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## MEMORANDUM

**November 15, 2023**

**To:** Consumer Financial Protection Bureau  
State Financial Regulators  
State Attorneys General

**From:** Student Borrower Protection Center

**RE: Material Omissions Related to the Income-Driven Repayment Account Adjustment**

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Federal and state consumer protection agencies have the authority to address an ongoing act or practice by student loan servicers that is blocking millions of federal student loan borrowers from receiving Congressionally conferred debt cancellation. Specifically, servicers have failed to explain the Income-Driven Repayment (IDR) Account Adjustment benefits to borrowers with commercially held Federal Family Education Loan (FFEL) student loans and the need to consolidate their loans by December 31, 2023, to be eligible for those benefits. This failure is a material omission in violation of federal and state consumer protection law.

### **I. The IDR Account Adjustment Addresses Past Servicer Misconduct to Deliver Congressionally Provided Debt Cancellation**

There are several repayment plans available to federal student loan borrowers. Under the IDR plans, borrowers' monthly payments are based on what they earn, not what they owe. In this way, they are meant to make payments more affordable. An important feature of the IDR plans is that, under the Higher Education Act, they offer complete debt cancellation to borrowers who have been enrolled in one of the IDR plans for at least 20 years.<sup>1</sup> The new, recently announced SAVE IDR plan will cancel debts after 10 years for some borrowers.<sup>2</sup>

In practice, however, borrowers were not receiving this debt cancellation. Investigations by advocates, journalists, and the federal Government Accountability Office all found that of the over 4 million borrowers whose loans were at least 20 years old and so should have been eligible

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<sup>1</sup> See 20 USC § 1098e(b)(7); 20 USC § 1089e(d)(1)(D); 34 CFR § 685.215; 34 CFR § 685.209.

<sup>2</sup> 88 FR 43820, 43903 (final 34 CFR § 685.209(k)(3)).



for IDR debt cancellation, fewer than 200 had had their debts cancelled through the program.<sup>3</sup> This was in large part due to years of steering by student loan servicers of borrowers toward forbearances and away from IDR plans. This practice, which is well documented by your offices, is more financially advantageous to student loan servicers, but robs borrowers of qualifying time toward IDR cancellation.

To address this servicer misconduct and restore the IDR eligibility that had been stolen from millions of borrowers, in April 2022 the Biden Administration announced the IDR Account Adjustment.<sup>4</sup> Under the adjustment, the U.S. Department of Education (ED) is crediting borrowers' accounts for any time spent in repayment, even if they were not enrolled in an IDR plan, and for certain time in deferment and forbearance.<sup>5</sup> Once their accounts are credited, borrowers who meet the minimum required time in repayment will have their debts cancelled, and all other borrowers will be able to accrue more time by affirmatively enrolling in an IDR plan and continuing to make payments until they are eligible for cancellation.

ED has announced that it will run the adjustment over the course of 2023 for borrowers whose debts will be cancelled as a result, and will run the adjustment in 2024 for all remaining borrowers.<sup>6</sup> Since August 2023, nearly one million borrowers have already had their debts cancelled through this program.<sup>7</sup>

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<sup>3</sup> National Consumer Law Center & Student Borrower Protection Center, *Education Department's Decades-Old Debt Trap: How the Mismanagement of Income-Driven Repayment Locked Millions in Debt* (Mar. 2021), [https://www.nclc.org/wp-content/uploads/2022/08/IB\\_IDR-1.pdf](https://www.nclc.org/wp-content/uploads/2022/08/IB_IDR-1.pdf); Cory Turner, *Exclusive: How the most affordable student loan program failed low-income borrowers* (Apr. 1, 2022),

<https://www.npr.org/2022/04/01/1089750113/student-loan-debt-investigation>; U.S. Government Accountability Office, *Federal Student Aid: Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment Forgiveness* (Mar. 21, 2022), <https://www.gao.gov/products/gao-22-103720>.

<sup>4</sup> 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>.

<sup>5</sup> *Id.*

<sup>6</sup> *Payment Count Adjustments Toward Income-Driven Repayment and Public Service Loan Forgiveness Programs*, Federal Student Aid, U.S. Dep't of Educ., <https://studentaid.gov/announcements-events/idr-account-adjustment> (last visited Nov. 13, 2023).

<sup>7</sup> 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. 13, 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>; Press Release, U.S. Dep't of Educ., *Biden-Harris Administration Announces an Additional \$9 Billion in Student Debt Relief* (Oct. 4, 2023), <https://www.ed.gov/news/press-releases/biden-harris-administration-announces-additional-9-billion-student-debt-relief>.



## **II. Borrowers with Older Loans Stand to Gain the Most From the IDR Account Adjustment, But Are Also the Only Population That Will Not Receive Its Benefits Automatically**

The IDR Account Adjustment is not automatic for all borrowers: only those whose loans are owned by the federal government receive these benefits automatically. This means some FFEL loan borrowers could miss out. FFEL program loans are a type of federal student loan that were originated by private banks and were merely insured by the federal government.<sup>8</sup> Over time, however, some FFEL loans were acquired by the federal government. Those that are still privately owned are known as commercial FFEL loans, whereas those that are federally owned are known as ED-held FFEL.

The FFEL program ended in 2010, at which point the Direct Loan program—loans both issued and owned directly by ED—became the primary federal student loan program.<sup>9</sup> This means that all commercial FFEL loans are at least 13 years old. Many FFEL borrowers have been in repayment for much longer than that and would have their loans cancelled under the IDR Account Adjustment. Approximately 4.3 million borrowers' FFEL loans are still commercially owned,<sup>10</sup> or are with intermediary entities called Guaranty Agencies,<sup>11</sup> totaling approximately \$110 billion. Each year ED publishes a list of the largest commercial FFEL holders.<sup>12</sup>

In order to benefit from the IDR Account Adjustment, commercial FFEL borrowers must apply to “consolidate” their loans by December 31, 2023.<sup>13</sup> Consolidation is the process of taking out a new federal Direct Consolidation Loan to pay off one or more existing federal student loans, including commercial FFEL loans.<sup>14</sup> The consolidation application is easy and can be done online in a matter of minutes.

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<sup>8</sup> *Federal Family Education Loan (FFEL) program*, Federal Student Aid, U.S. Dep’t of Educ., <https://studentaid.gov/help-center/answers/article/ffel-program> (last visited Nov. 13, 2023).

<sup>9</sup> *Id.*

<sup>10</sup> Federal Student Aid, U.S. Dep’t of Educ., *Location of Federal Family Education Loan Program Loans* (Q3 2023), <https://studentaid.gov/sites/default/files/fsawg/datacenter/library/LocationofFFELPLoans.xls>.

<sup>11</sup> *Id.*; see also Student Borrower Protection Center, *What it means to be a student loan servicer: Guaranty Agency edition* (Mar. 29, 2019), <https://protectborrowers.org/what-it-means-to-be-a-student-loan-servicer-guaranty-agency-edition/>.

<sup>12</sup> Federal Student Aid, U.S. Dep’t of Educ., *Top 100 Current Holders of FFELP Loans for 2022* (Sept. 2023), <https://fsapartners.ed.gov/sites/default/files/2023-09/Top100CurrentHoldersofFFELPLoansfor2022.pdf>.

<sup>13</sup> “Why do I have to apply to consolidate by the end of 2023?”, *Payment Count Adjustments Toward Income-Driven Repayment and Public Service Loan Forgiveness Programs*, Federal Student Aid, U.S. Dep’t of Educ., <https://studentaid.gov/announcements-events/idr-account-adjustment> (last visited Nov. 13, 2023).

<sup>14</sup> *Consolidating Student Loans*, Federal Student Aid, U.S. Dep’t of Educ., <https://studentaid.gov/manage-loans/consolidation> (last visited Nov. 13, 2023).



In order to consolidate and benefit from the IDR Account Adjustment, however, commercial FFEL borrowers must be aware that this one-time opportunity exists, must identify themselves as the class of borrower who must take the affirmative step of consolidating their loans, and must do so by the December deadline. Given all of the confusion and changes in the student loan landscape, this is more difficult than it may seem. FFEL loan holders and their servicers, however, are uniquely positioned to communicate these instructions directly to these borrowers. To date, we are unaware of any targeted communication from these companies about the IDR Account Adjustment.

### **III. Failing to Inform Commercial FFEL Borrowers About the Opportunity to Benefit From the IDR Account Adjustment Likely Violates State and Federal Consumer Protection Law**

Under the federal Consumer Financial Protection Act of 2010, it is unlawful for covered persons—which includes student loan servicers<sup>15</sup>—to engage in an unfair, deceptive, or abusive act or practice, or so-called “UDAAPs.”<sup>16</sup> This UDAAP consumer protection can be enforced by the federal Consumer Financial Protection Bureau (CFPB) and by state attorneys general and financial regulators.<sup>17</sup> States also have their own UDAAP laws, which generally apply to firms like FFEL holders and servicers and which prohibit some combination of unfair, deceptive, and abusive acts or practices.<sup>18</sup> At least 19 states across the country have also passed legislation that specifically regulates the student loan servicing industry.<sup>19</sup> These “Borrower Bill of Rights” laws include UDAAP provisions specific to the servicing of both federal and private student loans.

The “deceptive practices” component of UDAAP laws generally includes representations, omissions, acts, or practices. Specifically, under the federal standard, there is a three-prong test to determine whether something is an unlawful deceptive act or practice. A representation, omission, act, or practice is deceptive when:

1. It misleads or is likely to mislead a consumer;
2. The consumer’s interpretation of the representation, omission, act, or practice is

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<sup>15</sup> 12 CFR § 1090.106.

<sup>16</sup> 12 USC § 5531.

<sup>17</sup> *Id.* at § 5531(a); *id.* at § 5552(a)(1).

<sup>18</sup> *See generally*, National Consumer Law Center, *Consumer Protection in the State: a 50-State Evaluation of Unfair and Deceptive Practices Laws* (Mar. 1, 2018), <https://www.nclc.org/resources/how-well-do-states-protect-consumers/>.

<sup>19</sup> *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.



- reasonable; and
3. The misleading representation, omission, act, or practice is material.<sup>20</sup>

A representation, omission, act, or practice is material if it is likely to affect a consumer’s choice of, or conduct regarding, a product or service. Put differently, it is important “if it is likely to be considered important by consumers.”<sup>21</sup>

Failing to directly inform commercial FFEL borrowers about the upcoming deadline to consolidate and benefit from the IDR Account Adjust is a material omission. To a commercial FFEL borrower, the fact that they could receive complete debt cancellation by taking a simple administrative step would likely be considered important. It is certainly information that would likely affect a consumer's choice—to consolidate, to make payments, to seek other debt relief, etc.—about their federal student loan, which is a product, or about how they engage with their student loan servicer, which is a service.

Although federal circuit courts are split about whether the federal Higher Education Act preempts state law deception claims against federal student loan servicers, that does not mean that student loan companies cannot be held accountable for material omissions.<sup>22</sup>

First, and critically, preemption—when state laws are rendered inapplicable in specific situations due to the predominance of federal laws in those situations—does not apply to the application of federal law. Here, your offices can enforce for violations of the federal UDAAP standard regardless of whether similar claims under state UDAAP laws would be preempted. This authority is unconditional for the Consumer Financial Protection Bureau and for state attorneys general, and is conveyed to state financial regulators to the extent that student loan servicers are licensed or “otherwise authorized to do business” in their state.<sup>23</sup>

Second, state UDAAP claims are not categorically preempted with respect to federal student loan servicers, which means that state and private actors can still articulate a viable state-law claim. When the right facts present themselves, there is an opportunity to make new, better law that

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<sup>20</sup> Consumer Fin. Prot. Bureau, *Examination Manual: Unfair, Deceptive or Abusive Acts or Practices (UDAAPs)* 5 (Oct. 2012), [https://files.consumerfinance.gov/f/documents/cfpb\\_unfair-deceptive-abusive-acts-practices-udaaps\\_procedures\\_2023-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures_2023-09.pdf).

<sup>21</sup> *Id.* at 7.

<sup>22</sup> See *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010) (finding a deception claim is preempted); *but see Nelson v. Great Lakes Educ. Loan Services, Inc.*, 928 F.3d 639 (7th Cir. 2019) (distinguishing *Chae* and providing that state consumer protections not broadly preempted in every instance); *Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908 (11th Cir. 2020); *Pennsylvania v. Navient Corp. and Navient Solutions, LLC* (3rd Cir. 2020).

<sup>23</sup> 12 USC § 5552(a)(1).



clarifies this standard. ED recently reaffirmed the need for state laws governing student loan servicing and for a federalist, two-tier approach to supervising this market.<sup>24</sup>

Therefore, through either a standalone federal claim or a combination of federal and state claims, federal and state consumer protection agencies can and should hold student loan servicers accountable for material omissions, as well as other consumer protection violations.

#### **IV. The CFPB, State Attorneys General, and State Financial Regulators Should Put Commercial FFEL Holders and Servicers on Notice That They Will Hold Them Accountable for Failing to Communicate About the IDR Account Adjustment**

Commercial FFEL borrowers have fewer than seven weeks before the December 31, 2023, deadline to consolidate their loans and benefit from the IDR Account Adjustment. Loan holders and servicers are uniquely positioned to convey this important information directly to these borrowers, but have not done so.

Federal and state regulators and law enforcement should issue guidance to commercial FFEL holders and servicers that it is a material omission in violation of federal and state consumer protection law not to inform their federal student loan borrowers about their opportunity under the IDR Account Adjustment, the steps they need to take to benefit from this opportunity, and the deadline to do so. Until this information is clearly communicated to borrowers, these companies are engaged in both a rolling material omission for each day that passes and discrete material omissions for each billing statement that they send that does not include a disclaimer about borrowers' ability to cancel their loan by consolidating.

Such a guidance letter would not be unusual. In 2022, the CFPB issued a bulletin to federal student loan servicers about the Limited Public Service Loan Forgiveness (PSLF) Waiver, a limited-time opportunity for public service workers to obtain debt cancellation similar to the IDR Account Adjustment.<sup>25</sup> In the bulletin, the Bureau expressed its expectation that “servicers comply with Federal consumer financial protection laws[.]” and informed industry that it would “pay particular attention to . . . [w]hether servicers take steps to promote the benefits of the PSLF waiver to borrowers who express interest or *whose files otherwise demonstrate their eligibility*.”<sup>26</sup> Here, every commercial FFEL borrower is eligible for the IDR Account

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<sup>24</sup> *Id.* at § 5531(a); *id.* at § 5552(a)(1).

<sup>25</sup> *The Limited PSLF Waiver Opportunity Ended on Oct. 31, 2022*, Federal Student Aid, U.S. Dep’t of Educ., <https://studentaid.gov/announcements-events/pslf-limited-waiver> (last visited Nov. 13, 2023).

<sup>26</sup> Consumer Fin. Prot. Bureau, *Bulletin 2022-03: Servicer Responsibilities in Public Service Loan Forgiveness Communications*, 87 Fed. Reg. 11286, 11288 (Mar. 1, 2022), <https://www.federalregister.gov/documents/2022/03/01/2022-04266/bulletin-2022-03-servicer-responsibilities-in-public-service-loan-forgiveness-communications> (Emphasis added).



Adjustment, and so commercial FFEL servicers should promote the benefits of the opportunity to their entire portfolio of borrowers.

One state, Maryland, has already sent letters to commercial FFEL servicers operating in the state to inquire about what steps, if any, they have taken to notify borrowers about their ability to consolidate and benefit from the IDR Account Adjustment by December 31 of this year.<sup>27</sup> We applaud this step, and urge other agencies to follow, with the added message that any failure to meaningfully convey this important information to borrowers will be considered an unlawful material omission. Attached to this memorandum we have included model industry guidance for your offices' consideration.

## **Conclusion**

For many borrowers, this is a once-in-a-lifetime opportunity to become debt free. It is an opportunity originally conveyed by Congress in the Higher Education Act, being reaffirmed and extended to borrowers by the Biden Administration as a remedial measure after the federal government's own student loan servicers interfered with borrowers' rights. The borrowers who stand to benefit the most from the account adjustment are definitionally older borrowers who have had their loans for at least 20 years.

Thank you for the work your offices have done to date for student loan borrowers. We urge state and federal consumer protection agencies to act now to ensure these borrowers are finally given their statutory right to debt cancellation and that the same servicers whose misconduct necessitated the account adjustment do not stand in the way a second time. We welcome the opportunity to support your offices in this endeavor.

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<sup>27</sup> Letter from Amy P. Hennen, Acting Student Loans Ombudsman, Maryland Office of Financial Regulation, to Student Loan Servicers (Nov. 3, 2023), <https://protectborrowers.org/wp-content/uploads/2023/11/SLO-Letter-FFEL-11.3.23.pdf>.

## **APPENDIX I**

Model Guidance Letter to Student Loan Servicers



MONTH DAY, 2023

Re Income-Driven Repayment Plan Account Adjustment

Dear Student Loan Servicer:

I write to urge you to convey the benefits of federal Income-Driven Repayment (IDR) Account Adjustment to your federal student loan borrowers, and to inform you that any act or omission by you or your agents that interferes with a borrower's ability to benefit from the Account Adjustment may be a violation of federal and state consumer protection law.

On April 19, 2022, the U.S. Department of Education announced an audit of federal student loan borrowers' accounts to "address historical failures in the administration of the federal student loan program."<sup>28</sup> This one-time account adjustment credits borrowers' accounts with time toward cancellation under the IDR programs for any periods spent in repayment, regardless of repayment plan, and for certain periods spent in deferment and forbearance.<sup>29</sup> For many, if not most borrowers, this is an opportunity to finally benefit from Congressionally conferred debt cancellation after years of steering by the student loan servicing industry.<sup>30</sup>

Specifically, we write to inform you that any failure to affirmatively inform commercially held Federal Family Education Loan (FFEL) borrowers about the IDR Account Adjustment and the need to consolidate their loans by December 21, 2023, to benefit from this opportunity will be considered a material omission of information in violation of the federal Consumer Financial Protection Act, which prohibits deceptive acts or practices.<sup>31</sup> These borrowers are the only type of borrowers who must take an administrative step to qualify for the Account Adjustment, and so risk missing the chance for complete debt cancellation if they do not act by this deadline.

Student loan servicers are borrowers' first, and often only, point of contact with respect to their federal student loans. There have been significant changes and improvements to the federal student loan system that make it imperative for servicers to convey accurate, timely, and comprehensive information to the borrowers in their portfolios.

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<sup>28</sup> 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/departement-education-announces-actions-fix-longstanding-failures-student-loan-programs>.

<sup>29</sup> See *Payment Count Adjustments Toward Income-Driven Repayment and Public Service Loan Forgiveness Programs*, Federal Student Aid, U.S. Dep't of Educ., <https://studentaid.gov/announcements-events/idr-account-adjustment>.

<sup>30</sup> See generally U.S. Government Accountability Office, *Federal Student Aid: Education Needs to Take Steps to Ensure Eligible Loans Receive Income-Driven Repayment Forgiveness* (Mar. 21, 2022), <https://www.gao.gov/products/gao-22-103720>.

<sup>31</sup> 12 USC § 5531.

In furtherance of this goal and to ensure that student loan servicers are not engaged in unlawful conduct, I request that you submit the following information to this office:

1. The number of borrowers in this state whose commercially held FFEL loans are serviced by your company;
2. Of the borrowers identified in question 1, the number of those borrowers whose loans entered repayment at least 20 years ago;
3. What efforts, if any, your company has undertaken to inform commercially held FFEL loan borrowers residing in this state about the benefits of the IDR Account Adjustment and of the need to consolidate their loans by December 31, 2023, in order to receive those benefits; and
4. The number of commercially held FFEL loan borrowers residing in this state who have consolidated their loans since April 2022.

Please send your responses to these questions to **CONTACT** at **EMAIL** by **MONTH DAY**, 2023. Thank you for your immediate attention to this matter.

Sincerely,