borrowers have sufficient information to determine whether they will have their loans cancelled under the new SAVE plan. But servicers can identify these borrowers through their own servicer records and National Student Loan Data System (NSLDS). Sending bills to borrowers—especially those who are likely to be struggling financially—telling them that they owe thousands of dollars will pressure many of those borrowers into sending money to loan servicers that they cannot afford. The failure to tell borrowers about their legal rights while simultaneously telling borrowers that they must make payments deceives borrowers into believing a reality about their loans that is incorrect.

Sending bills to borrowers whom servicers know will never need to make a payment again is not just deceptive but it is also unfair and abusive.[38] Because of the imbalance of information, borrowers are not in a position to avoid the harm of making unnecessary payments, which will make it harder for them to pay rent and put food on the table. And there is no value to consumers (or competition) to sending borrowers a bill that they do not need to pay. These low-balance borrowers would be better off if they did not receive a bill and took no action. Lastly, sending these bills without complete information materially interferes with the borrower's ability to understand their rights and strong-arms borrowers who believe that they need to make payments to keep their loans in good standing into making payments they cannot afford.

Sending bills to borrowers—especially those who are likely to be struggling financially—telling them that they owe thousands of dollars will pressure many of those borrowers into sending money to loan servicers that they cannot afford.

Just like with low-balance Direct Loan borrowers, by sending bills to borrowers with commercially-held FFELP loans who could have their loans cancelled through either the IDR Account Adjustment and/or the SAVE plan, while omitting that with a simple consolidation application they could have their loans cancelled, FFELP lenders and servicers are similarly engaging in an unfair and deceptive practice. This information is material to these borrowers understanding their rights and their obligations. FFELP lenders and servicers also have the information necessary to identify borrowers who would benefit from these programs but are withholding that information. Sending bills without information about cancellation, is likely a violation of many state consumer protection statutes.[39] In particular, the California Student Borrower Bill of Right requires (among other things):

- Servicers must provide accurate information about repayment options. Borrowers must be given accurate information about income-based repayment plans or other flexible repayment options to avoid default.
- Servicers and lenders cannot omit important information. They must present all the important information about a loan and not misrepresent the information in any way.
- Servicers cannot take advantage of misunderstandings. They are required to work in the best interest of borrowers, even if it means missing out on profits.[40]

The IDR Account Adjustment and its imminent deadline are important information that FFELP lenders are omitting when they send bills to FFELP borrowers. Critically, many FFELP lenders may not want borrowers to take advantage of the IDR Account Adjustment because it means that these lenders will lose account volume. Nonetheless, as the California law clearly anticipates, lenders must provide this full information in spite of any financial losses to these lenders. By failing to provide accurate and complete information about borrowers' options, lenders are both violating California law and costing borrowers potentially thousands of dollars and years of additional repayment.

As this paper demonstrates, servicers' current practice of sending bills to low-balance borrowers who have been in repayment for more than a decade is harmful to borrowers and likely a violation of Dodd Frank and state laws. The Administration itself stated that the reason for reducing the time to cancellation for borrowers with low balances was because they are more likely to experience financial distress and to have not received value for their education. States and the Consumer Financial Protection Bureau must step up their enforcement efforts and protect low-balance borrowers from being deceived into making unnecessary and unaffordable payments.

Endnotes

1 Press Release, U.S. Dep't of Educ., Biden-Harris Administration Begins Discharges for 804,000 Borrowers with $39 Billion in Automatic Loan Forgiveness as a Result of Fixes to Income-Driven Repayment Plans (Aug. 14, 2023), https://www.ed.gov/news/press-releases/biden-harris-administration-begins-discharges-804000-borrowers-39-billion-automatic-loan-forgiveness-result-fixes-income-driven-repayment-plans.

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8 *See e.g.*, Mark Huelsman, Student Borrower Prot. Ctr., Driving Runaway Debt: How IDR's Current Design Buries Borrowers Under Billions of Dollars in Unaffordable Interest (Sept. 2021), https://protectborrowers.org/driving-runaway-debt-how-idrs-current-design-buries-borrowers-under-billions-of-dollars-in-unaffordable-interest/.

9 Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program, 88 Fed. Reg. 43820, 43874 (July 10, 2023).

10 *Id*.

11 The White House, Statements and Releases, FACT SHEET: President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers (June 30, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/30/fact-sheet-president-biden-announces-new-actions-to-provide-debt-relief-and-support-for-student-loan-borrowers/. *See* 88 Fed. Reg. 43820.

12 *See* 88 Fed. Reg. 43820.

13 *Id*.

14 88 Fed. Reg. at 43902.

15 *Id*. at 43820–21.

16 Press Release, U.S. Dep't of Educ., Department of Education Announces Actions to Fix Longstanding Failures in the Student Loan Programs (Apr. 19, 2022), https://www.ed.gov/news/press-releases/department-education-announces-actions-fix-longstanding-failures-student-loan-programs.

17 *See* U.S. Gov't Accountability Office, GAO-22-103720, *supra* note 4.

18 *See* Press Release, U.S. Dep't of Educ., *supra* note 16.

19 *Id.*

20 *Id.*

21 *See* U.S. Dep't of Educ., Fed. Student Aid, Payment Count Adjustments Toward Income-Driven Repayment and Public Service Loan Forgiveness Programs, https://studentaid.gov/announcements-events/idr-account-adjustment (last visited Sept. 20, 2023).

22 For further discussion of the IDR Account Adjustment and defaulted loans, *see infra*, Shafroth & Taylor, Delivering Distress to Borrowers in Default at p. 69.

23 *See* Press Release, U.S. Dep't of Educ., *supra* note 1.

24 *See* U.S. Dep't of Educ., Fed. Student Aid, Prepare for Student Loan Payments to Restart, https://studentaid.gov/manage-loans/repayment/prepare-payments-restart (last visited Sept. 20, 2023).

25 Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program, 88 Fed. Reg. at 43874.

26 *See generally*, U.S. Dep't of Educ., Federal Student Aid Data Center, https://studentaid.gov/data-center (last visited Sept. 18, 2023).

27 *Educ. Dep't Responses to Data Request* by Senator Warren, *supra* note 3.

28 Federal Student Aid Data Center., *supra* note 26.

29 SBPC analysis on file.

30 As counted under the IDR Account Adjustment.

31 Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program, 88 Fed. Reg. at 43903.

32 *Id*.

33 As counted under the IDR Account Adjustment.

34 For further discussion of the history and application of consumer law to student loan servicers, *see infra*, Berkman-Breen, Delivering Distress and Breaking the Law: How Sending Bills Violates Consumer Protection Laws at p. 96.

35 *See* Cal. Civ. Code § 1788.102(r)(2); Colo. Rev. Stat. § 5-20-109(1)(b); Va. Code Ann. § 6.2-2610(A)(2)(i).

36 Servicers may argue that because the rule has yet to take effect and because there is a pending resolution of disapproval in Congress, there may be some risk to borrowers that this cancellation may not happen. The congressional resolution is unlikely to succeed and thus any risk is hypothetical and speculative. However, even if a court could be persuaded that the resolution posed some risk to this cancellation, under the Congressional Review Act statute, the congressional resolution should be resolved well before the end of the year.

37 Thomas Conkling & Christa Gibbs, *Office of Research Blog: Update on Student Loan Borrowers as Payment Suspension Set to Expire*, Consumer Fin. Prot. Bureau (June 7, 2023), https://www.consumerfinance.gov/about-us/blog/office-of-research-blog-update-on-student-loan-borrowers-as-payment-suspension-set-to-expire/.

38 *See* 12 U.S.C.S. § 5536(a)(1)(B). *See also,* Consumer Fin. Prot. Bureau, *Policy Statement on Abusive Acts and Practices* (Apr. 2023), https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/.

39 *See e.g.*, Cal. Civ. Code § 1788.102(r)(2); Colo. Rev. Stat. § 5-20-109(1)(b); Va. Code Ann. § 6.2-2610(A)(2)(i).

40 *Student Borrower 'Bill of Rights' Protects Californians, Promotes Economic Justice*, Cal. Dep't of Fin. Prot. & Innovation, https://dfpi.ca.gov/2022/03/15/slbor/ (last visited Sept. 19, 2023).

DELIVERING DISTRESS TO PUBLIC SERVICE WORKERS

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Background

For more than 15 years, teachers, nurses, and other public service workers across the country have had the right under federal law to have student debt cancelled after completing a decade of full-time public service work.[1] The bipartisan legislation establishing the Public Service Loan Forgiveness (PSLF) program promised to give credit for any full-time public service work completed by a student loan borrower from the moment former President George W. Bush signed it into law in October 2007.[2] In 2013, the federal Consumer Financial Protection Bureau (CFPB), considering the potential scope of PSLF as designed, estimated that as many as one-in-four U.S. workers were employed by a PSLF-eligible employer.[3] Unfortunately, over the years that followed, a generation of public service workers were routinely and systematically denied their rights under this law—the direct result of widespread mismanagement of the program by Education Department (ED) officials across the Bush, Obama, and Trump Administrations, made worse by a shocking range of abuses by the largest student loan companies in America.[4]

In the years between October 2017, when the first student loan borrowers should have become eligible to have debts cancelled under PSLF, and January 2021, when President Biden and Education Secretary Miguel Cardona took ownership over the student loan system, more than 97 out of every 100 public service workers who applied to have their student debt cancelled were rejected.[5] Over this period, a series of high-profile enforcement actions by state attorneys general and private lawsuits by student loan borrowers and their advocates, including the American Federation of Teachers (AFT), documented a series of scandals that, when taken together, demonstrated the profound failure of this program.[6] These actions built on the foundation laid through earlier lawsuits brought by the CFPB and several state attorneys general related to the widespread mismanagement of Income-Driven Repayment (IDR) plans—the cornerstone of the student loan safety net and the repayment option that maximizes the amount of debt cancelled for public service workers under PSLF.[7] In the weeks following the 2020 presidential election, a broad coalition of advocates for public service workers, led by AFT and the National Education Association, demanded the new administration finally keep the promises made to public service workers, overhauling the scandal-plagued program and cancelling their student debt.[8]

In 2021, President Biden announced a sweeping overhaul of PSLF in the form of a time-limited "waiver"—opening the door to immediate student debt cancellation for millions of public service workers across the country.

How the Biden Administration Promised Student Debt Relief to Public Service Workers

On October 6, 2021, the Biden Administration announced a series of emergency actions to remedy more than a decade of mismanagement and abuse that had denied debt cancellation to a generation of public service workers. This new initiative, called the PSLF Limited Waiver, awarded credit toward PSLF for any borrower who spent any period of time since 2007 working in public service while repaying a federal student loan.[9] Specifically, this administrative action reopened access to PSLF for borrowers with older federal loans made by banks and other private lenders, and expanded the scope of qualified repayment plans to allow all borrowers making monthly payments to gain credit.[10] At the time this policy was first announced, the Administration stated that it would be available to public service workers for just one year, concluding on October 31, 2022.[11]

At the time the PSLF Limited Waiver was first announced in October 2021, the Biden Administration also pledged to fully automate the process of qualifying for PSLF for large classes of public service workers, starting with all current and former members of the U.S. military and all current and former federal employees.[12] These data matches could be followed by similar automation across the public service workforce—providing a pathway for state governments, school districts, and other large public service employers to eliminate the red tape and administrative burdens that blocked debt relief for millions of otherwise qualified borrowers.

Midway through the waiver period, the Administration announced a second student debt relief initiative also aimed at addressing the many barriers encountered by public service workers and other working people with student debt.[13] This broader initiative, subsequently known as the Income-Driven Repayment (IDR) Account Adjustment , would offer credit toward loan forgiveness under both IDR and PSLF for any borrower who paused their monthly loan payments for long periods of time—recognition that millions of borrowers, including those working in public service, had been improperly "steered" into these options by student loan companies.[14] In stating the rationale for this more expansive initiative, ED explained:

[Reviews by the ED's Office of Federal Student Aid (FSA)] suggest that loan servicers placed borrowers into

forbearance in violation of Department rules, even when their monthly payment under an IDR plan could have been as low as zero dollars. These findings are consistent with concerns raised by the Consumer Financial Protection Bureau and state attorneys general. A borrower advised to choose an IDR plan instead of forbearance can get a reduced payment, stay in good standing, and make progress toward loan forgiveness. A borrower advised to choose forbearance – particularly long-term consecutive or serial uses of forbearance – can see their loan balance and monthly payments grow due to interest capitalization and lead to delinquency or default.[15]

In effect, ED, as the largest holder of outstanding student loans and administrator of the student loan program, recognized that unlawful conduct by the student loan industry could be grounds to deliver student debt relief at an unprecedented scale.

To date, these two actions delivered complete debt cancellation to more than 660,000 public service workers and provided credit towards PSLF for an additional two million public service workers who had certified public service work over this period.[16]

In October 2022, just days before this Limited Waiver was set to expire, the Biden Administration announced that the IDR Account Adjustment would act as a quasi-extension of this program—offering expanded access to PSLF until July 2023.[17] This deadline was subsequently extended.[18] As of the date of this publication, ED intends to preserve expanded access to PSLF via the IDR Account Adjustment until at least July 2024, but will close the door to PSLF for borrowers with certain types of older federal student loans on December 31, 2023.[19] Unfortunately, a large cohort of borrowers promised immediate, automatic credit toward PSLF by virtue of their public service work as a member of the military or as a federal employee have yet to receive this benefit, suggesting that the window for these time-limited executive actions is likely to close before delivering debt relief for these borrowers, despite the federal government maintaining all of the information necessary to cancel their debts.

At the same time, the Biden Administration undertook a years-long process to write new rules for both PSLF and IDR, codifying in regulation many of the features of the PSLF Limited Waiver and the IDR Account Adjustment that sought to remedy the historical government mismanagement that had previously denied debt relief to public service workers.[20] ED finalized new rules for PSLF in October 2022, taking effect on July 1, 2023.[21] ED finalized new rules governing a new IDR plan, known as the Saving on a Valuable Education plan or SAVE, in June 2023—immediately implementing some aspects of these new regulations while delaying implementation of others until July 2024.[22]

As a backdrop to these sweeping changes, the Biden Administration repeatedly extended the pandemic-era pause on student loan payments, interest charges, and debt collection.[23] In total, the vast majority of federal student loan borrowers have not needed to make a payment since March 2020.[24] For public service workers, this three-and-a-half-year pause provided an additional benefit—each month of paused payments counted as a qualifying month toward PSLF.[25] Over time, opposition to this payment pause by the largest companies in the student loan industry grew more vocal, culminating in a lobbying blitz and litigation filed by the student loan refinance company SoFi in early 2023.[26] In May 2023, President Biden and House Speaker Kevin McCarthy reached an agreement to restart student loan payments in September 2023 as part of a broader deal to lift the nation's borrowing limit.[27]

Public Service Workers Eligible for Debt Relief May Face Unjust Debt Collection

The executive actions and regulatory changes described above promised that millions of public service workers would not reenter repayment at all. The Administration made laudable progress in its effort to keep this promise—cancelling debts outright for more than 600,000 public service workers before student loan payments would resume. However, recent data published by ED's Office of Federal Student Aid indicate that, over the course of this waiver period, as many as one million borrowers attempted to certify their service only to have paperwork mired in a gargantuan processing backlog managed by the Missouri Higher Education Loan Authority (MOHELA), the private-sector student loan company selected by the Department of Education in 2021 to administer PSLF.[28] Little is known about the length of time borrowers typically wait to have paperwork processed by MOHELA, but publicly available data indicates that the volume of unprocessed forms grew nearly seven-fold between March 2022 and January 2023.[29] As of the end of June 2023, the date of the most recent administrative data released by ED, nearly 900,000 forms remain in MOHELA's backlog—forms submitted by borrowers who will be expected to repay bills even if they ultimately have their debts cancelled when MOHELA processes their paperwork.

> The Administration made laudable progress in its effort to keep this prom-ise—cancelling debts outright for more than 600,000 public service workers before student loan payments would resume.

Further, in June 2022, the Student Borrower Protection Center estimated that more than 7 million public service workers remain potentially eligible to have their debts cancelled under PSLF if they certified their public service work.[30] This additional, unrealized wave of mass debt relief for public service workers would save these borrowers from having to navigate the return to repayment, which promises to return tens of millions of borrowers back into the same, broken student loan system that drove millions into distress prior to the pandemic.[31] Among these public service workers who have yet to take any action to pursue PSLF, an unknown number of military borrowers, potentially totaling in the hundreds of thousands, were promised automatic debt cancellation by the Biden Administration in October 2021.[32]

Instead, hundreds of thousands of public service workers who did everything right—certifying public service work and raising their hands to request debt relief—will receive a monthly student loan bill from their student loan servicer. Millions more will receive bills instead of direct outreach from student loan companies who may already have the information necessary to identify them as being potentially eligible for PSLF. As described below, for private-sector student loan companies, including those operating under contract with ED's Office of Federal Student Aid, it is also likely a violation of a range of federal and state consumer laws to prioritize debt collection over debt cancellation.

Collecting Student Debt Delivers Distress to Public Service Workers and Exposes Student Loan Companies to New Lawsuits

Dating back prior to America's founding, courts have banned fraud and other types of unfair dealing between financial firms and private citizens. Over time, Congress and state governments codified many of the legal principles of fair dealing by prohibiting so-called "unfair" and "deceptive" practices, along with practices that are otherwise "unlawful" or "illegal."[33] In 2010, in the throes of the foreclosure crisis and the Great Recession, Congress also codified the common law prohibition on "unconscionable" conduct, banning so-called "abusive" acts and practices by providers of consumer financial products and services.[34] This centuries-old body of consumer laws prohibits a range of bad practices and offers a bulwark against business conduct that unlawfully disadvantages one party in a business relationship. As applied in the student loan market, federal and state consumer law have halted a wide range of predatory lending and harmful loan servicing conduct.[35] For advocates seeking to protect student loan borrowers during the unprecedented and chaotic post-pandemic transition back into repayment, federal and state consumer law offers a set of guardrails independent of any policy decisions made by Biden Administration Education officials.

For the estimated three-quarters-of-a-million public service workers who have submitted paperwork to MOHELA but have yet to receive a determination as to their eligibility for debt cancellation, there is a colorable argument that any solicitation of any monthly payment of any amount by MOHELA is an unfair, deceptive, or abusive practice, depending on the circumstance.

> ...[F]ederal and state consumer law offers a set of guardrails independent of any policy decisions made by Biden Administration Education officials.

Further, specific states have enacted consumer protections intended to create a baseline of adequate conduct by nonbank student loan servicers like MOHELA. For example, the state of Colorado prohibits any student loan servicer operating in Colorado from engaging in "an unfair or deceptive practice toward a borrower" or misrepresenting or omitting "material information in connection with the servicing of a student loan, including, but not limited to, misrepresenting the amount, nature, or terms of a fee or payment due or claimed to be due on a student loan, the terms and conditions of the student loan agreement, or the borrower's obligations under the student loan."[36] Virginia law contains a similar prohibition and also prohibits student loan servicers from engaging in acts or practices that "that substantially interferes with a borrower's right to an alternative payment arrangement; loan forgiveness, cancellation, or discharge."[37] These general prohibitions appear to apply cleanly to circumstances where a loan servicer such as MOHELA has information in its possession indicating that a borrower is eligible to have his or her debt cancelled outright, but attempts to collect this debt anyway.

Some states also offer protections specific to public service workers—laws enacted directly in response to the widespread mismanagement and abuse by the student loan industry that necessitated emergency executive actions like the Limited Waiver and the Account Adjustment. For example, California prohibits a student loan servicer from engaging in "unfair or deceptive practice toward any borrower working in public service" or misrepresenting or omitting "material information in connection with the servicing of a student loan owed by a borrower working in public service."[38] A similar prohibition protects military borrowers.[39] These population-specific prohibitions also appear to apply to circumstances where a loan servicer has information in its possession indicating that a borrower is eligible to have his or her debt cancelled outright, but attempts to collect this debt anyway.

Viewed this way, the return to repayment constitutes an unprecedented emergency for public service workers with student debt. Hundreds of thousands of public service workers may have already been harmed by illegal loan servicing practices tied to the return to repayment and millions more are at risk in the coming weeks. It is incumbent on law enforcement officials, policymakers, and advocates to use all available tools to protect teachers, nurses, and other public service workers from these abuses. It would be an extraordinary injustice to allow the very programs enacted to remedy past abuses to be derailed in a similar manner. We have come too far to let the same predatory student loan companies create a new financial catastrophe for public service workers with student debt.

Endnotes

1 College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784 (2007).

2 *Id. See also,* 20 U.S.C. § 1087e(m).

3 Consumer Fin. Prot. Bureau, *Public Service & Student Debt: Analysis of Existing Benefits & Options for Public Service Organizations* (Aug. 2013), https://files.consumerfinance.gov/f/201308_cfpb_public-service-and-student-debt.pdf.

4 *See, e.g.*, Student Borrower Prot. Ctr. & Am. Fed'n of Teachers, *Keeping the Promise of Public Service Loan Forgiveness* (Dec. 2018), https://protectborrowers.org/wp-content/uploads/2020/01/SBPC-AFT-PSLF-Investigation.pdf; Student Borrower Prot. Ctr. & Am. Fed'n of Teachers, *Broken Promises: Employer Certification Failures* (Aug. 2020), https://protectborrowers.org/wp-content/uploads/2020/08/ECFFailures.pdf; Student Borrower Prot. Ctr. & Am. Fed'n of Teachers., *Broken Promises: The Untold Failures of ACS Servicing* (Oct. 2020), https://protectborrowers.org/wp-content/uploads/2020/10/Broken-Promises_ACS.pdf.

5 U.S. Dep't of Educ., Fed. Student Aid, Public Service Loan Forgiveness Data: June 2020 PSLF Report, https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data (last visited Sept. 20, 2023).

6 During the final weeks before the Administration announced the Limited Waiver, two additional scandals emerged undermining any remaining case that, over time, the program would live up to its promise on its own. First, Politico reported that thousands of public school districts across the country had educators rejected by ED when attempting to pursue PSLF, seemingly due to improper handling of paperwork or clerical errors. Second, the continued obstacles to PSLF facing active-duty members of the military received extraordinary attention due to an investigative piece aired by CBS News' 60 Minutes. In both cases, the ED appears to have made policy decisions in response to this press coverage. *See Michael Stratford, Thousands of teachers rejected for public service loan forgiveness program, new data shows, Politico* (Sept. 21, 2021), https://www.politico.com/news/2021/09/21/teachers-rejected-loan-forgiveness-program-513396; Lesley Stahl, *60 Minutes: Military members promised student debt relief in exchange for ten years of public service say promise is often broken, CBS*

News (Oct. 3, 2021), https://www.cbsnews.com/news/student-loan-debt-forgiveness-public-service-60-minutes-2021-10-03/.

7 *See, e.g.*, *Consumer Fin. Prot. Bureau v. Navient Corp*., No. 17-cv-00101, 2017 U.S. Dist. LEXIS 123825 (M.D. Pa. Aug. 4, 2017), Complaint, Pennsylvania*. v. Navient Corp*., No. 3:17-cv-1814-RDM (M.D. Pa. June 19, 2019), https://www.attorneygeneral.gov/wp-content/uploads/2018/01/PA-v.-Navient-Complaint-2017-10-6-Stamped-Copy.pdf; Complaint, *Caifornia v. Navient Corp*., No. CGC-18- 19 567732 (Cal. Super. Oct. 16, 2018), https://oag.ca.gov/system/files/attachments/press_releases/CA%20AG%20First%20Amended%20Complaint%20-%20Navient.pdf; Complaint*, Illinois v. Navient Corp*., No. 2017-CH-00761 (Ill. July 10, 2018), https://illinoisattorneygeneral.gov/pressroom/2017_01/NavientFileComplaint11817.pdf; Complaint, *Mississippi. v. Navient Corp*., No. G2108-98203 (Miss. July 24, 2018), https://www.scribd.com/document/384612507/Navient-ComplaintFiled; Complaint, *Washington v. Navient Corp*., No. 17-2- 01115-1 SEA (Wash. Jan. 18, 2017), https://www.classaction.org/media/state-of-washington-v-navient-corporation-et-al.pdf.

8 For further discussion see, Memorandum from the Student Borrower Prot. Ctr. on Paving the Way for Public Service Loan Forgiveness Reform to Interested Parties, (Oct. 2021), https://protectborrowers.org/wp-content/uploads/2021/10/PSLF-Memo-10.21.pdf.

9 Press Release, U.S. Dep't. of Educ., Fact Sheet on Public Service Loan Forgiveness Overhaul (Oct. 6, 2021), https://www.ed.gov/news/press-releases/fact-sheet-public-service-loan-forgiveness-pslf-program-overhaul.

10 *Id.*

11 *Id.*

12 *Id.*

13 Press Release, U.S. Dep't. of Educ., Department of Education Announces Actions to Fix Longstanding Failures in the Student Loan Programs (Apr. 19, 2022), https://www.ed.gov/news/press-releases/department-education-announces-actions-fix-longstanding-failures-student-loan-programs.

14 *Id.*

15 *Id.*

16 Between October 2021 and June 2023, 98.8% of all debts cancelled under PSLF were done via these emergency actions. During this period, 3,286,397 forms were submitted and successfully documented qualifying public service work, on behalf of 2,732,912 unique borrowers. Of these borrowers, 662,000 have had their debts cancelled since October 2021. Assuming the proportion of borrowers receiving credit is roughly equivalent to the proportion of borrowers receiving debt cancellation under PSLF, SBPC estimates 2,037,401 unique borrowers have received credit toward PSLF over this period but have yet to have their debts cancelled. Student Borrower Prot. Ctr., Unpublished 2023 Analysis of Administrative Data Released by the Office of Federal Student Aid (on file with authors). *See also* U.S. Dep't. of Educ., Fed. Student Aid, Public Service Loan Forgiveness Data, https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data (last visited Sept. 10, 2023).

17 Readers should note that the IDR Account Adjustment is not a complete extension of the PSLF Waiver. For example, former public service workers who no longer work full time in public service jobs lost the right to apply for PSLF when the PSLF Limited Waiver concluded on October 31, 2022. *See* Press Release, U.S. Dep't. of Educ., Education Department Announces Permanent Improvements to the Public Service Loan Forgiveness Program and One-time payment Count Adjustment to Bring Borrowers Closer to Forgiveness (Oct. 25, 2022), https://www.ed.gov/news/press-releases/education-department-announces-permanent-improvements-public-service-loan-forgiveness-program-and-one-time-payment-count-adjustment-bring-borrowers-closer-forgiveness. For a further discussion of the limitations of this quasi-extension, *see* Press Release, Student Borrower Prot. Ctr., Biden Administration Listens to Borrowers, Grants Last-Minute Reprieve to Millions of Public Service Workers With Student Debt; Action Still Leaves Many Without Path to Debt Relief (Oct. 20, 2022), https://protectborrowers.org/in-last-minute-biden-administration-extends-most-pslf-benefits-but-still-leaves-many-out/.

18 For further discussion of deadlines related to the Account Adjustment, *see* U.S. Dep't. of Educ., Fed. Student Aid, *Payment Count Adjustments Toward Income-Driven Repayment and Public Service Loan Forgiveness Programs,* https://studentaid.gov/announcements-events/idr-account-adjustment#frequently-asked-questions (last visited Sept. 10, 2023).

19 *Id.* ("Borrowers who have commercially managed FFEL, Perkins, or Health Education Assistance Loan (HEAL) Program loans, should apply for a Direct Consolidation Loan by the end of 2023, to get the full benefits of the one-time account adjustment.")

20 *See also* U.S. Dep't of Educ., *Education Department Announces Permanent Improvements to the Public Service Loan Forgiveness Program and One-time payment Count Adjustment to Bring Borrowers Closer to Forgiveness* (Oct. 25, 2022), https://www.ed.gov/news/press-releases/education-department-announc-

es-permanent-improvements-public-service-loan-forgiveness-program-and-one-time-payment-count-adjustment-bring-borrowers-closer-forgiveness.

21 U.S. Dep't. of Educ., *supra* note 20.

22 For a more detailed discussion, *see supra*, Yu, Delivering Distress to Low-Income, Low-Balance Borrowers, at p. 10.

23 U.S. Dep't of Educ., Fed. Student Aid, *COVID-19 Loan Payment Pause and 0% Interest*, https://studentaid.gov/announcements-events/covid-19/payment-pause-zero-interest (last visited Sept. 10, 2023).

24 *Id.*

25 *Id.*

26 *See* Press Release, Student Borrower Prot. Ctr., Failing Private Student Lender Sues Biden Administration to Force Student Loan Bills for Tens of Millions (March 2023); https://protectborrowers.org/failing-student-loan-refi-company-sues-to-end-vital-pandemic-relief-amid-case-to-block-cancellation-effort/.

27 Fiscal Responsibility Act of 2023, Public L. No. 118-5, 137 Stat. 10.

28 *See* Student Borrower Prot. Ctr., Unpublished 2023 Analysis of Administrative Data Released by the Office of Federal Student Aid (on file with authors). *See also* U.S. Dep't of Educ., Fed. Student Aid, Public Service Loan Forgiveness Data, https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data (last visited Sept. 10, 2023).

29 *Id*.

30 *See* Press Release, Student Borrower Prot. Ctr., New Analysis: More Than 9 Million Public Service Workers with Federal Student Loans Eligible to Pursue Debt Cancellation, Fewer Than 2 Percent Have Received Relief, and Only 15 Percent On Track (June 9, 2022), https://protectborrowers.org/new-analysis-more-than-9-million-public-service-workers-with-federal-student-loans-eligible-for-debt-cancellation-fewer-than-2-percent-have-received-relief-and-only-15-percent-on-track/.

31 David Dayen, *Student Borrowers Report Chaos and Confusion as Repayment Looms,* The Am. Prospect (Aug. 31, 2023), https://prospect.org/education/2023-08-31-student-borrowers-report-chaos-repayment-looms/.

32 *See* Mike Saunders, *Relief for Servicemembers and Veterans in Delivering on Debt Relief: Proposals, Ideas, and Actions to Cancel Student Debt on Day One and Beyond 150, 153* (2020), https://protectborrowers.org/wp-content/uploads/2021/02/Delivering-on-Debt-Relief-Final.pdf ("The Consumer Financial Protection Bureau (CFPB) estimates that 200,000 servicemembers collectively owe more than $2.9 billion in student debt. These figures suggest that relatively high numbers of military borrowers should be in pursuit of PSLF. However, in analyzing recently obtained data from ED about which borrowers have certified an intent to pursue PSLF, the SBPC identified only 17,534 military borrowers. In other words, based on available government data, fewer than nine percent of military borrowers are on track for PSLF."); *Contra* Press Release, U.S. Dep't of Educ., Fact Sheet on Public Service Loan Forgiveness Overhaul (Oct. 6, 2021), https://www.ed.gov/news/press-releases/fact-sheet-public-service-loan-forgiveness-pslf-program-overhaul ("To date, approximately 110,000 federal employees and 17,000 service members have certified some employment toward PSLF.").

33 For further discussion of the history and application of consumer law to student loan servicers, see *infra*, Berkman-Breen, Delivering Distress and Breaking the Law: How Sending Bills Violates Consumer Protection Laws at p. 96.

34 For further discussion of the history, purpose, and application of the prohibition on "abusive" acts and practices, *see* Consumer Fin. Prot. Bureau, *Policy Statement on Abusive Acts and Practices* (Apr. 2023), https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/.

35 For further discussion, *see* Mike Pierce & Tamara Cesaretti, *The System is Broken: What More Than a Decade of Litigation Reveals About the State of the Student Loan Industry,* Protect Borrowers (Dec. 2019), https://protectborrowers.org/the-system-is-broken-what-more-than-a-decade-of-litigation-reveals-about-the-state-of-the-student-loan-industry/.

36 *See Colo. Rev. Stat.* § 5-20-109(1)(b).

37 *See Va. Code Ann.* § 6.2-2619(b).

38 *See Cal. Civ. Code* § 1788.101(8).

39 *Id.* at §101(7).

DELIVERING DISTRESS TO BORROWERS APPROVED FOR STUDENT DEBT RELIEF

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Introduction

In Fall 2022, the U.S. Department of Education (ED) individually notified over 16 million student loan borrowers that up to $20,000 of their debt was "approved" for cancellation. Hearing this news, many borrowers reacted. They paid off other loans; they requested refunds for money they paid to ED during the COVID-19 payment pause; they obtained long-delayed medical treatment; they had children; they secured new housing; and they went back to school. Now, in the aftermath of the Supreme Court's decision vacating the Biden Administration's cancellation program, these borrowers find themselves in a perilous position: ED is replacing their prior approval letters with collection notices.

The law does not compel ED to do so. Under the Higher Education Act (HEA) and the Federal Claims Collection Act, ED can cancel debt when there is "significant doubt about the government's ability to prove its case in court," or where "[t]he cost of collecting the debt does not justify the enforced collection of the full amount." Here, these 16 million-plus borrowers—through their reliance on ED's individualized notices and per the terms of their Master Promissory Notes (MPN)—have colorable claims against ED. Those claims, coupled with the potential cost of litigating thousands (or millions) of cases, would justify an order cancelling this debt.

> ...[B]orrowers find themselves in a perilous position: ED is replacing their prior approval letters with collection notices.

Below, this paper explains why. After walking through some background facts and governing legal principles, it identifies (and very briefly summarizes) these borrowers' potential claims. It also explains how these claims intersect with ED's cancellation authority. The upshot: as we enter repayment, ED need not collect the amount of debt it "approved" for cancellation as to each of these borrowers. And, given borrowers' potential claims against ED and doubt as to the enforceability of this debt, the ongoing return to repayment may carry additional legal risk for servicers across the student loan system.

Background

Since March 2020, the federal government has not collected on most federal student loans. When repayment was ultimately supposed to start again in January 2023, ED recognized that thrusting millions of borrowers into repayment without more permanent relief would yield an historic wave of defaults. So, coupled with the return to repayment, ED announced it would "provide targeted student debt cancellation to borrowers with loans held by the Department of Education."[1]

For many borrowers, ED had income information to determine eligibility for the program. In mid-October 2022, ED individually notified these borrowers that they were eligible for a discharge saying, "You don't need to take any action if you are interested in receiving student loan debt relief!" The email continued, in bold and underlined text, "We will work with your servicer to process any relief for which you're eligible after November 14, unless you opt out." It reiterated that if they "do not opt out," the "U.S. Department of Education will send your information to your loan servicer(s) after November 14," and the loan servicer "will notify you if and when your debt relief has been applied."[2]

For the remaining borrowers, ED created a simple application form. Approximately 25 million borrowers applied, and ED approved over 16 million of them for cancellation.[3] Using the email addresses the borrowers provided, ED individually notified them of their approval. The notice explained that ED had "reviewed your application and determined you are eligible for loan relief under the Plan." It added "we have sent this approval to your loan servicer." It indicated that the application for cancellation was "complete and approved." The notices also referenced the ongoing litigation challenging the cancellation plan and stated that while it had "approved" the cancellation, the lawsuits were preventing it from "implementing" the cancellation and actually "discharge[ing]" the debt."

As we now know, the litigation challenging the cancellation program succeeded before the Supreme Court. But before the Court ruled, ED and President Biden continually told borrowers that the litigation was "meritless," and cancellation would be forthcoming. For instance, even after a Court temporarily enjoined ED from effectuating relief under the HEROES Act, ED described the decision as "temporary" and noted that it could continue "to provide borrowers the opportunity to apply for debt relief."[4] That same day, President Biden encouraged borrowers to submit their application, saying "A simple application process keeps that commitment, just as I'm keeping my commitment to relieve student debt as borrowers recover from the economic crisis caused by the once-in-a-lifetime pandemic."[5] Until June 2023, the President and ED continually reassured borrowers that the litigation was nothing to worry about.

The Governing Laws

Two laws govern here. First, the HEA. That law provides the Secretary with the power to “compromise, waive, or release any title, claim, lien, or demand.”[6] The HEA also provides the Secretary with authority to modify loans. Specifically, it authorizes the Secretary to “consent to modification, with respect to rate of interest, time of payment of any installment of principal and interest or any portion thereof, or any other provision of any note or other instrument evidencing a loan which has been insured by the Secretary under this part.”[7]

The second key authority is the Federal Claims Collection Act and Debt Collection Improvement Act.[8] These laws set the standards that agencies must follow when attempting to collect certain debts owed to the federal government. The Department of Treasury and Department of Justice promulgated regulations, known as the Federal Claims Collection Standards (FCCS), to implement this law. The circumstances include when[9]:

- Collection is in doubt because the debtor is unable to pay the full amount in a reasonable time;
- The government cannot collect the debt in full within a “reasonable time;”
- The cost of collecting the debt does not justify the enforced collection of the full amount; or
- There is significant doubt about the government’s ability to prove its case in court.

Borrowers Approved for Student Debt Relief May Face Unjust Debt Collection

Under these authorities—which are distinct from the one that was at issue before the Supreme Court—ED has the basis to "compromise a debt in any amount" for each individual who received a specific, personalized, and direct communication regarding cancellation. It can do so on the grounds that "[t]here is significant doubt concerning the Government's ability to prove its case in court" and because this risk multiplies the potential costs of trying to collect on the debt.[10] This form of "legal doubt" compromise is based on "the legal issues involved," "the probabilities of successful prosecution to judgment," and "litigative risks involved," including the necessity of paying costs and attorney fees pursuant to the Equal Access to Justice Act.[11] Here, borrowers share at least three plausible claims against ED that constitute significant "litigative risk" and, if asserted *en masse,* would require substantial resources to address.[12]

First, these 16 million borrowers share a defense that ED should be equitably estopped from collecting on them. Although there is a "high" bar to estop the government,[13] borrowers can plausibly allege the claim. To start, although ED hedged on "implementing" relief, it made a definitive representation to borrowers that they had been "approved" for a discharge. In other words, ED represented that cancellation would be forthcoming even if it was temporarily barred from providing it under one specific authority. Borrowers then—in reliance on that approval *and* the government's repeated statements that the litigation was meritless—reasonably made life-altering choices. And, although "affirmative misconduct" is usually required when trying to establish equitable estoppel against the government, there is no such need for the requirement when it is the agency (and the President), making the representation. The claim, said simply: borrowers should be able to trust the word of a federal agency and the President of the United States.

> ED represented that cancellation would be forthcoming even if it was temporarily barred from providing it under one specific authority.

Second, these borrowers may have a defense under the terms of their MPNs, because ED arguably waived its right to collect on the amount approved for discharge and/or released borrowers' obligations to pay the specific amount.[14] Both the HEA and borrowers' MPNs specifically permit ED to unilaterally waive or release borrowers from their obligations under their contract.[15] ED was aware of its contractual rights to waive payments and ED intentionally relinquished those rights through its express, written, and individualized statements to borrowers that they were either "approved" for relief or would receive relief unless they opted out. In other words, after inviting borrowers to apply for cancellation even after a Court temporarily enjoined the program, and repeatedly telling borrowers the litigation was "meritless," ED cannot now "shift costs" of the Court's decision onto "its contractual partners who are adversely affected by" the decision.[16]

...[W]here ED makes an administrative decision to cease enforcement of these debts, loan servicers may face private liability.

Finally, borrowers may have claims under the Administrative Procedure Act (APA) to try to compel discharge of the debt or to bar ED from collecting on the debt.[17] This is because, through its statements to borrowers, ED unilaterally modified the terms of borrowers' contracts such that it has an obligation to provide debt relief.[18] Moreover, prohibitions on retroactive rulemaking likely create a legal obligation for discharge since, when an agency promises certain benefits to individuals, there are restrictions on when an agency can retroactively deprive the individual of those benefits.[19] Under this theory, ED agreed to provide the discharges and the borrowers now have a vested interest in that cancellation. So long as ED has some legal authority to fulfill its promise, it has a continued legal obligation to this group of individuals.

Notably, this would not be the first time that ED utilizes its HEA and FCCS authority to cancel debt in comparable circumstances. ED has exercised this authority under the HEA for large groups of borrowers sharing a potential defense to repayment of their loan.[20] Indeed, during President Obama's administration, ED notified tens of thousands of borrowers that they were qualified for borrower defense to repayment cancellation. When President Trump took office, the cancellation was still pending. The incoming administration doubted its legality, but found that "[t]he only supportable choice" was to sign off on the discharges. Any other action would "likely result in a lawsuit from…impacted borrowers that would be difficult to defend…"[21]

Where an individual successfully asserts a claim against ED to be released from a loan approved for debt relief, or where ED makes an administrative decision to cease enforcement of these debts, loan servicers may face private liability under a range of federal and state consumer laws should these firms pursue collection efforts anyway.[22] As other papers in this series discuss in greater detail, the student loan industry has a shameful track record of attempted enforcement of debts eligible for cancellation or discharge.[23] Because of the uncertainty surrounding the debts described above, a prudent servicer could choose to act now–delaying collection efforts for all borrowers approved for student debt relief in 2022 or opting to enhance the safety net offered to those borrowers who may miss a payment during this transition.

Conclusion

At bottom: the Supreme Court's decision was limited to the HEROES Act and "is independent of any student-loan relief the Department might craft under the HEA (or any other statute)." Notwithstanding the prohibition on ED's ability to cancel debt under the HEROES Act program, ED's individualized notices to borrowers created a significant reliance interest and an accompanying legal risk to ED that would support cancelling debt under its other authorities. By taking additional steps to ensure borrowers are held harmless should they reasonably believe they do not owe payments for debts ED previously approved for cancellation, servicers can also act now to protect themselves against potential future consumer protection enforcement risk tied to these loans.

Endnotes

1 Press Release, U.S. Dep't of Educ., Biden-Harris Administration Announces Final Student Loan Pause Extension Through December 31 and Targeted Debt Cancellation to Smooth Transition to Repayment (Aug. 24, 2022), https://www.ed.gov/news/press-releases/biden-harris-administration-announces-final-student-loan-pause-extension-through-december-31-and-targeted-debt-cancellation-smooth-transition-repayment.

2 It further informed borrowers that "[I]f you made voluntary payments during the payment pause (after March 13, 2020) that brought your total balance below $10,000 but did not pay off your loan(s) in full, you do not need to take further action to receive a refund for which you are eligible."

3 The White House, Statements and Releases, FACT SHEET: President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers, (Jan. 27, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/27/fact-sheet-biden-harris-administration-releases-new-data-showing-26-million-people-in-all-50-states-applied-or-were-automatically-eligible-for-one-time-student-debt-relief/.

4 Press Release, Sec'y Miguel Cardona, Statement from U.S. Secretary of Education on Debt Relief (Oct. 21, 2022), https://www.ed.gov/news/press-releases/statement-us-secretary-education-miguel-cardona-debt-relief.

5 Press Release, White House, Remarks by President Biden on Student Loan Forgiveness (Oct. 21, 2022), https://www.ed.gov/news/press-releases/statement-us-secretary-education-miguel-cardona-debt-relief.

6 20 U.S.C. § 1082(a)(6) (2022). Although these provisions are in the section for FFEL loans, federal law directs that Direct Loans shall "have the same terms, conditions, and benefits as loans made to borrowers" under the FFEL program. *See* 20 U.S.C. § 1087a(b)(2) (2019).

7 20 U.S.C. § 1082(a)(4).

8 31 U.S.C. § 3711(a)(3) (2021).

9 31 C.F.R. §§ 900–904 (2000).

10 31 C.F.R. § 902.2(a)(4).

11 31 C.F.R. § 902.2(d).

12 ED's cancellation of these borrowers' debts would not trigger formal rulemaking requirements. A federal agency can set policy in multiple ways. The biggest distinction is between a "rule" – which is developed through "rule making" and may implicate formal procedures – and an "order" – which is generally developed through "adjudication" and does not require formal procedures. The Administrative Procedure Act defines "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing." Two key factors drive whether an agency action is a "rule" or an "order." The first element is the applicable scope of the action – rules are "generally applicable," while orders are (typically) tailored to specific individuals or groups. The second element is the nature of the policy – rules change a policy to be applied on a going-forward basis, while an order "retroactively applies law to [] past actions." Debt cancellation based on existing legal authorities and applied to a subset of student loan borrowers would constitute an "order" not subject to formal rulemaking procedures.

13 Estoppel applies against the government where "(1) 'there was a "definite" representation to the party claiming estoppel,' (2) the party 'relied on its adversary's conduct in such a manner as to change his position for the worse,' (3) the party's 'reliance was reasonable' and, if the act was unauthorized, (4) the government 'engaged in affirmative misconduct.'" *Penny v. Guiffrida*, 897 F.2d 1543, 1546 (10th Cir. 1990).

14 An entity waives rights under a contract when it has full knowledge of those rights and intentionally seeks to relinquish them. *See United States v. Olano*, 507 U.S. 725, 733 (1993).

15 The MPN provides ED with broad authority to modify or waive certain terms of the contract. Most notably, ED can waive terms if it does so in writing. The MPN says: "No term of your loan may be modified or waived, unless we do so in writing." The MPN also provides that such a waiver becomes effective upon mailing to an adequate address. The MPN also includes specific instances in which ED can unilaterally modify provisions of the MPN and includes an illustrative list of instances in which ED can discharge a borrower's debt under the MPN. Finally, the MPN ensures that any modification or change to the regulatory structure is incorporated into the contract. The MPN notes that "The terms of this MPN are determined in accordance with the Higher Education Act of 1965, as amended (the HEA), our regulations, and other federal laws and regulations. Throughout this MPN, we refer to these laws and regulations as "the Act."" It then adds: "Any amendment to the Act that changes the terms of this MPN will be applied to your loans in accordance with the effective date of the amendment."

16 *U.S. v. Winstar Corp.,* 518 U.S. 839 (1996).

17 A borrower could bring a claim under section 706(1) of the APA, alleging that ED "failed to take a discrete agency action that it is required to take." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). A borrower can also allege that ED's efforts to collect on the debt constitutes action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C.§ 706(2)(A) (1966).

18 ED, itself, seems to have recognized a shift in the contract, telling the Office of Legal Counsel that any modification of the regulations "would nullify any contractual requirement for repayment stemming from the borrowers' loan agreements because those agreements expressly state that they are subject to the HEA and its implementing regulations." *See* Office of Legal Counsel, *Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, U.S. Dep't. Of Justice* (Aug. 23, 2022) (citing Memorandum from the Office of General Counsel, U.S. Dep't of Education to the Office of Legal Counsel, U.S. Dep't of Justice,, Re: Questions on Broad-Based Debt Cancellation at 2 (Aug. 16, 2021)). https://www.justice.gov/olc/opinion/use-heroes-act-2003-cancel-principal-amounts-student-loans.

19 *See, e.g., Cort v. Crabtree,* 113 F.3d 1081 (9th Cir. 1997).

20 *See, e.g., Sweet v. Cardona*, Case No. 3:19-cv-03674-WHA, ECF 337 at 2 (N.D. Cal. Filed Nov. 9, 2022) (explaining that ED utilized its settlement and compromise, to discharge debts for groups of borrowers that attended Minnesota School of Business/Globe University, Marinello Schools of Beauty, Corinthian Colleges, ITT Technical Institute, and Westwood College).

21 Memorandum from James Manning, Acting Undersecretary, *Action Items on Borrower Defense*, May 4, 2017; *Sweet v. Cardona*, Case No. 3:19-cv-03674-WHA, ECF 193 at 43 (N.D. Cal. Filed March 18, 2021).

22 For further discussion of liability under federal and state consumer laws for the private-sector student loan companies facilitating the return to repayment, *see infra*, Berkman-Breen, Delivering Distress and Breaking the Law: How Sending Bills Violates Consumer Protection Laws at p. 96.

23 For further discussion, see supra Pierce and Weingarten, Delivering Distress to Public Service Workers, at p. 25; Yu, Delivering Distress to Low-Income Borrowers, at p. 10; and infra Connor, Delivering Distress to Borrowers Defrauded by Predatory Schools, at p. 50.

DELIVERING DISTRESS TO BORROWERS DEFRAUDED BY PREDATORY SCHOOLS

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Background

Borrower defense to repayment is a fail-safe against loans that never should have been made in the first place, and were made only because a critical actor in the system—the institution, the accreditor, and/or the Department of Education (ED) did something wrong or neglected to do something right. It is a tool for addressing non-isolated instances of mistaken and/or improper lending, and is both a necessary outcome of, and a key indicator of the need for, program oversight and enforcement.

The Biden Administration inherited a stalled and incomplete system for borrower defense (BD) discharge. Despite the implosion of several large for-profit college companies, only a fraction of borrowers eligible for BD discharge had received one. The prior administration rewrote the ground rules to ensure that over 95 percent of meritorious claims would be denied, introduced a nonsensical and draconian formula to reduce the amount of loan cancellation for those few successful claims, and instituted claim review protocols designed to disregard evidence of misconduct. There was no link between back-end cleanup and front-end enforcement. There wasn't even an enforcement unit. ED was staffed by political appointees with direct financial interests in annihilating borrower protections and keeping the spigot of federal money flowing to profit-making ventures that destroyed the lives of would-be nurses, plumbers, mechanics, social workers, and first-generation college graduates. At the helm was a Secretary of Education who openly scorned these borrowers and dispatched her office with "staggering cruelty."[1]

In contrast, this administration has embraced borrower defense as an important consumer protection, as well as a means of delivering "targeted" loan cancellation.[2] It has announced borrower defense cancellations for over one million borrowers, promising to wipe out billions of dollars in federal student debt. The question is whether ED has actually delivered on this cancellation, or will leave defrauded borrowers exposed to further potentially unlawful collection by its private-sector student loan contractors as student loan repayments resume.

How the Biden Administration Promised Borrower Defense Relief and an End to Lending to Predatory Schools

The Biden-Harris campaign's higher education platform specifically identified for-profit colleges as "often predatory," and promised to "stop for-profit education programs from profiteering off of students."[3] It would do this by "requir[ing] for-profits to first prove their value to the U.S. Department of Education before gaining eligibility for federal aid."[4] Additionally, the campaign promised to "return to the Obama-Biden Borrower's Defense Rule, forgiving the debt held by individuals who were deceived by the worst for-profit college or career profiteers."[5]

With one exception,[6] the Biden Administration's efforts on borrower defense did not rely on emergency powers invoked in response to the COVID-19 pandemic and economic emergency. Rather, the Administration's actions on borrower defense—the creation of an enforcement unit within Federal Student Aid (FSA), a return to cooperation with other federal and state enforcement agencies, completing rulemaking on borrower defense, rolling out borrower defense adjudications and three major group discharges, initiating an action to recoup against an institution for losses on borrower defense discharges, and resolving litigation related to the borrower defense backlog—embody agency actions that one would hope and expect to see in normal times from an administration committed to program integrity and borrower rights.

Within a half year of assuming office, the Biden-Harris Administration began showing its work on borrower defense, announcing discharges for 18,000 borrower defense applicants who attended ITT. A steady drumbeat of similar announcements followed, as summarized below:

Date	School	Misconduct Timeframe	# Borrowers	Approx. Discharge $
Mar. 18, 2021	Partial Relief Methodology Rescinded			
June 16, 2021	**ITT**	2005–2016 (employment prospects) Jan. 2007–Oct. 2014 (credit transfer)	**18,000**	**$500,000,000**
July 9, 2021	**Westwood College**	2002–2015 (credit transfer) 2004–2015 (Chicago criminal justice)	**1,600**	**$53,000,000**
July 9, 2021	**Marinello Schools of Beauty**	2009–2016 (widespread misreps)	**200**	**$2,200,000**
July 9, 2021	**Court Reporting Institute**	1998–2006 (time to completion)	**18**	**$340,000**
Feb. 16, 2022	**DeVry**	2008–2015 (false job placement rate ad)	**1,800**	**$71,700,000**
Feb. 16, 2022	**ITT**	July 2007–2016 (nursing school accreditation)	**130**	**$3,100,000**
Feb. 16, 2022	**Westwood College**	2002–2015 (job guarantee, earnings)	**1,600**	**$53,100,000**
Feb. 16, 2022	**Minn. Sch. of Bus./ Globe U.**	Jan. 1 2009–closure (criminal justice)	**961**	**$3,000,000**
Apr. 28, 2022	**Marinello Schools of Beauty**	2009–closure (pervasive/ widespread misconduct)	**28,000**	**$238,000,000**
June 1, 2022	**Corinthian**	1995–closure (pervasive misreps about job placement rate and credit transfer)	**560,000**	**$5,800,000,000**
Aug. 16, 2022	**ITT**	Jan. 1, 2005–2016 closure	**208,000**	**$3,900,000,000**
Aug. 16, 2022	**Kaplan**	July 1, 2011–Feb. 16, 2012 (MA campus, med. insurance & billing assis't program)	**100**	**//**
Aug. 30, 2022	**Westwood College**	Jan. 1, 2022–Nov. 17, 2015	**79,000**	**$1,500,000,000**
Jan. 28, 2023	*Sweet v. Cardona* Settlement Effective Date			

June 30, 2023	*Biden v. Nebraska* Ruling			
July 1, 2023	Biden-Harris Borrower Defense Regulation Effective Date			
July 25, 2023	**CollegeAmerica**	Jan. 1, 2006–July 1, 2020	**7,400**	**$130,000,000**
Aug. 7, 2023	Biden-Harris Borrower Defense Regulation Enjoined			
Aug. 30, 2023	**Ashford**	March 1, 2009–April 30, 2020	**2,300**	**$72,000,000**
Sep. 20, 2023	**University of Phoenix**	Sep. 21, 2012–Dec. 31, 2014	**1,200**	**$37,000,000**
Approximate Total			910,309	$12,363,440,000
(grey)	AG application			
(white)	No application			
(green)	Open School			

Including the settlement in Sweet v. Cardona, under which the Department of Education agreed to immediately cancel the outstanding loans of approximately 200,000 borrower defense applicants whose original loan disbursements totaled over $6 billion,[7] the Department has announced loan cancellation for more than 1.1 million borrowers, promising to wipe out more than $18 billion of fraudulent and predatory debt. The Department predicated borrower defense cancellation on grounds other than falsified job placement rates, employment guarantees, and misrepresented accreditation status and likelihood that credits will transfer to another institution. Additional bases include misleading students about the timeframe within which a program can be completed, and the ability of a program to qualify a completer for a specific job. In March 2023, FSA announced a secret shopper program "to hold predatory schools accountable," designed to identify "misrepresentations regarding the transferability of credits, job placement rates, completion and withdrawal rates, graduates' future earning potential, career services, the cost of attendance, the amount of federal student aid, and accreditation status."[8]

And at long last, ED recognized that certain schools engaged in such pervasive and widespread misconduct that everyone who borrowed to attend is entitled to discharge, without first needing to apply or submit any individualized evidence. Marinello Schools of Beauty "failed to train students in key elements of a cosmetology program, such as how to cut hair," and "used salons as profit centers and exploited students as a source of unpaid labor."[9] Corinthian Colleges "engaged in wholesale financial exploitation of students, misleading them into taking on more and more debt to pay for promises they would never keep."[10] Citing evidence "that for years, ITT's leaders intentionally misled students about the quality of their programs in order to profit off federal student loan programs, with no regard for the hardship this would cause," it was "time for student borrowers to stop shouldering the burden from ITT's years of lies and false promises."[11] Westwood's "culture of false promises, lies, and manipulation" led to ED's group discharge of debt associated with that school.[12] Unfortunately, as discussed further below, ED has relied on an individualized process in its recent discharges related to Ashford and University of Phoenix, despite well-developed records of the widespread nature of misconduct and its broad impact on student borrowers.

A few other aspects of the Biden-Harris Administration's actions on borrower defense are notable. First, ED shows a commitment to collaboration with other enforcement entities at the state and federal level to enhance both oversight and borrower defense. ED cited evidence and assistance provided by the Consumer Financial Protection Bureau, the Federal Trade Commission (FTC), and state attorneys general in nearly every announcement of a borrower defense discharge. And it has openly sought additional collaboration.[13]

Additionally, ED, in most but not all cases, named the entities and individuals who oversaw and/or owned the schools where borrower defense discharges have been granted.[14] These "now-shuttered institutions… left considerable liabilities owed to the federal government," but, according to Undersecretary James Kvaal, "because the Department did not require the owners of those institutions to assume responsibility for losses by co-signing the PPAs of the institutions," ED has "no clear path" to recoup those losses from the entities that walked away with the profits.[15] Although some dispute that a signature is required to impose personal liability,[16] ED is committed to this interpretation and issued guidance stating that it may require signatures on a PPA from individuals or corporations that have or may have a direct or indirect impact on the institution, "[t]o better ensure that taxpayers are protected in the event of…borrower defense claims[.]"[17] Personal liability aside, one would hope that the owners and operators of schools with significant borrower defense liabilities would be precluded from future participation in the federal student aid system, but it seems that in only one instance has ED sought debarment or suspension of individuals associated with these schools, even though they are named in press releases.[18]

As the above chart depicts, ED has granted borrower defense claims from students from schools that continue to operate. This creates an opportunity for the back-end safety valve of borrower defense to act as a front-end accountability check, either through substantial recoupment or enforcement actions based on established misconduct. This opportunity has yet to be seized. In just one instance, ED sent notice to DeVry that it intended to recoup $23.6 million (out of $71.1 million) for borrower defense discharges.[19] And ED promised that it "intends to initiate a recoupment proceeding" against University of Phoenix to recoup borrower defense liabilities.[20] In the meantime, between July 1, 2022 and June 30, 2023, ED disbursed just under $232 million in Direct Loan funds to DeVry, creating commensurate debt obligations for approximately 30,000 people.[21] In this same award year, ED sent $484 million to Phoenix, for close to 64,000 borrowers.[22] And according to the common origination and disbursement system, schools whose borrowers received automatic cancellation under the Sweet settlement received a combined $4.8 billion in the most recent award year.[23] ED will "prevent a future debt crisis by holding schools accountable," as Secretary Cardona pledged to do, only by resolving the disconnect between back-end cancellation and ongoing lending.[24]

Defrauded Borrowers Eligible for Debt Relief May Face Unjust Debt Collection

ED's incremental approach[25] to borrower defense means that, for hundreds of thousands of individuals who were swindled into student debt, instead of getting the cancellation they deserve—and that the Administration promised—they will be receiving a bill.

First, announced discharges have not been completed. In August, ED claimed that "roughly half" of the "roughly 1 million" borrowers awarded borrower defense discharge "have had their balances cleared."[26] At best, this means that half a million borrowers who have been promised cancellation stand to receive a bill. At worst, it may be more—it is not clear whether and how ED verifies that discharges, once requested, are processed appropriately. For example, under the Sweet settlement, approximately 200,000 individuals were notified in February 2023 that their loans will be discharged. In August, ED reported that it had "effectuated relief" for close to 130,000 class members.[27] The settlement gives ED until late January 2024 to complete the remaining discharges, and both the settlement and regulations bar collection pending discharge. But nevertheless, class members have received bills and been told they must submit payment. They are bounced between FSA and servicers such as MOHELA, with FSA claiming to have asked the servicer to cancel or hold in forbearance, and with MOHELA claiming that FSA told it to remove borrower defense forbearances from class member accounts.[28] The implications are unsettling.

> Now that the blanket payment pause is no longer in effect, borrowers will need to rely on this untested safety net—the student loan equivalent of jumping out of an airplane with a parachute nobody has inspected in three years.

Second, return to repayment presents an acid test on borrower defense forbearance. Individual applicants awaiting a decision, such as the approximately 250,000 individuals who applied for borrower defense between June and November 2023,[29] should not receive any demand for repayment while their applications for cancellation are pending. Now that the blanket payment pause is no longer in effect, borrowers will need to rely on this untested safety net—the student loan equivalent of jumping out of an airplane with a parachute nobody has inspected in three years. Those who are part of a group discharge and who never applied for borrower defense have no safety net at all, despite having been told by ED that they needed to take no further action to receive cancellation.[30] ED does not report publicly as a matter of course on their progress completing the processing of group discharges,[31] with one exception owing to the need to file status reports in litigation related to Corinthian job placement rate discharges. In that context, ED reported in September 2023 that it had discharged Corinthian-related loans for approximately 76 percent of the borrowers covered by the group discharge.[32] That leaves nearly 150,000 former Corinthian students open to collection, despite being told in June 2022 to "rest assured that the Biden-Harris administration has their back and will discharge their federal student loans."[33]

Third, there is no question that people who are eligible for discharge due to school misconduct are unaware that they can apply for borrower defense. Their loans will enter repayment despite strong evidence that they are tainted by misconduct. The two most recently announced discharges—concerning Ashford and University of Phoenix—are prime examples. After an 18-day trial of charges brought by the California Department of Justice, a court concluded that Ashford made over 1.2 million misrepresentations for over a decade.[34] Despite acknowledging that Ashford operated as "an uncontrovertibly predatory institution,"[35] ED's findings extend only to the 2300 people who have currently outstanding borrower defense applications (that is, those whose applications were not already resolved by the Sweet settlement). The Phoenix discharges are predicated on an ED finding, building off an FTC investigation into a national advertising campaign and sales pitch, "Let's Get to Work," which claimed that Phoenix had a special relationship with thousands of prominent companies that ensured graduates jobs.[36] The campaign was false (a top executive called it "smoke and mirrors") and misleading. It lasted from September 21, 2012 through December 31, 2014, a time period during which Phoenix enrolled an average of more than 350,000 students.[37] The FTC has sent restitution to nearly 147,500 students, which is itself only a subset of affected borrowers.[38] But only 1,200 students who applied for borrower defense will get a discharge.[39]

In several instances, ED reached conclusions that a school was no longer fit to operate in the federal student aid program, but has yet to deliver relief to borrowers directly impacted by the school's documented misconduct and failings.[40] For example:

- In 2016, ED found that MedTech "made numerous misrepresentations to its accreditor, to the Department, and to the public regarding job placement rates of its graduates."[41]
- In 2016, ED denied recertification of Charlotte School of Law based on substantial misrepresentations to students about its program and outcomes, including accreditation and bar passage rate.[42]
- In April 2023, ED denied recertification to Florida Career College, based on a finding that the school failed to meet a fiduciary standard of conduct, including administrative capability.[43] ED's investigation revealed that FCC preyed upon students with no high school diploma or GED, and falsified test results

to allow them to enroll where otherwise they would be ineligible. This orchestrated scheme was perpetrated by company employees, including senior leadership. Students without high school diplomas accounted for nearly half of FCC's student enrollment since 2018. ED knows which borrowers were certified as eligible under this scheme, but has taken no steps to discharge their debt or inform them that they may be eligible for cancellation.

- In August 2023, ED reached a settlement with five law schools (Albany Law School, Atlanta's John Marshall School of Law, Brooklyn Law School, New England Law-Boston, and New York Law School) for improperly disbursing $2.9 million in loans to 92 students enrolled in unaccredited masters programs.[44]

This is to say nothing of schools where ED has yet to issue specific findings. For example, in April 2022, the attorneys general of Alabama, California, Colorado, Maryland, Pennsylvania, and Virginia joined together to submit a lengthy application for group discharge of loans associated with Education Corporation of America (ECA), owner of the brands Virginia College and Brightwood. The school entered receivership in 2018, after they failed to secure accreditation from any entity other than the de-recognized ACICS. Between June 2016 and December 2018, the attorneys general submit, "ECA's communications with current and prospective students during the relevant time period consistently misrepresented and/or omitted material facts related to its accreditation status, financial position, quality of education, and the likelihood and impact of its possible loss of accreditation."[45]

This unfinished business is a problem not only because borrowers are set to enter repayment, but because time may be running out. Industry has placed a target on borrower defense cancellation and related procedures, by pressing radical arguments before courts that are inclined to endorse them.[46] The U.S. Court of Appeals for the Fifth Circuit enjoined the Biden-Harris borrower defense regulation just one month after it took effect,[47] indicating that a consortium of career colleges have a plausible chance of prevailing on the merits of their challenge to the rule. They raise sweeping arguments that borrower defense adjudication and cancellation are not authorized by Congress—creating the chance that not only the Biden-Harris regulation, but every borrower defense regulation could be nullified.[48] For now, ED seems to be in a holding pattern—making progress on the Sweet settlement but little else. And the injunction may explain why ED acted incrementally with respect to Ashford and Phoenix—the enjoined regulation had a group discharge process, whereas the DeVos regulation did not—notwithstanding that it compromised debts on a group-wide basis outside of regulations multiple times across administrations.[49] Similarly, DeVry is seeking pre-enforcement review of ED's ability to recoup, raising structural constitutional claims about ED's Office of Hearings and Appeals in addition to statutory and constitutional challenges to borrower defense cancellation and adjudication.[50] And ED's intent to enact a broad-based debt cancellation proposal under the same statutory authority as used for borrower defense cancellation presents yet another opening for litigation with far-reaching ramifications for borrowers harmed by predatory schools.[51]

Collecting Student Debt Delivers Distress to Defrauded Borrowers and Exposes Student Loan Companies to New Lawsuits

Collecting "cancelled" debt violates a multitude of federal and state laws, ED's regulations, and court orders. The government's private-sector student loan contractors may face liability under a wide range of federal and state consumer protection laws, including general prohibitions against unfair, deceptive, or abusive acts and practices, and industry-specific prohibitions against fraud and improper loan servicing passed by state legislatures over the past decade.[52]

The specific subset of student loan borrowers awarded borrower defense "cancellation" are, definitionally, in precarious straits. A student loan payment in any given month can mean the difference between housing and eviction, utilities or darkness. The reality, though, is that there are not adequate controls in the student loan system to ensure that these borrowers will be protected and not subject to further injustice. After all, the Secretary of the Department of Education was held in contempt of court for violating a court-ordered injunction against collection.[53] In that instance, it was borrowers and not ED who sounded the alarm that servicers were ignoring the injunction—a fact that "terrified" the judge overseeing the case.[54] In a separate case brought after ED was held in contempt, a court noted that the contract between ED and Maximus gives the latter "significant discretion," and "does not mandate a specific process" for ensuring borrower defense applicants with defaulted loans do not face involuntary collection (such as wage garnishment or tax refund offset) while awaiting adjudication.[55] And although there was "an explicit directive from FSA" to apply a "borrower defense tag" following ED notification, Maximus "made a unilateral decision to cease processing pending BD tag requests."[56] Not even the blanket payment pause prevented involuntary collection.[57]

This record does not inspire confidence that defrauded borrowers—including those who have already been told their loans will be cancelled—will be held harmless during the return to repayment. This population of student loan borrowers is particularly vulnerable, and the effects of losing what might seem like a small amount of money to some can be devastating. The last time ED unlawfully collected on Corinthian borrowers—an event that is still a possibility today—the economic injury was amplified by financial precarity. People took out payday loans, incurred late fees, fell behind on other bills.[58] The temporary loss of a $400 tax refund caused one person to be evicted for failure to pay rent.[59] Another was unable, without an expected refund, to flee her abusive partner.[60] It will fall to ED or its servicers to account for the damages,[61] but the harm will be irreparable in some cases.

Endnotes

1 Erica L. Green, *Over Veterans' Protests, Trump Vetoes Measure to Block Student Loan Rules*, New York Times (May 29, 2020).

2 In its press release, ED characterized its group-wide cancellation of debt associated with Corinthian Colleges as evidence of its "continued commitment to targeted relief." Press Release, U.S. Dep't of Educ., Education Department approves $3.9 billion group discharge for 208,000 borrowers who attended ITT Technical Institute (Aug. 16, 2022), https://www.ed.gov/news/press-releases/education-department-approves-58-billion-group-discharge-cancel-all-remaining-loans-560000-borrowers-who-attended-corinthian-colleges.

3 The Biden-Harris Plan for Education Beyond High School, Joe Biden, https://joebiden.com/beyondhs/ [https://web.archive.org/web/20201118212117/https://joebiden.com/beyondhs/#].

4 *Id.*

5 *Id.*

6 The Biden-Harris Administration continued a waiver under HEROES, first published in December 2020, so that borrowers who, prior to July 1, 2020 (the effective date of the DeVos borrower defense regulation), submitted an application for borrower defense to repayment relief that included a FFEL or Perkins loan and who would need to consolidate those loans into a Direct Consolidation Loan to receive borrower defense relief will have their eligibility for relief adjudicated under the prior regulation. Student Assistance General Provisions, Federal Perkins Loan Program, William D. Ford Federal Direct Loan Program, and Federal- Work Study Programs, 85 Fed. Reg. 79, 856 (Dec. 11, 2020).

7 According to ED, schools selected for inclusion on the list for automatic cancellation had a large volume of borrower defense applications associated with them, and ED possessed evidence regarding these schools that provided sufficiently "strong indicia regarding substantial misconduct" that was "in some instances proven" or "credibly alleged." Joint Motion for Preliminary Approval of Settlement at 3, *Sweet v. Cardona*, Case No. 3:19-cv-

03674-WHA (N.D. Cal. June 22, 2022), ECF No. 246.

8 Press Release, U.S. Dep't of Educ., Education Department Announces Use of Secret Shopping to Protect Students, Crack Down on Institutions that Lure Students with Lies (Mar. 14, 2023), 8https://www.ed.gov/news/press-releases/education-department-announces-use-secret-shopping-protect-students-crack-down-institutions-lure-students-lies%E2%80%AF%E2%80%AFr.

9 Press Release, U.S. Dep't. of Educ., Education Department Approves $238 Million Group Discharge for 28,000 Marinello Schools of Beauty Borrowers Based on Borrower Defense Findings (Apr. 28, 2022), 9https://www.ed.gov/news/press-releases/education-department-approves-238-million-group-discharge-28000-marinello-schools-beauty-borrowers-based-borrower-defense-findings.

10 Press Release, U.S. Dep't. of Educ., Education Department Approves $5.8 Billion Group Discharge to Cancel all Remaining Loans for 560,000 Borrowers who Attended Corinthian (June 1, 2022), 10https://www.ed.gov/news/press-releases/education-department-approves-58-billion-group-discharge-cancel-all-remaining-loans-560000-borrowers-who-attended-corinthian-colleges.

11 Press Release, U.S. Dep't. of Educ., *supra* note 2.

12 Press Release, U.S. Dep't. of Educ., Education Department Approves $1.5 billion in Debt Relief for 79,000 Borrowers Who Attended Westwood College (Aug. 30, 2022), 12https://www.ed.gov/news/press-releases/education-department-approves-15-billion-debt-relief-79000-borrowers-who-attended-westwood-college.

13 For example, announcing the discharge of CollegeAmerica loans, ED stated that it "invites more states to provide evidence of wrongdoing as Colorado did here to justify relief for students who were harmed."

14 Those named include: Alta Colleges, Inc., Housatonic Partners, Kirk Riedinger, George Burnett (Westwood); B&H Education, Rashad Elyas, Nagui Elyas, Mike Benvenuti, Michael Flecker, Nancy Alpough, and others (Marinello); Alen Janish (Court Reporting Institute); Adtalem Global Education, Daniel Hamburger, David Pauldine (DeVry); Kevin Modany, Eugene Feichtner (ITT); and Terry Myhre, Jeff Myhre, Kaye Myhre (Globe/Minnesota School of Business).

15 Letter from James Kvaal, U.S. Under Sec'y of Educ., U.S. Dep't of Educ., to Robert C. Scott, Chair of Comm. on Educ. and Labor, U.S. H.R. (Mar. 31, 2022), https://subscriber.politicopro.com/f/?id=00000181-58f9-df3b-a7af-

fcfb61cc0000. More recently, in announcing discharges for Ashford borrowers, ED promised, in its press release, to "review the evidence to examine whether members of Ashford's management and leadership took actions that violated Federal laws or regulations and threatened the integrity of the federal student financial aid programs. If the evidence shows they did, the Department may pursue appropriate remedies to enforce those rules." Press Release, U.S. Dep't. of Educ., Biden-Harris Administration Approves $72 Million in Borrower Defense Discharges for over 2,300 Borrowers who Attended Ashford University (Aug. 30, 2023), https://www.ed.gov/news/press-releases/biden-harris-administration-approves-72-million-borrower-defense-discharges-over-2300-borrowers-who-attended-ashford-university.

16 *See, e.g.,* Daniel A. Zibel & Alice W. Yao, *Protection and the Unseen: Holding Executives Personally Liable under the Higher Education Act*, 100 Day Docket Student Defense (Oct. 2020), https://www.defendstudents.org/news/body/docket/100-Day-Docket-Personal-Liability-Report.pdf.

17 U.S. Dep't of Educ., Fed. Student Aid Partners, Electronic Announcement General-22-16, Updated Program Participation Agreement Signature Requirements for Entities Exercising Substantial Control Over Non-Public Institutions of Higher Education (Mar. 23, 2022). One data point suggests that crystalizing the liability of school owners by requiring them to sign the PPA is a powerful accountability tool. The owner of a for-profit law school shuttered the school rather than personally sign a provisional PPA agreeing to be jointly and severally liable for losses to the Department. Order at 6-13, *Florida Coastal School of Law, Inc. v. Cardona, et al.*, Case No. 3:21-cv-721-MMH-JBT (M.D. Fla. Aug. 9, 2021), ECF 29. At the time, the law school and two others owned by InfiLaw and Sterling Capital faced $167 million in potential liability from borrower defense applications. *Id.* at 6.

18 On April 23, 2021, ED notified Eric Juhlin, President of Center for Excellence in Higher Education, of his government-wide suspension from federal procurement. Letter from Susan D. Crim, Notice Debarment and Suspension Official, U.S. Dep't of Educ., to Eric Juhlin, CEO/President/Chairman, Ctr. for Excellence in Higher Educ. (Apr. 23, 2021), https://www.republicreport.org/wp-content/uploads/2021/04/Eric-Juhlin-Suspension-Notice-4.23.21_Redacted.pdf.

19 Letter from Susan D. Crim, Dir., Admin. Actions and Appeals Service Group, U.S. Dep't of Educ., to Thomas Monahan III, President & CEO, Cogswell Education, LLC, DeVry University (Aug. 15, 2022), https://static.politico.com/53/ec/f10a0eea4ab9a4e7b0a55f994e75/devry-letter-1.pdf. ED is also in possession of a substantial letter of credit and escrow funds posted by Center for Excellence in Higher Education, from which it intends to offset losses from the closure and fraud of that school. In turn, CEHE has sued the United States for conversion and breach of contract, seeking $500 million in damages. Complaint, *Center for Excellence in Higher Education, Inc. v.*

United States, Case No. 1:22-cv-01732 (Ct. Fed. Cl.), ECF (Nov. 23, 2022).

20 Press Release, U.S. Dep't of Educ., Biden-Harris Administration Approves $37 Million in Borrower Defense Discharges for Over 1,200 Students Who Attended the University of Phoenix (Sept. 20, 2023), 20https://www.ed.gov/news/press-releases/biden-harris-administration-approves-37-million-borrower-defense-discharges-over-1200-students-who-attended-university-phoenix.

21 Title IV Program Volume Reports, Fed. Student Aid, https://studentaid.gov/data-center/student/title-iv (last visited Oct. 4, 2023).

22 *Id.*

23 ED does not consider inclusion on the list in and of itself a grounds for recoupment of discharges under the settlement, *see* Order Granting Final Settlement Approval at 15, *Sweet*, ECF 345 (Nov. 16, 2022) , and "any recoupment proceedings against the schools" would have to be "based on separate decisions that the standard for borrower defense is met," Reply in Support of Defs.' Mot. to Dismiss at 10 n.4, *DeVry v. Cardona*, No. 1:22-cv-05549 (N.D. Ill. Mar. 3, 2023), ECF 25.

24 Press Release, U.S. Dep't of Educ., *supra* note 2.

25 ED first reached the conclusion that Corinthian committed widespread fraud in 2015, and Vice President Harris, while attorney general of California, obtained a $1.1 billion default judgment against Corinthian for, among other things, inflating its job placement rate by 80 percent. People of the State of California v. Heald College, LLC et al., No. CGC-13-534793 (Sup. Ct., Cty. of San Francisco); *see also* Press Release, U.S. Dep't of Educ., Fact Sheet: Protecting Students from Abusive Career Colleges (June 8, 2015), https://www.ed.gov/news/press-release.

26 Danielle Douglas-Gabriel, *Appeals Court Halts New Biden Rules on Debt Relief for Defrauded Students*, The Washington Post (Aug. 7, 2023), https://www.washingtonpost.com/education/2023/08/07/student-loan-forgiveness-defrauded-borrowers-court-injunction/.

27 U.S. Dep't of Education, Fed. Student Aid, Second Quarterly Report under Settlement Agreement in *Sweet et al. v. Cardona*, (Aug. 28, 2023), https://studentaid.gov/sites/default/files/sweet-quarterly-report-2.pdf.

28 Letter from Project on Predatory Student Lending and Housing & Economic Rights Advocates to Missouri Higher Education Loan Authority (Sept. 20, 2023), https://www.ppsl.org/news/federal-student-loan-servicer-mohela-is-failing-to-comply-with-borrower-defense-settlementnbsp.

29 Defendants' Response to Court's Inquiry Concerning Number of Post-Class Applicants, *Sweet*, Case No. 3:19-cv-03674-WHA, ECF 380 (Feb. 16, 2023).

30 As one example, ED's press release tells ITT borrowers they "will have the federal student loans they received to attend ITT discharged without any additional action on their part." Press Release, U.S. Dep't of Educ., *supra* note 2. It also promised to notify borrowers personally by email. *Id.*

31 Likewise, ED "does not publicize the outcome of individual BD applications." Dep't of Educ., Institutional Eligibility Under the Higher Education Act of 1965, as amended; Student Assistance General Provisions; Federal Perkins Loan Program; Federal Family Education Loan Program; and William D. Ford Federal Direct Loan Program, 87 Fed. Reg. 65,904, 65,909 (Nov. 1, 2022) ("2022 BD Final Rule"), https://www.federalregister.gov/d/2022-23447/p-81.

32 Joint Status Report at 2, *Calvillo Manriquez. v. U.S. Dep't of Education*, Case No. 3:17-cv-7210-SK (N.D. Cal. Sept. 18, 2023) ECF 404.

33 Press Release, U.S. Dep't of Educ., *supra* note 10.

34 Statement of Decision, *California v. Ashford University, LLC*, Case No. 37-2018-00046134 (Cal. Mar. 3, 2022).

35 Press Release, U.S. Dep't. of Educ., *supra* note 15. 35https://www.ed.gov/news/press-releases/biden-harris-administration-approves-72-million-borrower-defense-discharges-over-2300-borrowers-who-attended-ashford-university.

36 University of Phoenix, Borrower Defense Executive Summary, https://studentaid.gov/sites/default/files/phoenix-executive-summary.pdf.

37 Complaint, *Federal Trade Commission v. The University of Phoenix, Inc.*, Case No. 2:19-cv-05772-ESW (D. Ariz.), ECF1 at 5 (Dec. 10, 2019).

38 Bridget Small, *University of Phoenix students get payments*, Federal Trade Commission (Mar. 29, 2021), 38https://consumer.ftc.gov/consumer-alerts/2021/03/university-phoenix-students-get-payments.

39 In the context of the discharge available to students who cannot complete their studies because of a school's abrupt closure, the Department's data suggests that less than half of those eligible for cancellation apply and receive it. U.S. Dep't of Educ., Final Regulations, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926, 76,059 (Nov. 1, 2016) (2016 BD Final Rule). More recently, the Department recognized that "adding an opt in process would…increase the likelihood that borrowers who are eligible for relief will miss out on it." 2022 BD Final Rule at 65939.

40 A March 2023 press release from FSA touted "progress on the Biden-Harris Administration's ongoing commitment to improving student outcomes, including by holding low-performing and predatory schools accountable for swindling students out of time and money and leaving taxpayers holding the bill," and cited "dozens of actions, including denying 10 schools recertifications, revoking six Provisional Program Participation Agreements, which enable schools to participate in the Title IV program; and issuing two terminations, five suspensions, seven debarments, and eighteen fines." Press Release, U.S. Dep't of Educ., *supra* note 8.

41 Letter from Susan D. Crim, Dir., Admin. Actions and Appeals Service Group, U.S. Dep't of Educ., to Willam Winkowski, President, Medtech College (Jul. 26, 2016), https://studentaid.gov/sites/default/files/medtech-recert-denial.pdf.

42 Letter from Susan D. Crim, Dir., Admin. Actions and Appeals Service Group, U.S. Dep't of Educ., to Chidi Ogene, President, Charlotte School of Law (Dec. 19, 2016), https://studentaid.gov/sites/default/files/csl-recert-denial.pdf.

43 Press Release, U.S. Dep't of Educ., Federal Student Aid Denies Florida Career College Application to Continue Offering Federal Grants, Loans, and Work-Study Funds (Apr. 11, 2023), 43https://www.ed.gov/news/press-releases/federal-student-aid-denies-florida-career-college-application-continue-offering-federal-grants-loans-and-work-study-funds.

44 Press Release, U.S. Dep't of Educ., U.S. Department of Education Takes Action Against Five Schools for Disbursing Federal Student Aid to Students Enrolled in Unaccredited Programs (Aug. 24, 2023), 44https://www.ed.gov/news/press-releases/us-department-education-takes-action-against-five-schools-disbursing-feder-

al-student-aid-students-enrolled-unaccredited-programs. The settlement requires the entities, including the American Bar Association, to "reimburse the expected loss to the Department from the improperly disbursed funds," implying that loans will be discharged at some point.

45 Letter from Attorneys General of Pennsylvania, Maryland, California, Colorado, Virginia, and Alabama, to Miguel A. Cardona, Sec'y, U.S. Dept. of Educ. (Apr. 28, 2022), https://oag.ca.gov/system/files/attachments/press-docs/2022.04.28%20-%20Multistate%20Group%20Borrower%20Defense%20Application%20-%20Education%20Corporation%20of%20America.pdf.

46 Career Education Colleges and Universities, the industry's trade lobby, "spearheaded a multi-prong campaign to raise awareness of the devastating impact of the BDR rule, and advocate for its withdrawal." Press Release, Career Education Colleges and Universities, CECU Statement on Gainful Employment Final Rule (Sept. 27, 2023), https://www.career.org/releases-and-statements.

47 Order, *Career Colleges and Schools of Texas v. U.S. Dep't of Education, et al.*, Case No. 23-50491 (5th Cir.), ECF. 42-1 (Aug. 7, 2023).

48 Brief for Appellant, *Career Colleges and Schools of Texas v. U.S. Dep't of Education, et al.*, Case No. 23-50491 (5th Cir.), Doc. No. 48-1 (Sept. 5, 2023) (arguing that the Higher Education Act does not authorize the Department to adjudicate borrower defense claims, and the Constitution precludes it); *see also* Plaintiff's Memo ISO Motion for Preliminary Injunction, *DeVry University, Inc. v. United States Department of Education*, Case No. 1:22-cv-05549 (N.D. Ill.), Doc. No. 38-1 (June 30, 2023) (same).

49 *See* Order Granting Final Settlement Approval, *Sweet*, ECF 345 at 10 (Nov. 16, 2022) (listing examples of exercises of the Department's authority under the HEA to compromise debts).

50 *DeVry University, Inc. v. United States Department of Education*, Case No. 1:22-cv-05549.

51 U.S. Dep't of Educ., Negotiated Rulemaking Committee; Negotiator Nominations and Schedule of Committee Meetings, 88 Fed. Reg. 60163 (Aug. 31, 2023) (forming "Student Loan Relief Committee" to "address the topics of the authorities granted to the Secretary in the HEA, including the provisions related to the modification, waiver, release, or compromise of Federal student loans in section 432(a) of the HEA").

52 For further discussion of liability under federal and state consumer laws for the private-sector student loan

companies facilitating the return to repayment, *see infra*, Berkman-Breen, Delivering Distress and Breaking the Law: How Sending Bills Violates Consumer Protection Laws at p. 96.

53 Order Denying Motion to Lift Stay and Requiring Compliance Report, *Calvillo Manriquez*, ECF 110 (Aug. 19, 2019); U.S. Dep't of Educ., Fed. Student Aid, Compliance Report, *id.*, ECF 111-2 (Sept. 18, 2019) (disclosing that ED violated injunction against collection tens of thousands of times); Order Regarding Sanctions, *id.*, ECF 130 (Oct. 24, 2019) (finding Department in civil contempt).

54 "I'm very, very worried about future violations. And…it took the Plaintiffs to tell us this because the Named Plaintiffs were affected. If the Named Plaintiffs hadn't been affected, we might not have found out even. That's what really terrified me when I read the [Department's] report." Transcript of Proceedings at 23:6-10, *Calvillo Manriquez*, ECF 124 (Oct. 7, 2019). The court also noted that the Department's compliance report was "silent as to the normal actions one would expect from an entity facing a binding court order: multiple in-person meetings or telephone calls to explain the preliminary injunction and to confirm that the contractors were complying with the preliminary injunction. Defendant's attempt to comply with the preliminary injunction consisted of a single email to each service provider and partial confirmation of receipt of those emails." Order on Sanctions at 4-5, *id.*, ECF 130 (Oct. 24, 2019).

55 *Bodor v. Maximus Fed. Servs., Inc.*, Case No. 5:19-cv-05787-JMG, 2021 WL 4941503, at *7 (E.D. Pa. Oct. 22, 2021).

56 *Id.*

57 ED admittedly collected over $186 million from nearly 400,000 borrowers between March 13, 2020 and January 2021. Defendant's Status Report at 4, *Barber v. Rosenfelt*, Case No. 20-cv-1137-CJN (D.D.C. Jan. 25, 2021), ECF 51.

58 Motion for Partial Reconsideration at 9-12, *Calvillo*, ECF No. 167 (Jan. 8, 2020).

59 *Id.*

60 *Id.*

61 Contractors cannot seek shelter in the government's immunity from certain state-law damages claims when

they fail to follow direct instructions. *Campbell-Ewald v. Gomez*, 577 U.S. 153 (2016). Attempts to hold servicers liable for violations of state consumer protection law and federal debt collection standards have resulted in messy battles and finger pointing between the Department and its servicers. *See, e.g., Bodor*, 2021 WL 4941503 at *7 (detailing dispute between Maximus and the Department); *New York v. Pennsylvania Higher Educ. Assistance Agency*, No. 19-civ-9155 (ER), 2020 WL 2097640, at *6-7 (S.D.N.Y. May 1, 2020) ("While PHEAA contends that the DOE directs various aspects of its performance, it does not point to any evidence that in performing the complained-of conduct, it simply followed the DOE's instructions.").

DELIVERING DISTRESS TO BORROWERS IN DEFAULT

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Introduction

Over seven million Americans are in default on their federal student loans, and over two million of those borrowers have struggled under the weight of this debt for over 20 years, with no hope in sight.[1] Student loan default both results from financial distress and exacerbates it. Many borrowers in default are simply unable to pay their loans in full, and continued collection efforts are doomed to fail—while inflicting needless economic pain on millions of low-income Americans and their families. The government's collection efforts, including seizures of poverty-level wages and Social Security benefits, interfere with many families' ability to pay for necessities and keep them trapped in cycles of poverty.

Further, although there are a variety of safety net programs intended to prevent default and to cancel the debts of certain distressed borrowers, many people eligible for those programs have nonetheless defaulted because the companies paid to service their loans failed to connect them to these programs, wrongly denied them access, or actually steered them away. As discussed throughout this paper series, servicers have an obligation to help borrowers access the relief they are entitled to under law. Defaulted borrowers have paid the ultimate price for these servicing failures.

Fortunately, the U.S. Department of Education (ED) can choose to end this suffering. This paper starts by grounding readers in the consequences of student loan default, who is in default and why, and why so many borrowers remain in default for years. It then identifies legal authority, under existing regulations, that empowers the Secretary of Education to compromise student loan debts and so end collection from defaulted borrowers where such efforts would be futile or unreasonable. Now—before the suspension of federally-held student loan collection ends next year—is the time to act on that authority.

The Consequences of Student Loan Default

Borrowers default on their federal loans after 270 days of nonpayment. Following default, ED notifies credit reporting agencies and accelerates the debt—meaning the full balance becomes immediately due in full. It then begins attempting to collect the full amount of the debt as quickly as possible through a variety of means. During this time, borrowers continue to be charged interest along with potentially significant collection fees and penalties that can cause their debt to balloon.[2]

To collect the debt, the federal government can extra-judicially garnish wages, seize tax refunds—including refunds attributable to anti-poverty tax credits like the Earned Income Tax Credit and Child Tax Credit[3]—and seize a portion of some federal benefits, including Social Security benefits. While there are limits on how much the government can seize from a borrowers' wages or Social Security, such seizure can result in the borrower being left with income that is well below the poverty line.[4]

These collection practices have a disastrous impact on the financial security of low-income borrowers, who report that these seizures interfere with their ability to pay for necessities like housing, transportation to work, food, and medication.[5] There is no statute of limitations on the collection of federal student loan debt, so the government's collection practices often keep borrowers in an indefinite cycle of debt and obstruct their pathway out of poverty.

Who Defaults on Federal Loans?

A growing body of research demonstrates that borrowers default not because they are attempting to shirk payment, but because they simply cannot afford to pay and have been unable to access or are not served by existing debt relief programs.[6]

Borrowers who are most likely to default are those who entered school with limited financial resources and those whose investment in education has not paid off. Borrowers in default overwhelmingly come from low-income families and are first-generation college students.[7] Nearly half of borrowers with loans in default did not finish their degree[8] and as a result do not have improved employment prospects when they enter repayment. Further, people who attended for-profit colleges account for half of federal student loan defaults.[9] These borrowers are more likely to have higher debt burdens and a low-value credential that makes it difficult to pay off their debt.[10]

Default is also racialized: Borrowers of color, and especially Black borrowers, are disproportionately likely to experience default.[11] In one longitudinal study, nearly a third of all Black graduates reported having defaulted at least once, as opposed to one-tenth of white graduates,[12] whereas another study found that one in two Black borrowers and two in five Hispanic borrowers, regardless of graduation status, would default over a 20 year repayment period, as opposed to less than a third of white borrowers.[13] This is due, in part, to the persistent racial wage and wealth gaps—realities that are exacerbated by unequal levels of student loan debt.[14] Similarly, researchers estimate that twice as many Black Parent PLUS borrowers—who are often pressured to take on federal loans for their children despite having low-incomes and no realistic ability to repay—will default on their loans as white Parent PLUS borrowers.[15]

A growing body of research demonstrates that borrowers default not because they are attempting to shirk payment, but because they simply cannot afford to pay and have been unable to access or are not served by existing debt relief programs.

Finally, other economically vulnerable populations are also more likely to be in default. This includes older Americans, many of whom rely on Social Security disability and retirement benefits that are subject to partial seizure following default.[16] It also includes people with disabilities, who are more likely to have lower-incomes than their non-disabled peers and may have larger medical bills.[17] While some disabled borrowers may be eligible for totally and permanently disabled discharges, many are ineligible for the program, are unaware that they may be eligible, or cannot navigate the application process.

Many Vulnerable Borrowers Default Because They Could Not Access Relief Programs

As a result of past policy failures and servicer misconduct, millions of borrowers are currently in default who not only should not be in default, but should have had their loans discharged already through either the income-driven repayment programs or the various discharge programs available to borrowers whose investment in education did not pay off due to school closure or misconduct or a physical or mental condition.

As ED recognized in 2022, longstanding and widespread servicing failures and misconduct resulted in millions of financially-distressed borrowers missing out on the full benefits of the Income-Driven Repayment (IDR) program, which promises participants discharge of their remaining loan balance after 20 to 25 years in repayment.[18] Among other problems, instead of enrolling cash-strapped borrowers into IDR, servicers steered them into forbearances, which would lead their loans to accrue interest and drive up their outstanding debt.[19] Eventually, those forbearances would end, and the borrowers, still unable to pay, would default on the now larger loans. This problem was particularly acute for the lowest-income borrowers, who would be eligible for $0 payments in IDR while making progress toward having their debt discharged. One study found that less than half of borrowers who received means-tested government benefits, like SNAP or SSI, were enrolled in IDR, even though IDR would entitle them to a $0 payment.[20]

These practices catalyzed the Biden Administration's IDR Account Adjustment. However, time in default has been excluded from receiving relief, even though borrowers in default suffered the most severely from those practices, and some paid much more in default than if they had been in IDR. If servicers had effectively connected financially-distressed borrowers to IDR, or if the Biden Administration were to include time in default as part of its IDR Account Adjustment, then many of the over two million Americans with loans in default that are over 20 years old[21] would be eligible for automatic discharge of their loans now.

> ...[I]nstead of enrolling cash-strapped borrowers into IDR, servicers steered them into forbearances, which would lead their loans to accrue interest and drive up their outstanding debt.

Additional borrowers wind up in default due to systemic failures to connect them to other Congressionally-created discharge programs. For example, a review by ED in 2016 found that almost half of disabled borrowers eligible for a Total and Permanent Disability Discharge were in default on their loans.[22] Similarly, when reviewing ED's practices and rules governing Closed School Discharges, a Government Accountability Office (GAO) report found that half of the borrowers that would receive an automatic discharge three years after their school closed were in default on their loans.[23] While ED is making important progress in delivering discharges to eligible borrowers by expanding the use of automatic discharges, it is without question that many borrowers still remain in default despite being eligible for discharge.

Many Borrowers in Default, Particularly Those That Are Older or Are Persistently Low-Income, Will Never Be Able to Repay Their Loans

Just as many borrowers in IDR programs will never repay their loans in full, and rely on IDR forgiveness to put an end to their indebtedness, many borrowers in default will never be able to repay their loans in full. While the premise behind the student loan system is that the investment in education will pay off in increased earnings, allowing for successful repayment over time, it is clear that is not the case for some borrowers.

This is particularly problematic for borrowers who subsist on income near or below the poverty line for a number of years. Poverty in the United States is sticky: Recent research found that 44 percent of people in poverty for a year will not be able to exit poverty, and that portion jumps to 87 percent for people who are in poverty for seven years.[24] Many borrowers in poverty simply lack sufficient income or assets to collect to repay their student loans in full despite the government's powerful collection apparatus. And what little is available to collect from them—generally only certain anti-poverty benefits like the Earned Income Tax Credit, the Child Tax Credit, or a portion of poverty-level Social Security benefits or wages—likely should not be collected, and would not be considered available for student loan payment in income-driven repayment.

Poverty in the United States is sticky: Recent research found that 44 percent of people in poverty for a year will not be able to exit poverty, and that portion jumps to 87 percent for people who are in poverty for seven years.

While public data on long-term default is limited, information that ED has made available in recent years demonstrates both that a sizeable portion of borrowers currently in default have been unable to repay their loans in full despite decades in repayment and default, and that for some persistently low-income borrowers, enforced collection does not result in progress toward paying down the debt.

First, ED data released in 2021 revealed that over two million borrowers were in or close to default on loans that were over 20 years old, and over three million additional borrowers were in or close to default on loans that were 10 to 20 years old.[25]

Second, a 2016 GAO report revealed that many older borrowers subject to Social Security offset to collect their defaulted student loans had sufficiently low income that the collection failed to result in any progress in reducing their debt.[26] The GAO report highlighted that nearly three quarters of the amounts collected through Social Security offset were applied to interest and fees and did not touch principal.[27] A third of these borrowers remained in default for five years after becoming subject to offset, and many saw their loan balances increase over time despite the offsets.[28] Thus, ED pursued collection and deprived these borrowers of basic subsistence income for years, pushing many borrowers' benefits below or further below the poverty level in doing so,[29] even though it did not result in meaningful repayment.

The Biden Administration Promised Relief to Borrowers in Default

In April 2022, the U.S. Department of Education announced that it would provide a "Fresh Start" to millions of borrowers with loans that entered default under prior administrations. The Biden Administration's Fresh Start program has temporarily suspended default consequences, including collection, for federal student loans in default and allows borrowers to request to be fully removed from default, and returned to "good standing" in repayment, through September 2024.

The Fresh Start program has provided critical relief to financially-distressed borrowers in default, among other things protecting their income and benefits from seizure so they can put those funds toward their and their families' basic needs.[30] But unfortunately, uptake in the program has been low, likely due to insufficient communication to borrowers about the program.[31] As a result, for most borrowers with loans in default, the harsh consequences of default will resume later next year.

The Administration Should Act to Cancel Eligible Defaulted Loans Before Collection Resumes

The Biden Administration has a pivotal window of opportunity to act on the default crisis between now and fall 2024, when forced collection activities resume on roughly seven million Americans with student loans in default. Fortunately, ED has tools available to provide relief to many of these borrowers, and in particular to those who have experienced significant financial distress and who are unlikely to be able to successfully repay their student loans. There are at least two potential avenues that ED should consider:

- First, under current regulations, the Secretary has authority to compromise federal student loan debts that it is "unable to collect . . . in full within a reasonable time."[32] This may encompass a large number of defaulted federal student loan debts, including debts that have already been in collection for a significant amount of time without collection in full, and additional debts that are unlikely to be collectible in full within a reasonable amount of time based on data readily available to the Secretary. Exercising this authority could allow the Secretary to discharge a substantial number of outstanding student loan debts that the government is unlikely to be able to collect in full and that will otherwise continue to inflict needless financial hardship on low-income Americans.
- Second, the Secretary could extend the current IDR Account Adjustment to provide credit towards loan forgiveness for past time in default, on a one-time basis, just as it is already providing credit for past time in delinquency and several other statuses indicative of financial distress and systemic failures to connect eligible borrowers to IDR.

This paper focuses on the first path–compromising uncollectible debts–with extension of the IDR Account Adjustment discussed in detail elsewhere.[33] But the two approaches are not mutually exclusive; pursuing both could maximize relief to borrowers who have experienced extended financial distress and as a result have been unable to repay their loans in a reasonable amount of time.

Starting from the legal framework for compromise, current Department regulations provide that "under the provisions of 31 CFR part 902 or 903, the Secretary may compromise a debt in any amount, or suspend or terminate collection of a debt in any amount, if the debt arises under the Federal Family Education Loan Program . . . , the William D. Ford Federal Direct Loan Program . . . , or the Perkins Loan Program." 34 C.F.R. § 30.70(e)(1). Part 902, in turn, authorizes the Secretary to compromise a debt if "[t]he Government is unable to collect the debt in full within a reasonable time by enforced collection proceedings." 31 C.F.R § 902.2(a)(2).

In summary, current regulations authorize the Secretary to compromise a Direct, Federal Family Education Loan (FFEL), or Perkins Loan that the Secretary determines that the government is unable to collect in full within a reasonable amount of time through enforced collections.[34]

The Biden Administration has a pivotal window of opportunity to act on the default crisis between now and fall 2024, when forced collection activities resume on roughly seven million Americans with student loans in default.

The question then arises: How does the Secretary determine which loans it is unable to collect in full within a reasonable amount of time through enforced collections? To our knowledge, ED has not published any guidance as to how it makes such a determination or what it considers a "reasonable" amount of time to collect a student loan debt in full. Indeed, the discussion of compromise in the Private Collection Agency (PCA) Procedures Manual—which set out the policies for the private collection agencies that ED until recently contracted with to collect on defaulted debts and to handle requests to compromise defaulted loans—does not address this basis for compromise at all. In the absence of existing subregulatory policy guidance for compromise of old defaulted debts in the student loan program, ED could establish new guidance starting from a blank slate or could act to offer compromise relief consistent with the discretion afforded under the regulations on a one-time basis.

In identifying loans that the government is unable to collect in full in a reasonable amount of time, there are at least two categories that ED could consider:

1. **Defaulted loans that the government has already been unable to collect in full in a reasonable amount of time.** For such loans, eligibility for compromise should be clear cut, and no additional assessment should be needed because the debt has already met the standard for compromise through demonstrated government inability to collect in full in a reasonable amount of time. In setting the number of years considered "reasonable" to expect collection in full, ED could look to the practices of other agencies or to actors in the private marketplace. Alternatively, ED could look to its internal data, which should reveal, for example, the number of years that most loans spend in default before either being collected in full or returning to good standing, as well as the number of years in default after which loans are unlikely to be successfully repaid or collected in full. Then putting this into practice, the Secretary may determine, for example, that three years is a reasonable amount of time to pursue debts

in default, and that loans that remain in default after three years are unlikely to be successfully repaid or collected in full and should be discharged.[35]

ED might also reasonably decide that the amount of time that it is reasonable to attempt collection in full could also depend on the total, cumulative period the loan has been outstanding, including both time in repayment and time in default. Under this approach, ED could, for example, determine that outstanding loans in default that entered repayment 20 or more years ago are debts that the government cannot collect in full a reasonable amount of time, and should be discharged. There are potentially a large number of low-income and financially-distressed borrowers who would meet this criteria for having their debt compromised, and for whom debt relief would offer tremendous benefit to their financial security. As discussed above, approximately two million borrowers are in or near default on very old loans that entered repayment over 20 years earlier.[36] Many older and disabled Americans subject to offset have loans that fall into this category; according to a 2016 GAO report, 43 percent of older borrowers subject to Social Security offset had loans over 20 years old (and 10.6 percent had loans that were at least 30 years old).[37]

2. **Defaulted loans that the government will be unable to collect in full because the amount that the government is able to collect is insufficient to reduce borrowers' balances.** Despite ED's tremendous collection powers, including the authority to seize tax refunds in full and to garnish wages and Social Security benefits without a court order, there are some borrowers in default who are simply so poor that enforced collection is fruitless. The government cannot draw blood from a stone. For many low-income borrowers, the amount that is available and can legally be collected from them via wage garnishment, Social Security offset, and tax refund offset is not enough to even cover collection fees and ongoing interest charges, and thus does not reduce principal. As a result, the government will be unable to collect the debt "in full" in a reasonable amount of time because the collection will only service interest and collection charges, with the principal untouched. Continued collection will leave the debt balance the same or cause it to increase as unaffordable interest continues to accrue.

Loans in this category include defaulted loans that are subject to Social Security offset but do not have decreasing principal because the borrower's Social Security income is so low that it is either fully protected from offset or the amount that can be seized is less than the interest and fees that accrue each month. For example, the 2016 GAO report found that roughly half of borrowers who were subject to Social Security offset had no portion of the amount collected via offset applied to their principal—it all went to interest and fees.[38] Application of the compromise standard to this group of borrowers is particularly compelling as most Social Security recipients are unlikely to experience the type of significant income increases that would improve the likelihood of collection in full, and because for many, the offset pushes the remaining Social Security payment below—or further below—the poverty level.[39]

In addition to providing relief to millions of the most financially-distressed borrowers at little actual cost to the government, both of these categories have the advantage of presenting clear, bright-line rules that can be used to determine loans eligible for compromise relief. Further, all of the information needed to assess eligibility for relief is within ED's possession, as ED has data at the individual borrower level reflecting the amount of time in default, the amount of time since loans entered repayment, and whether a borrower in collection has a balance that is decreasing (indicating that it is making at least some progress toward collection in full) versus remaining flat or increasing (indicating that the government is not making progress toward collection and is unlikely to successfully collect in full in a reasonable amount of time). Thus, ED could provide this relief to eligible borrowers, on an opt-out basis, without requiring borrowers to apply or submit evidence of their eligibility—an important advantage, considering the difficulty ED continues to have with reaching defaulted borrowers and the burden that application-based relief programs place on borrowers and ED alike.

Ultimately, ED and the companies it pays to collect student loans cannot draw blood from a stone, and continuing to try is not only futile but inflicts needless suffering on low-income borrowers and their families, too often trapping them in poverty. This practice is unnecessary and counter to the purpose of the federal student loan system, which aims to deliver economic mobility to low-income Americans by providing access to education. Now, before collection resumes in 2024, is the time for the Secretary of Education to reevaluate ED's practice of continuing to pursue financially-distressed Americans for student debts past the point that collection is futile, and to use available authority to change course.

Endnotes

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31 In several states, sending borrowers bills and/or collection notices without informing them of their rights to utilize the Fresh Start program may constitute a violation of state consumer protection laws. See e.g., Cal. Civ. Code § 1788.102(r)(2); Colo. Rev. Stat. § 5-20-109(1)(b); Va. Code Ann. § 6.2-2610(A)(2)(i). For further discussion of the history and application of consumer law to student loan servicers, see infra, Berkman-Breen, Delivering Distress and Breaking the Law: How Sending Bills Violates Consumer Protection Laws at p. 96.

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DELIVERING DISTRESS TO BORROWERS WITH JOINT CONSOLIDATION LOANS

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Introduction

Since 1993, the little-known and short-lived Joint Consolidation Loan program has left a group of student loan borrowers in financial distress and excluded from several student debt relief opportunities. In 2022, Congress finally acted to protect these borrowers by enacting the Joint Consolidation Loan Separation Act. Although not yet implemented, the Act will finally allow families to separate their loans and participate in critical debt relief programs.

Background

The Joint Consolidation Loan program allowed married couples to consolidate their student loans. This was designed to allow borrowers to simplify household finances and take advantage of lower interest rates. But to do so, borrowers had to agree to be held jointly liable for the new consolidation loan, regardless of any later change to their marital status.[1] In addition, these loans stipulated that if one of the borrowers was unable, or refused, to pay back the loan, the co-borrower would be held responsible for the entire balance.[2] Because there was no way to separate these loans, the co-borrowers remained locked together financially, even in the case of domestic abuse or divorce.[3] Congress ended this program in 2006 by enacting the Higher Education Reconciliation Act, but it did not provide a pathway for separating these loans.[4]

Very little is known about these spousal consolidation loan borrowers today. Documents made available in response to a National Consumer Law Center Freedom of Information Act request reveal that 14,782 borrowers consolidated their loans using this program.[5] Only 776 spousal consolidation loan borrowers continue to owe money on those loans – the remainder presumably paid off their loans or refinanced into private loans not eligible for federal loan forgiveness programs. These remaining borrowers, representing roughly 0.00002% of the federal student loan portfolio, have been in repayment for at least 17 years since the consolidation program ended.

The inability to separate these loans has resulted in former spouses having to work together to make payments on their consolidated loan. In some cases, survivors of domestic violence have found themselves financially entangled with their abusers with no possibility of an exit.[6] In instances when a former spouse chooses to not make payments, the other spouse has no choice but to pick up their share of the bill or face the harsh consequences of loan default.[7] Even for couples who remain in a marriage, joint consolidation loans have imposed major financial obstacles including, as discussed below, ineligibility for student debt relief programs.

These remaining borrowers, representing roughly 0.00002% of the federal student loan portfolio, have been in repayment for at least 17 years since the consolidation program ended.

Many of the Joint Consolidation Loans in existence today originated under the now defunct Federal Family Education Loan (FFEL) Program, leaving these borrowers at an even greater disadvantage than co-borrowers who consolidated their loans into a Direct Joint Consolidation Loan. While individual FFEL loan borrowers can consolidate their loans into a Direct Consolidation Loan in order to access critical student debt relief programs, Joint Consolidation Loan borrowers with FFEL loans cannot do so. This denies them access to Public Service Loan Forgiveness (PSLF), most Income-Driven Repayment (IDR) plans, and the one-time IDR Account Adjustment that will allow millions of borrowers to finally qualify for debt forgiveness and bring millions more closer to forgiveness. Holding these joint loans also prevents them from consolidating their loans to exit default. In addition, FFEL Joint Consolidation Loans that are not held by the U.S. Department of Education (ED)--some such loans are now held by ED—were excluded from the COVID-19 payment pause that was in place between March 2020 and September 2023, which meant they were required to continue loan payments throughout the pandemic.

While borrowers holding Joint Direct Consolidation Loans are eligible for some debt relief programs, those benefits are limited. For example, spousal consolidation loan borrowers may participate in PSLF but only if both spouses worked full time in a qualifying public service position when each of the requisite 120 monthly payments were made.

Today, 17 years after Congress ended the Joint Consolidation Loan program, these borrowers still find themselves waiting for relief that will allow them to participate fully in these student debt relief programs.

Locked Out, Left Behind

In 2022, Congress made a promise to provide relief to Joint Consolidation Loan borrowers. The Joint Consolidation Loan Separation Act,[8] a bill led by Senator Mark Warner (D-VA) and Representative David Price (D-NC04), received bipartisan support, passed easily through both chambers, and in October 2022 was signed into law by President Biden.[9] The bill directed ED to create a mechanism for these borrowers to separate their loans and ensure they could access the student debt relief they had long been denied.

The timing of the bill's passage was of particular significance. It was signed just three weeks before the PSLF Limited Waiver ended, which had relaxed eligibility requirements for public service workers to receive loan forgiveness following years of programmatic failure. Though not widely distributed beyond an update on its website, ED explained that it would eventually reach out to Joint Consolidation Loan borrowers who expressed interest in the Limited Waiver prior to its expiration on October 31, 2022, and would retroactively apply the Waiver's benefits after borrowers acted to separate their loans.[10] It is unknown how many joint borrowers expressed interest in receiving the benefits of the PSLF Waiver.

The limbo in which these borrowers found themselves relative to debt relief programs increased in April 2023, when ED announced its plan to "address[] historical failures in the administration of the federal student loan programs."[11] This plan addresses problems such as student loan companies steering borrowers into forbearance and correcting for data problems and payment history inaccuracies by conducting a "one-time account adjustment." As with the Limited Waiver, borrowers with FFEL Joint Consolidation Loans were told that they would not immediately receive these benefits and would need to wait until ED separated their loans before they became eligible.[12]

Finally, in July 2023, ED acknowledged that although Congress required that ED allow these borrowers to separate their Joint Consolidation Loans, the process for doing so "will not be fully implemented until late 2024 at the earliest."[13]

While these borrowers continue to wait for student debt relief, ED has advised that borrowers with Direct Joint Consolidation Loans and borrowers with FFEL Joint Consolidation Loans held by ED may ask their loan servicer to place their loans into forbearance until the loan separation process is available. Those loans will accrue non-capitalizing interest in the meantime. For spousal borrowers who hold commercially-held FFEL Joint

Consolidation Loans, ED has encouraged FFEL lenders to grant discretionary forbearances until the separation process is finalized, but came short of requiring it.[14] A number of spousal borrowers have reported to Student Borrower Protection Center that their lenders have denied their requests for a discretionary forbearance, thereby requiring these borrowers to continue making payments as they wait for a process to separate their loan and access student debt relief.[15]

Spousal Consolidation Borrowers Are All But Assured to Face Harm From the Delayed Implementation of the Joint Consolidation Loan Separation Act

Spousal consolidation borrowers who have patiently waited for help accessing student debt relief programs are all but assured to face continued harm while they wait for ED to implement the Joint Consolidation Loan Separation Act. It remains unclear when the promised relief will reach these borrowers, or how many will still even be in repayment when it arrives. Even in the best-case scenario, spousal consolidation loan borrowers are likely to see their student loan balances slowly creep up if they move into an interest-accruing forbearance.

While the delayed implementation of the Joint Consolidation Loan Separation Act is a concern for all borrowers with these loans, this is a particular problem for survivors of domestic violence or economic abuse, who will remain financially tied to their abusers until they are able to separate their loans. And, it will delay access to affordable IDR plans. Because these loans were last issued 17 years ago, with the first loans issued 30 years ago, many of these borrowers will likely be eligible for debt cancellation once the Account Adjustment is eventually applied to them.

> ...[A]lthough Congress required that ED allow these borrowers to separate their Joint Consolidation Loans, the process for doing so "will not be fully implemented until late 2024 at the earliest.

The failure to ensure that all FFEL Joint Consolidation Loan borrowers can place their loans into forbearance while they continue to wait is likely to have long-lasting harms to these borrowers. Even under the PSLF Waiver and IDR Account Adjustment, any payments made towards a FFEL Program loan cannot be refunded even after the borrower is able to complete the process for a new Direct Consolidation Loan. This means that any spousal consolidation loan borrower who is required to make payments until the separation process is enacted, then receives PSLF or IDR cancellation, will not be able to get their money back––even if they far exceed the 120 to 300 monthly payments required to receive forgiveness under these programs.

These borrowers continue to face other harms while they remain caught in this limbo rather than receiving the student debt relief they were promised. For instance, these borrowers will continue to have a higher debt-to-income ratio, which makes taking out other consumer products more expensive. And for borrowers who have slipped into default, they must continue to face wage garnishment, tarnished credit scores, and no way out.

Collecting Student Debt Delivers Distress to Spousal Consolidation Borrowers and Exposes Student Loan Companies to Potential Liability

> Spousal consolidation borrowers who have patiently waited for help accessing student debt relief programs are all but assured to face continued harm while they wait for ED to implement the Joint Consolidation Loan Separation Act.

ED can and should act to implement the Joint Consolidation Loan Separation Act as quickly as possible to minimize these harms. Most notably, ED could simply forgive these loans given, as noted above, that only 776 borrowers continue to hold these loans. ED's announcement that it will be unable to implement a process to separate these loans for at least another 14 months suggests that doing so requires the expenditure of time and other resources that could be devoted to other programs that impact a greater number of borrowers. Fiscally, it likely makes sense simply to forgive these loans under the Secretary's Higher Education Act authority to compromise, waive or release loans "under certain circumstances."[16]

Alternatively, ED could reprioritize the work of implementing the Joint Consolidation Loan Separation Act, which requires the U.S. Secretary of Education to separate Joint Consolidation Loans into two new individual Direct Consolidation Loans upon joint or, in limited circumstances, individual application by borrowers.[17] Doing so for the 776 borrowers who continue to hold these loans should not take 25 or more months (from the October 2022 enactment "until late 2024 at the earliest"). Although this pool of borrowers is relatively small, the harm they have realized since the consolidation program ended 17 years ago is potentially great. This prompted Congress to act on their behalf. It is past time for ED to carry out Congress's wishes and protect these borrowers.

Endnotes

1 U.S. Dep't of Educ., Fed. Student Aid, Joint Consolidation Loan Separation News and Updates, https://studentaid.gov/announcements-events/joint-consolidation-loans.

2 *Id.*

3 These terms are unique to Joint Consolidation Loans, and do not seem to appear with any other type of consumer product today. *See* Emma Rindlisbacher, *The US Government Pushed Hundreds of Married Couples Into Disastrous Student Loans*, Mother Jones (Mar. 2, 2022), https://www.motherjones.com/politics/2022/03/student-debt-spousal-consolidation-loans-biden-education-department/.

4 Higher Education Reconciliation Act of 2005, Public L. No. 109–171 (2006).

5 *See* Response to Nat'l Consumer Law Ctr. request to U.S. Dep't of Education, 21-01155-F (May 26, 2021). *See also* Rindlisbacher, *supra* note 3.

6 *See* Emma Rindlisbacher, *She Accused Her Ex-Husband of Abuse. She's Still Stuck With His Student Loans.* (Apr. 29, 2022), https://www.motherjones.com/politics/2022/04/spousal-consolidation-student-loans/.

7 *Supra* note 1.

8 Joint Consolidation Loan Separation Act, Public L. No. 117-200, 136 Stat. 2219 (2022).

9 Thao Nguyen, *President Biden Signs Bill Allowing Divorced Couples to Sever Joint Consolidation Student Loans*, USA Today (Oct. 12, 2022, 6:18 AM), https://www.usatoday.com/story/news/nation/2022/10/12/president-biden-student-loans-couples-separate-debts/8173052001/.

10 *Supra* note 1; *see* "Who Qualified and Your Steps for the Limited PSLF Waiver.

11 Press Release, U.S. Dep't. Of Educ., Biden-Harris Administration to Provide 804,000 Borrowers with $39 Billion in Automatic Loan Forgiveness as a Result of Fixes to Income Driven Repayment Plans (July 14, 2023), https://www.ed.gov/news/press-releases/biden-harris-administration-provide-804000-borrowers-39-billion-automatic-loan-forgiveness-result-fixes-income-driven-repayment-plans.

12 U.S. Dep't of Educ., Fed. Student Aid, 12The Limited PSLF Waiver Opportunity Ended on Oct. 31, 2022, *Who Qualified and Your Steps for the Limited PSLF Waiver*, Fed. Student Aid https://studentaid.gov/announcements-events/pslf-limited-waiver.

13 *Joint Consolidation Loan Separation Act: Forbearance Guidance*, Fed. Student Aid Partners (July 19, 2023), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2023-07-19/joint-consolidation-loan-separation-act-forbearance-guidance.

14 *Id.*

15 These denials are on file and can be made available upon request.

16 20 U.S.C. § 1098bb(a)(2).

17 20 U.S.C. § 1087e(g)(2)(C).

DELIVERING DISTRESS AND BREAKING THE LAW: HOW SENDING BILLS VIOLATES CONSUMER PROTECTION LAWS

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Introduction

This is an unprecedented time for student loan borrowers. In October 2023, payments on federal student loans are due for the first time since March 2020. Borrowers must reengage with a system with which they may not have interacted throughout this paused period, and other, recent borrowers must navigate this system for the first time. Changes to federal regulations and consolidation in the market for student loan servicing have made an already-complex landscape nearly impossible to navigate for the average consumer.

During this time of transition and upheaval, certain populations of borrowers face additional hardships: those who should never have been returned to repayment because their loans should have been cancelled. The federal student loan system provides several different programs and mechanisms through which eligible borrowers' loans will be cancelled. This ranges from public service workers to borrowers whose schools defrauded them to long-term borrowers, and more. Due to regulatory changes in the student loan system, hard-fought judicial relief, and executive action, millions of borrowers in these groups are entitled to have their loans cancelled. Instead, they are receiving bills. Each of these circumstances is explored in detail in accompanying papers.

Sometimes what seems unjust is also unlawful. This paper examines these borrowers' circumstances through the lens of consumer protection law, and asserts that by sending these borrowers statements and demanding payments, student loan services are engaged in unfair, deceptive, and abusive conduct in violation of federal law. Especially when the student loan system itself is failing borrowers, federal and state law enforcement agencies and financial regulators can and must step in to ensure that no borrower is forced to make a payment on a loan that should no longer exist.

Federal and State Laws Prohibit Student Loan Servicers From Engaging in Unfair, Deceptive, and Abusive Acts or Practices

One of the main tools to combat consumer abuses are laws against unfair or deceptive acts or practices, so-called UDAPs.[1] These consumer protections are intentionally flexible and are intended to meet new challenges as they arise without having to engage in the whack-a-mole exercise of endlessly legislating against hyper-specific abuses.[2]

At the federal level, the Federal Trade Commission (FTC) has for nearly a century had the authority to address UDAPs "in or affecting commerce."[3] In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) expanded the scope of traditional UDAPs by prohibiting abusive acts and practices by financial services firms,[4] resulting in a UDAAP that can be enforced by the federal Consumer Financial Protection Bureau (CFPB) and by state attorneys general and financial regulators.[5] Through rulemaking, the CFPB has made clear that student loan servicers, regardless of whether they service federal or private student loans, are covered persons subject to this UDAAP standard for both supervisory and enforcement purposes.[6]

Virtually every state also has a UDAP statute, although they vary in the scope of conduct that is prohibited, entities to which it can be enforced, and who can bring claims when the law is violated.[7] Additionally, approximately 19 states have passed consumer protection laws specific to student loan servicers that contain "mini-UDAPs" applicable to that industry.[8] These state laws are not alternatives to states' ability to exercise the federal UDAAP standard, but rather can be enforced in parallel to police unlawful conduct.

Although intentionally flexible and broad, UDAAPs are not vague. Years of case law and agency interpretations have helped to flesh out the contours of what makes an act or practice unfair or deceptive,[9] and for Dodd-Frank's UDAAP, Congress included specific elements of what makes conduct unfair, deceptive, or abusive.[10] Given Dodd-Frank's applicability to student loan servicers, national scope, and enforceability by both federal and state actors, this paper focuses on it as a tool to address servicers conduct as federal student loan payments resume.

Although intentionally flexible and broad, UDAAPs are not vague.

An act or practice is unfair in violation of the Dodd-Frank when:

1. It causes or is likely to cause substantial injury to consumers;

2. The injury is not reasonably avoidable by consumers; and

3. The injury is not outweighed by countervailing benefits to consumers or to competition.[11]

An act, practice, representation, or omission is deceptive in violation of Dodd-Frank when:

1. The act, practice, representation, or omission misleads or is likely to mislead the consumer;

2. The consumer's interpretation of the act, practice, representation, or omission is reasonable under the circumstances; and

3. The act, practice, representation, or omission is material.[12]

Finally, pursuant to Dodd-Frank, an act or practice is unlawfully abusive when it:

1. Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

2. Takes unreasonable advantage of

   a. A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

   b. The inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

   c. The reasonable reliance by the consumer on the covered person to act in the interests of the consumer.[13]

These three categories of unlawful conduct are not mutually exclusive, and a single act or practice can be any combination of unfair, deceptive, or abusive. As discussed below, when student loan servicers send statements demanding payments to borrowers who have a right to loan cancellation, that is an unfair, deceptive, and abusive act in violation of federal UDAAP consumer protections.

There Are Several Identifiable Classes of Borrowers Whose Loans Should or Could Be Cancelled

As federal student loan payments resume for the first time since March 2020, there are discrete categories of borrowers who will receive statements demanding monthly payments, but whose loans should have been cancelled instead. These groups of borrowers include public service workers, defrauded students, borrowers who have been in repayment for decades, and borrowers with low balances, among others. Each of these groups is discussed in greater detail in companion papers to this one.[14] What unites them, however, is that if the student loan system were functioning efficiently and fairly, they should not have to resume payments on their student loans.

For the purpose of determining whether student loan servicers are engaged in unlawful activity by sending statements and demanding payment from these borrowers, rather than discuss each class of borrower's individual circumstances, they can be grouped into three general categories.

First, borrowers who have met all statutory requirements to have their loans cancelled, but who are waiting on an under-staffed,[15] slow,[16] and error-prone[17] student loan servicer to process their rights.[18] *Second*, borrowers whose loans will be cancelled without any further action, but at a later date known or knowable by the servicer.[19] *Third*, borrowers who could take an affirmative action that would result in their loans being cancelled.[20]

Each of the three categories of borrowers whose loans should be cancelled are readily identifiable to student loan servicers, which have complete access to borrowers' student loan records, including payment histories and cancellation applications. Servicers could, therefore, either refrain from sending statements and demanding payments from these borrowers until their cancellations have been processed, or could include with the statements an acknowledgement that the nature of these debts is conditional: these borrowers may not be required to pay.

Federal servicing contracts provide no shield against consumer protection laws; to the contrary, they incorporate them.

Federal servicing contracts provide no shield against consumer protection laws; to the contrary, they incorporate them. Although student loan servicers are contracted to service student loans, which generally includes sending statements and collecting payments,[21] those same contracts provide that servicers "will be responsible for maintaining a full understanding of all federal and state laws and regulations and Federal Student Aid (FSA) requirements and ensuring that all aspects of the service continue to remain in compliance as changes occur."[22] Not only does this create an affirmative obligation for servicers to remain current on changes to the federal student loan system, it also requires them to understand when and if their conduct may run afoul of state and federal consumer protection law. This is especially true of Dodd-Frank, as the CFPB already determined that student loan servicers are covered persons and because it is not subject to the same preemption challenges as state law. Servicers should therefore have understood that segments of the loans they service met, will soon meet, or could meet statutory requirements for cancellation and that failing to alter their servicing of those loans in any way would potentially constitute a UDAAP.

Beginning in September 2023, however, student loan servicers began sending these borrowers statements that unconditionally demand a monthly payment, due on a date certain.

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Billing Statement Summary

Information is current as of 09/21/2023

Your Student Loan Payment is Due 10/16/2023

Current Due:	$59.12
Past Due:	$0.00
Total Due:	$59.12

Pay Online Now

This notice does not replace your billing information available on mohela.com. For information about which loans are included in this billing statement and your repayment options, please log in.

Easy Ways to Pay

- Receive a **0.25% interest rate reduction** by signing up for Auto Debit
- Login to your mohela.com account and pay online
- Get the MOHELA app for your iPhone or Android device
- Use our automated phone system at 888.866.4352 anytime 24/7

You received this email because you are a MOHELA customer and signed up for our Go Paperless program. Replies to this message are not monitored. If you would like to contact us or cancel your participation in MOHELA's Go Paperless program, call our Customer Service Department at 888-866-4352. We respect your privacy. See our Privacy Policy

This message is an attempt to collect a debt and any information obtained will be used for that purpose.

These statements make no explicit or implicit mention of borrowers' right to cancellation or progress toward cancellation, and provide only a general disclaimer that borrowers can contact their student loan servicer for assistance. Critically, the sending of statements that demand payment and fail to address these borrowers' statutory right to have their loans cancelled is an "act or practice" for the purpose of the following UDAAP analysis.

Sending Bare-Minimum Statements to and Demanding Payments From Federal Student Loan Borrowers Who Have a Statutory Right to Loan Cancellation is Unfair

For each of the three categories of borrowers described above, sending statements demanding payment, without any acknowledgement or information related to debt cancellation, satisfies each prong of an unfair act in violation of Dodd–Frank.

Demanding Payment From Borrowers Who Have a Right to Loan Cancellation Causes or Is Likely to Cause Substantial Injury

There can be little objection to the fact that making a payment on a debt that should no longer be owed is a form of monetary harm. Not only does it shock the conscience, but it is also a general tenet of consumer protection law that borrowers should never have to pay a debt that they do not owe.[23] We see this maxim reflected through state and federal debt collection laws, such as the Fair Debt Collection Practices Act (FDCPA), which prohibits unfair collection practices, including collecting any amount expressly authorized and owed.[24] Although the FDCPA is generally not applicable to student loan servicers,[25] it is nonetheless instructive for how to apply Dodd-Frank's applicable unfairness standard to the collection of a debt.[26]

Additionally, the fact that the monthly payments being demanded may not be substantial relative to each individual borrower's personal circumstances is not dispositive; the CFPB has explained that "an act or practice that causes a small amount of harm to a large number of people may be deemed to cause substantial injury."[27]

> ...[A]n act or practice that causes a small amount of harm to a large number of people may be deemed to cause substantial injury.

Finally, injury need not have occurred. In drafting Dodd-Frank, Congress was explicit in the text that conduct that is "likely to cause" harm can still be considered unlawful.[28]

Here, there is clearly the risk of substantial injury. For all three categories, payments are being demanded from borrowers who should no longer need to make any payment, either because their loans should already be cancelled or because they have a right to cancellation without additional payments, *i.e.*, by waiting additional time or by taking an affirmative step. This amounts to an injury. In addition to offending the legal principle that borrowers should not make payments where none should be legally due, there are practical harms, too. Making a payment diverts funds from other monthly expenses, investment opportunities, or emergency funds. And there is no need to assess individual borrowers' circumstances, because taken together, by sending statements and demanding payments, servicers' actions cause or will likely cause injury to thousands, if not millions, of borrowers, which is sure to meet any standard for substantial injury.

Borrowers Cannot Reasonably Avoid This Substantial Injury

Not only does demanding payments from borrowers who have a right to loan cancellation create at least the risk of substantial injury, it creates an injury that is not reasonably avoidable by borrowers.[29]

First, as a threshold matter, even borrowers who have satisfied all applicable legal requirements may not be aware that they have a right to have their loans cancelled, and so they cannot reasonably avoid harm that they do not know they are likely to experience. The federal student loan system is exceedingly complex and has undergone significant changes in recent years.[30] The system is too complex to assume that the average borrower is familiar with the various statutory provisions by which their debt could be cancelled. Servicers, not borrowers, are the ones with the subject matter expertise and access to consumer records necessary to identify whether a borrower has a right to cancellation.

> Servicers, not borrowers, are the ones with the subject matter expertise and access to consumer records necessary to identify whether a borrower has a right to cancellation.

Additionally, the system's historic failure to deliver debt cancellation, including the Supreme Court's decision to block President Biden's broad-based debt cancellation following millions of borrowers being told they were approved for loan cancellation, have understandably created distrust and uncertainty that reasonably could result in a borrower assuming the only way to end their debt is by paying it off.[31] We therefore cannot expect a borrower to reasonably avoid a harm that they do not know, understand, or anticipate.

Second, borrowers cannot reasonably avoid this injury because they cannot reasonably avoid its cause: they have little to no choice in which company services their loans. There are only five companies that service non-defaulted federal student loans held by the federal government,[32] and a handful of additional companies that service commercially-owned federal student loans.[33] The federal student loan servicing system is a closed and small market that prevents any meaningful consumer choice or incentive for servicers to compete for business by improving the quality of their services. This is particularly true for borrowers whose loans should be cancelled under a statutory discharge program with a dedicated student loan servicer, such as the Public Service Loan Forgiveness (PSLF) program,[34] as they have no choice in the company to which their loans are assigned.

Further, the problems that have plagued the servicing industry and that result in servicers demanding payment on loans that should be cancelled—namely slow processing time and low-quality customer service that fails to provide borrowers with timely and material information about their loans—is pervasive across all servicers in this closed and small market.[35] Borrowers cannot avoid this harm because it is being perpetrated by all available student loan servicers.

Third, even in the rare circumstance where borrowers have sufficient information to know that their loans are immediately eligible for cancellation and that payment toward their loans would therefore represent a harm, they are left with only two options: seek a payment alternative or make no payment. Neither of these options is reasonable.

Borrowers cannot avoid this harm because it is being perpetrated by all available student loan servicers.

To avail themselves of a payment alternative, such as a forbearance, is not a reasonable option. For too many borrowers it is practically impossible to reach their servicer in a reasonable manner. Leading up to the return to repayment, student loan servicers reduced staff and operating hours,[36] which has resulted in extraordinary call wait times and abandonment rates.[37] It is not reasonable to expect a borrower to wait on hold for hours on end, during their work day, to reach their servicer. Even if a borrower can reach their student loan servicer, being placed into a forbearance is not reasonable, as that exchanges one harm, a payment, for another: unnecessary interest that continues to accrue while in forbearance.

Nor is it reasonable to expect these borrowers to simply ignore statements sent to them and make no payment. Again, many borrowers who have a right to debt cancellation may not be aware of that right, and so may make a payment under the belief that they must pay down their loan over time. Additionally, it is not reasonable to expect an individual borrower to defy a statement and demand for payment sent by a government contractor. The consequences of delinquency and default on federal student loans is too great,[38] and the federal government is actively encouraging repayment. Although the Biden Administration has announced an "on-ramp" policy that will allow borrowers to miss payments without becoming delinquent, this does not make it reasonable for a borrowers whose loans should be cancelled to skip payments: the government has been very clear that the on ramp should be a last resort for borrowers who are unable to afford their monthly payments.[39] Inability to pay and the right to not pay are different circumstances. The on-ramp also would not completely avoid the injury of repayment, as interest will continue to accrue during any month when no payment is made.[40]

For these reasons, which range from difficulties navigating an overly complex system to facing interest accrual as an alternative injury, borrowers cannot reasonably avoid the injury of having payments demanded on their loans that legally should be cancelled.

This Injury to Borrowers Is Not Outweighed by Any Countervailing Benefit to Consumers or to Competition

There are no countervailing benefits to demanding payments from borrowers whose loans should be cancelled. The federal student loan system is not dependent on revenues from any borrower payments, let alone this subclass of borrowers, to originate loans to new borrowers.[41] To the extent that is operationally easier for servicers to send out statements en masse rather than identifying the borrowers whose loans should be cancelled, that would likely be outweighed by the need to subsequently issue refunds to borrowers who make unnecessary payments, resulting in a net cost, rather than benefit. There are also strong public policy arguments against framing collection from these borrowers as a benefit, since Congress provided for loan cancellation. In fact, the failure to execute these loan cancellations in a timely manner and the decision to instead send statements and demand payment generates more work than is necessary and misses an opportunity to reduce the government's overall portfolio, which would have resulted in a net benefit.

For these reasons, by sending statements to and demanding payment from borrowers who have a legal right to loan cancellation, student loan servicers are likely engaging in an unfair act in violation of federal consumer protection law.

Sending Bare-Minimum Statements to and Demanding Payments From Federal Student Loan Borrowers Who Have a Statutory Right to Loan Cancellation is Deceptive

Sending statements and demanding payment from borrowers whose loans should legally be cancelled is also likely a deceptive act in violation of federal law. This is particularly true for borrowers in category three, who must take an affirmative action to benefit from cancellation.

Servicers' Acts and Omissions Are Likely to Mislead Borrowers

The act of issuing a statement that lists a payment amount and due date to a borrower sends a clear message: that the borrower must pay, or else. As discussed in the accompanying papers, borrowers who have satisfied all legal requirements to have their debts cancelled do not, in fact, owe a payment. Sending a statement is therefore misleading because it conveys something that is not true.

Similarly, the statements omit important information.[42] They do not identify the borrower as someone who is entitled to loan cancellation or, in the case of borrowers in category three, provide specific instructions about what steps must be taken to qualify for debt cancellation or identify any relevant deadlines. Although statements do refer borrowers to the FSA website and to servicers' own websites, neither of those resources meaningfully helps borrowers self-identify as someone who should not owe additional payments. The failure to include individualized and relevant information about debt cancellation on statements demanding payments is therefore an omission that is likely to mislead a borrower into believing that they must make a payment.

The act of issuing a statement that lists a payment amount and due date to a borrower sends a clear message: that the borrower must pay, or else.

Borrowers' Belief That a Payment Is Due Is Reasonable Under the Circumstances

It is reasonable for a borrower who has a legal right to debt cancellation to believe that a payment is nonetheless due when they receive a statement demanding payment. As a threshold matter, it is reasonable for a borrower to believe a payment is due when their student loan servicer sends a bill. To entertain the contrary—that it is reasonable for a borrower to question a bill received by a student loan servicer—would concede that the student loan servicing system is unreliable. Although that may mitigate a deception claim, it would bolster unfairness and other legal claims against servicers.

As discussed above, many borrowers may not know that they have a right to loan cancellation, and without the additional information and context that the servicers omit from the statement, the borrowers could not reasonably determine this on their own.

Finally, context is important. The President of the United States,[43] the Secretary of Education,[44] Congress,[45] and mainstream and alternative news outlets have made clear that payments on federal student loans will resume in October 2023.[46] It is therefore reasonable for a borrower to believe that receipt of a statement requires payment.

Taken together, a borrower who receives a bill would reasonably believe they must pay the stated amount, even if the borrower has a legal claim to debt cancellation.

The Act, Practice, Representation, or Omission Is Material

The CFPB explains that a "representation, omission, act, or practice is material if it is likely to affect a consumer's choice of, or conduct regarding, the product or service" and that "information that is important to consumers is material."[47] There can be no question that misrepresenting whether a payment is due is material. Similarly, omitting information that gives a borrower complete context for whether a payment is due and identify any steps that they could take to benefit from loan cancellation is material. These acts and omissions are likely to affect whether a borrower will make a payment or take steps necessary to obtain loan cancellation. Given that they relate to the borrower's loan status, they are also inherently important information.

> These acts and omissions are likely to affect whether a borrower will make a payment or take steps necessary to obtain loan cancellation.

For the foregoing reasons, in addition to being unfair conduct, sending statements and demanding money from borrowers whose loans should be legally cancelled, without providing additional information, is likely a deceptive act and omission in violation of federal consumer protection law.

Sending Bare-Minimum Statements to and Demanding Payments From Federal Student Loan Borrowers Who Have a Statutory Right to Loan Cancellation Is Abusive

Sending statements to and demanding payments from borrowers whose loans should legally be cancelled satisfies both independent prongs of the abusiveness definition in Dodd-Frank.

Sending Statements and Omitting Material Information Interferes With Borrowers' Ability to Understand the Terms of Their Loans

Whether or not to pay on a debt and whether a borrower has a right to debt cancellation are critical terms or conditions of their loans. As discussed above, the act and practice of sending statements and demanding payments, while omitting material information, is likely to lead a borrower who should not have to make a payment to do so, and does not help a borrower who could benefit from loan cancellation to take any necessary steps. Servicers, by engaging in this act or practice, are materially interfering with borrowers' ability to understand these important terms and conditions, which is sufficient to meet the definition of abusive conduct under Dodd-Frank.

Sending Statements and Demanding Payments From Borrowers Whose Loans Should Legally Be Cancelled Takes Unreasonable Advantage of Those Borrowers

The Dodd-Frank's abusiveness definition's second independent prong has three subcomponents.[48] Conduct need only satisfy one of the subcomponents to be unlawfully abusive, and the student loan servicers' actions trigger all three.

First, the act of sending statements and demanding payments takes unreasonable advantage of borrowers' lack of understanding of the material conditions of their student loans. As discussed above: the student loan system is vast, complicated, and changing;[49] the right to have one's debt cancelled is a condition of the loan itself, as well as being enshrined in federal law;[50] and the receipt of a statement from a government contractor reasonably conveys that a payment is due. Taken together, sending statements to borrowers who have a legal right to debt cancellation takes unreasonable advantage of the relatively difficulty that those borrowers may have in understanding their rights and pushing back against the demand for payment.

Second, the act of sending statements and demanding payments takes unreasonable advantage of borrowers' inability to project their interest in having their loan cancelled. As discussed above, borrowers have virtually no choice in which company services their loan, and all servicers are engaged in similar unlawful conduct.[51] Additionally, for those borrowers who have already taken every necessary step to qualify for debt cancellation, or for whom cancellation will come at a known later time, there is nothing that they can reasonably do to protect their interests. For those borrowers who must take an affirmative step to benefit from debt cancellation, the servicers' material omissions paired with a demand for payment take advantage of the information asymmetry between servicer and borrower and effectively prevents them from protecting interests about which they may not know.

Third and finally, the act of sending statements and demanding payments takes unreasonable advantage of borrowers' reasonable reliance on their assigned student loan servicer to assist them with their loan. This does not require servicers to have an actual duty to act in the borrower's best interest, just for a borrower's reliance thereof to be reasonable. Given the consistent messaging from the federal government urging borrowers with questions to contact their servicer,[52] and offers to help from the servicers themselves,[53] it is reasonable for a borrower to rely on their servicer to act in their best interest. At least one federal court has already ruled that, in similar circumstances and for the purpose of Dodd-Frank abusiveness, it is reasonable for a borrower to rely on their student loan servicer.[54] In doing so, the court specifically rejected the servicer's claim that "there is no expectation that the servicer will 'act in the interest of the consumer.'"[55]

Here, too, as discussed above, to suggest that it is unreasonable for a borrower to rely on their servicer to act in their best interest concedes deep failures in the student loan servicing system. These failures may mitigate liability under this prong of abusiveness, but would support allegations of unfair conduct and other liability. For example, it bolsters the idea that a consumer cannot reasonably avoid harm that is imposed by a servicer, which the consumer had no hand in choosing, that administers their loan, and that claims no responsibility for the borrower or loan's wellbeing.

In addition to being unfair and deceptive, student loan servicers' act of sending statements and demanding payment from borrowers who have a legal right to debt cancellation is likely abusive in violation of Dodd-Frank.

This Conduct Likely Also Violates a Variety of State Student Loan Servicing-Specific Laws and Consumer Protections

In addition to the UDAAP claims discussed above, by sending statements to and demanding payment from borrowers whose loans should legally be cancelled, student loan servicers are also likely violating a variety of state laws across the country. As discussed above, states have their own UDAP authority, and some states also have student loan servicer specific laws with "mini-UDAPs," many of which include bans against abusive conduct.[56]

Sending statements and demanding payments of borrowers whose loans should be cancelled likely also violates specific provisions of state student loan servicing laws. For example, many of these laws provide that servicers cannot misrepresent the "nature" or "appropriateness" of a payment that is due or claimed to be due on a student loan.[57] Where a borrower has already satisfied all statutory requirements to have their debt cancelled, such as making 120 qualifying payments under the PSLF program or by making the relevant number of payments under one of the Income-Driven Repayment (IDR) plans, sending a statement misrepresents whether additional payments are due. Other provisions require student loan servicers to train and employ student loan specialists who are knowledgeable about repayment and discharge options,[58] such that servicers know or should know that certain of their accounts are likely eligible for debt cancellation.

These state causes of action can be used in parallel to states' ability to bring claims under Dodd-Frank, and in some instances may offer alternative and superior remedies for borrowers.[59] Many of these local laws also provide private rights of action, which are critical to ensuring access to justice for individual borrowers experiencing unlawful conduct from their student loan servicer. Too often individual borrowers are left without any remedy while government enforcement offices wait to build large cases. With these private rights of action, however, borrowers can immediately defend their rights in court, stop bad practices, and be made whole. These cases brought by individuals also serve to alert government officials to unlawful conduct.

The CFPB and States Can and Should Enforce These Laws to Ensure That No Borrower Repays a Loan That Is Eligible for Cancellation

For the borrowers who are entitled to cancellation, the path to this point has been littered with system failures, private sector fraudsters, and inadequate government responses. Unfortunately, these borrowers are poised to be disappointed and failed yet again. Student loan servicers had the opportunity to identify borrowers whose loans were eligible for cancellation and to avoid sending those accounts back into repayment. Instead, they demanded payment from millions of borrowers from whom no payment should be due. In scenarios such as these, consumer protection agencies, whether the CFPB, state attorneys general, or state financial regulators, must use their available tools to ensure that borrowers are held harmless. As discussed in detail above, UDAAP protections are applicable to this scenario, are flexible enough to address each category of borrower, and could provide necessary injunctive and monetary relief.[60] Consumer protection agencies and chart a new path by stepping up and protecting borrowers from distress.

Endnotes

1 *See generally*, Prentiss Cox, Amy Widman, & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 Harv. J. on Legis. 37, 41-47 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942406#.

2 Fed. Reserv. Bd. & Fed. Deposit Ins. Comm'n, *Unfair or Deceptive Acts or Practices by State-Chartered Banks* 2 (Mar. 11, 2004), https://www.federalreserve.gov/boarddocs/press/bcreg/2004/20040311/attachment.pdf ("Congress drafted this [FTC Act UDAP] provision broadly in order to provide sufficient flexibility in the law to address changes in the market and unfair or deceptive practices that may emerge.").

3 *See* Wheeler-Lea Act of 1938, P.L. No. 75-447, § 3, 52 Stat. 111, 111 (codified as amended at 15 U.S.C. § 45(a)(1) (2012)).

4 P.L. 111-203. For further discussion of the history, purpose, and application of the prohibition on "abusive" acts and practices, *see* Consumer Fin. Prot. Bureau, *Policy Statement on Abusive Acts and Practices* (Apr. 2023), https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/.

5 12 U.S.C. § 5561 et seq.; 12 U.S.C. § 5552(a).

6 *See* 12 C.F.R. § 1090.106.

7 Nat'l Consumer L. Ctr., *Consumer Protection in the States: a 50 state evaluation of unfair and deceptive practices laws* (Mar. 2018), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf.

8 *See* Cal. Civ. Code § 1788.100 et seq; Colo. Rev. Stat. § 5-20-100 et seq.; Conn. Gen. Stat. § 36a-846 et seq.; D.C. Official Code §31-101 et seq.; 110 Ill. Comp. Stat. Ann. 992 et seq.; Ky. Rev. Stat. § 286.12-005 et seq.; La. Rev. Stat. § 6:1401 et seq.; Me. Rev. Stat. Title 9-A, Art. 14; Md. Educ. D. IV, Title 26, Subt. 6; Ma. G.B.L. c. 93L; Minn. Stat. Ch. 58B; 2023 Bill Text NV A.B. 332; N.J. Stat. § 17:16ZZ; N.Y. Banking Law Art. 14-A; Okla. Stat. tit. 24, § 170 et seq.; Or. Laws 2021, ch. 651, secs 1-11; R.I. Gen. Laws § 19-33; Va. Code Ann. Title 6.2, Subt. IV, Ch. 26; Wash. Rev. Code Ann. § 31.04.400 et seq.

9 *See*, *e.g.*, Letter to Senators Wendell H. Ford and John C. Danforth, Senator Committee on Commerce, Science, and Transportation, from Fed. Trade Comm'n, *FTC Policy Statement on Unfairness* (Dec. 17, 1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness; Letter to Chairman John D. Dingell, House Committee on Energy and Commerce, from Chairman James C. Miller III, Fed. Trade Comm'n, *FTC Policy Statement on Deception* (Oct. 13, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf; *FTC v. Sperry & Hutchinson C.,* 405 U.S. 223, 244-45 n.5 (1972).

10 *Supra* note 4; 12 U.S.C. § 5531.

11 12 U.S.C. § 5531(c)(1); *see* Consumer Fin. Prot. Bureau, *Consumer Laws and Regulations: Unfair, Deceptive, or Abusive Acts or Practices*, Supervision and Examination Manual, V.2 1 (Oct. 2012), https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures_2023-09.pdf (Hereinafter, "CFPB UDAAP Exam Manual").

12 *See* CFPB UDAAP Exam Manual, *supra* note 11 at 5; *FTC Policy Statement on Deception*, *supra* note 9.

13 12 U.S.C. § 5531(d); *see* CFPB UDAAP Exam Manual, *supra* note 11 at 9.

14 *See supra* Rovenger, *Delivering Distress to Borrowers Approved for Debt Relief*, at p. 39; Shafroth & Taylor, *Delivering Distress to Borrowers in Default*, at p. 69; Burritt & Hicks, *Delivering Distress to Borrowers with Joint-Consolidation Loans*, at p. 87; Pierce & Weingarten, *Delivering Distress to Public Service Workers*, at p. 25; Yu, *Delivering Distress to Low-Income, Low-Balance Borrowers*, at p. 10; and Connor, *Delivering Distress to Borrowers Defrauded by Predatory Schools*, at p. 50.

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18 *See supra* note 14 (citing to Burritt & Hicks, Pierce & Weingarten, and Connor).

19 *See supra* note 14 (citing to Yu).

20 *Id*.

21 *See* Contract between Nelnet Servicing, LLC and U.S. Dep't of Educ., ED-FSA-09D-0013 (June 17, 2009), https://studentaid.gov/sites/default/files/nelnet-061709.pdf.

22 Id. at ¶ C.1.4.3.

23 *See*, *e.g.*, Press Release, Consumer Fin. Prot. Bureau, Consumers Report Being Hounded About Debts Not Owed (Mar. 20, 2014) ("'Consumers should never be hounded about debts they do not owe,' said CFPB Director Richard Cordray."); Press Release, N.Y. Office of the Att'y Gen., Attorney General James Warns Debt Collectors of New State Regulations Banning Lawsuits on Old Debts (Mar. 29, 2022) (asserting that debts beyond the applicable statute of limitations are not legally owed); 15 U.S.C. § 1692e(2)(a) (prohibiting debt collectors from misrepresenting the legal status of any debt).

24 15 U.S.C. § 1692f(1).

25 The FDCPA does not apply to the collection of a debt by a person if that person obtained the debt before it was in default. *See* 15 U.S.C. § 1692a(6)(F)(iii).

26 *See* FTC Policy Statement on Unfairness, *supra* note 9 (discussing how statutory standards can inform public policy intentions that unfair conduct may violate).

27 CFPB UDAAP Exam Manual, *supra* note 11, at 2.

28 12 U.S.C. § 5531(c)(1)(A).

29 Although the Department of Education may, in some instances, refund overpayments made on a loan that is ultimately cancelled, that does not mitigate the injury or constitute reasonable borrower avoidance of the injury.

First, potential future reimbursement does not address the present harm from an unnecessary payment and its associated opportunity cost. Second, not all overpayments are likely to be reimbursed, such as payments made by public service workers to commercial lenders before consolidating their loan. Finally, again, actions taken by the creditor—here, the U.S. Department of Education—are not reasonable borrower avoidance, as required by statute.

30 *See*, *e.g.*, Press Release, U.S. Dep't of Educ., Education Department Announces Permanent Improvements to the Public Service Loan Forgiveness Program and One-Time Payment Count Adjustment to Bring Borrowers Closer to Forgiveness (Oct. 25, 2022), https://www.ed.gov/news/press-releases/education-department-announces-permanent-improvements-public-service-loan-forgiveness-program-and-one-time-payment-count-adjustment-bring-borrowers-closer-forgiveness (discussing permanent and temporary changes to two major debt cancellation programs); Cory Turner & Emily Olson, *You could still be eligible for student loan forgiveness under this plan*, NPR (July 14, 2023), https://www.npr.org/2023/07/14/1187545921/student-loan-forgiveness-save-repayment (discussing new debt cancellation options under revised payment plan in wake of Supreme Court striking down President Biden's debt relief); Consumer Fin. Prot. Bureau, *Student loan servicing: analysis of public input and recommendations for reform* (Sept. 2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf (discussion of complexity of student loan system and servicing).

31 *See generally* Danielle Douglas-Gabriel, *Student loan borrowers approach payment restart with apprehension, confusion*, Wash. Post (Aug. 16, 2023), https://www.washingtonpost.com/education/2023/08/16/student-loan-payment-restart-confusions/; Annie Nova, *Despite the economic recovery, student debtors' "monster in the closet" has only worsened*, CNBC (Sept. 22, 2018), https://www.cnbc.com/2018/09/21/the-student-loan-bubble.html; Report, The Pew Charitable Trusts, *Borrowers Discuss the Challenges of Student Loan Repayment* (May 2020), https://www.pewtrusts.org/-/media/assets/2020/05/studentloan_focusgroup_report.pdf.

32 *See* U.S. Dep't of Educ., Fed. Student Aid, Who's My Student Loan Servicer, https://studentaid.gov/manage-loans/repayment/servicers (last visited Sept. 28, 2023). This a consolidation within the market due to companies exiting the sector and accounts being transferred to remaining servicers. *See generally* Danielle Douglas-Gabriel, *Navient to exit federal student loan servicing*, Wash. Po. (Sept. 28, 2021), https://www.washingtonpost.com/education/2021/09/28/navient-exits-federal-student-loan-servicing/.

33 *See*, *e.g.*, Am. Edu'c Servs., About AES, https://www.aessuccess.org/about/ (last visited Sept. 28, 2023) ("American Education Services (AES) was established by the Pennsylvania Higher Education Assistance Agency (PHEAA) to guarantee and service a variety of Federal Family Education Loan Program (FFELP) and private

(alternative) student loan products for our lending partners throughout the nation.").

34 *See* U.S. Dep't of Educ., Fed. Student Aid, Public Service Loan Forgiveness (PSLF), https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service#form-submission (last visited Sept. 28, 2023) (describing MOHELA as the dedicated servicer for PSLF).

35 *See*, *e.g.*, U.S. Dep't of Educ., Fed. Student Aid, FY 2022 Annual Report 66 (Jan. 23, 2023), https://www2.ed.gov/about/reports/annual/2022report/fsa-report.pdf (student loan servicers failing to meet FY 2022 targets for Quality Standard for Average Speed to Answer at All Call Centers and Quality Standard for Abandon Rate for Incoming Calls at All Call Centers).

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38 U.S. Dep't of Educ., Fed. Student Aid, Consequences of Default, https://studentaid.gov/manage-loans/default#consequences-default (last visited Sept. 28, 2023) (discussing damage to credit rating, offsetting of tax refunds, wage garnishment, court actions, additional costs and fees, and ineligibility for additional federal aid).

39 *See* Press Release, The White House, Statements and Releases, FACT SHEET: President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers (June 30, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/30/fact-sheet-president-biden-announces-new-actions-to-provide-debt-relief-and-support-for-student-loan-borrowers/ ("Borrowers who can pay should do so[.]").

40 *Id*.

41 *See generally* Higher Education Act of 1965, P.L. 89-329.

42 Although there is a growing body of case law related to whether the Higher Education Act preempts state law claims of deception related to federal student loan servicing, *see*, *e.g.*, *Nelson* v. *Great Lakes Educ. Loan*

Services, Inc., 928 F.3d 639 (7th Cir. 2019) (distinguishing affirmative misrepresentation claims from duty to disclose claims); *Lawson-Ross* v. *Great Lakes Higher Educ. Corp.*, 955 F.3d 908 (11th Cir. 2020) (same), obligations to disclose material information that derive from federal consumer protection law face no preemption challenges. Further, the applicability of both state and federal protections against deception is evolving. In July 2023, the U.S. Department of Education published an interpretive document to the federal register in which it opined that state consumer protection laws are not categorically preempted by federal law with respect to student loan servicers and invited states to engage in oversight of this industry. *See* U.S. Dep't of Educ., *Federal Preemption and Joint Federal-State Regulation and Oversight of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers*, Final Interpretation, 88 FR 47370 (July 24, 2023), https://www.federalregister.gov/documents/2023/07/24/2023-15436/federal-preemption-and-joint-federal-state-regulation-and-oversight-of-the-department-of-educations.

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47 CFPB UDAAP Exam Manual, *supra note* 11, at 6.

48 12 U.S.C. § 5531(d)(2).

49 *See supra* note 30.

50 *See also* U.S. Dep't of Educ., *William D. Ford Federal Direct Loan Program Master Promissory Note (Direct Subsidized Loans and Direct Unsubsidized Loans)*, OMB No. 1845-0007 (Exp. 07/31/2022), https://fsapartners.ed.gov/sites/default/files/attachments/2020-04/SubUnsubMPN.pdf (including in loan "Borrower's Rights and Responsibilities Statement" various loan "terms and conditions" related to discharge programs).

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54 Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-CV-101, 2017 U.S. Dist. LEXIS 123825, at *58 (M.D. Pa. Aug. 4, 2017) (internal citation omitted) ([T]he statutory language does not state that a duty is an element of an abusive act or practice but instead states that a loan servicer cannot take unreasonable advantage of "the reasonable reliance by the consumer" that the servicer will "act in the interests of the consumer." The concept of reasonable reliance, however, is not always paired with preexisting duty. It is therefore enough that a borrower's reliance that a loan servicer will act in their interest is reasonable, irrespective of whether a legal duty actually exists on the part of the loan servicer to act in the borrower's interest.).

55 Mem. of Law in Support of Def's Mot. to Dismiss, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-CV-101, Doc. 29 at *20 (M.D. Pa. Mar. 24, 2017).

56 *See supra* note 8.

57 *See*, *e.g.*, Cal. Civ. Code § 1788.102(r)(2); Colo. Rev. Stat. § 5-20-109(1)(b); Va. Code Ann. § 6.2-2610(A)(2); 110

Ill. Comp. Stat. Ann. 992/ 5-5(a); N.Y. Banking Law § 719(2).

58 *See*, *e.g.*, Cal. Civ. Code § 1788.102(g); 110 Ill. Comp. Stat. Ann. 992/ 5-30.

59 *See*, *e.g.*, Cal. Civ. Code § 1788.103(c) (providing treble damages in certain instances).

60 12 U.S.C. § 5565(a)(2).

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