This is a comment on the U.S. Department of Education's proposed rule, "Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program," **Docket ID ED-2021-OPE-0077**.

Identities of the Commenters

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Contents

This comment addresses several topics:

1. The bans on "aggressive" recruitment and certain omissions ban typical marketing in the U.S. market economy, and these bans are often unreasonable or too vague to enforce fairly;
2. Special circumstances regarding closed-school discharges should not include probation from an accreditor;
3. Opportunity for fraud in discharges due to disability, use of Department of Veterans Affairs information, and technical corrections;
4. The assertion that borrowers lack financial literacy and feel surprised about interest capitalization dictates improved attention to financial literacy rather than relieving borrowers of their contracted responsibility.
5. "Borrower defense" issues: definition of a school; presumptive full discharge; group claims; role of legal assistance organizations; bans on dispute resolution via internal dispute resolution or arbitration, and prevention of bans on class actions; establishment of unconstitutional conditions; putting all loans on hold regardless of the locus of a claim; due process for accused institutions; timeline for adjudication of a claim; and breach of contract regarding constitutional rights; and
6. Public Service Loan Forgiveness.

Comment/Discussion

1. Regarding **34 CFR PART 668, Subpart R—Aggressive and Deceptive Recruitment Tactics or Conduct**:

Subpart R, particularly § 668.500 and § 668.501, incorrectly conflate protected "aggressive" marketing and recruitment with potentially unprotected "deceptive" recruitment. We warmly support the policy goal of addressing truly deceptive marketing. The need to do so is especially pressing for students who, for example, are misled by a postsecondary institution about their ability to gain employment in the field for which they are seeking a degree. Such students face immense financial consequences. Students who are inveigled into attendance at a college by misrepresentations may struggle for years under the weight of loans they would not have taken out had they been apprised of the truth, and they may suffer the loss of years spent attending an institution that fails to offer the preparation they were promised.

While we strongly support the goal of holding postsecondary institutions accountable for such deceptive marketing, ED's proposed rule is not rationally drawn to the achievement of that objective.

First, the rule is irrationally overbroad, as it applies protections to unsophisticated and sophisticated students alike. College students are in fact of all adult ages, they often have considerable military experience, and many students covered by the proposed rule attend sophisticated graduate programs. The proposed rule fails to acknowledge the difference in sophistication between, for instance, a 17-year-old high school senior deciding which college to attend and a mid-career professional seeking graduate education. Protections that are necessary for the former are highly unlikely to be necessary for the latter, just as protections adequate for the latter may not be enough for the former. The proposed rule's adoption of a one-size-fits-all approach is irrational and hence arbitrary and capricious.

Second, the proposal fails to explain why additional protections are necessary in the context of educational decisions that are absent in the context of other big-ticket purchases. Adults at any education level, including high school dropouts, and adults at any level of financial and economic literacy, are generally permitted full access to the opportunities of America's market economy, including homes and automobiles that may be more expensive than a postsecondary degree. The proposed rule fails to explain why a different approach is necessary in the education context.

Third, the proposal fails to show the need for its protections in light of extensive State authorities that apply to ban fraud and consumer deception, including in the educational context. It is black-letter administrative law that a regulation is arbitrary and capricious when other regulators are already effectively addressing the need that the regulation claims to address. To justify itself, the proposed rule needs to show that State enforcement regimes are not up to the task of preventing fraud and other deceptive activities of postsecondary institutions. That showing will face a heavy burden, as we rely on State anti-consumer deception activities in most other contexts. But absent such a showing, the rule that ED proposes would be arbitrary and capricious.

Fourth, the rule fails to account reasonably for its distinction between non-profit and for-profit postsecondary institutions. The States already take action against illegal activity regardless of whether an actor is for-profit or nonprofit. In contrast, ED admits that its proposed rule is primarily targeted at for-profit institutions, raising a reasonable risk that ED will focus on for-profit institutions at the expense of enforcement against nonprofit institutions. In particular, ED acknowledges that the proposed rule will disproportionately affect for-profit institutions, and, in fact, ED acknowledges that the proposed rule is *designed* to do so. See especially *Federal Register* page 41958 ("Almost 90 percent of borrower defense claims are from the proprietary sector. … This is reflected in the school conduct assumption in Table 5.").[1] The primary origin of such claims, however, was the animus against the proprietary sector that led to increased scrutiny in the

[1] U.S. Department of Education, "Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program," Proposed Rule, *Federal Register*, Vol. 13, No. 133 (July 13, 2022), p. 41878, https://www.federalregister.gov/documents/2022/07/13/2022-14631/student-assistance-general-provisions-federal-perkins-loan-program-federal-family-education-loan (accessed August 10, 2022).

first place ("Reining in the multibillion-dollar industry has been the administration's goal for most of President Barack Obama's term in office"):[2]

> Deputy Undersecretary of Education Robert Shireman[in a speech in 2010] noted that, because of falling state- and property-tax revenues, state and community colleges have reduced enrollment, raised tuition, and cut course offerings. In other words, the institutions that the Obama administration prefers have been unable to capitalize on the increased demand its spending has engendered. On the other hand, Shireman noted (somewhat bitterly) that "tuition-driven institutions didn't [have to make such cutbacks] [brackets in original article]— because they're tuition-driven institutions." He then called out the for-profit schools by name, reciting the percentages by which each had benefited from increased Pell grant spending in the last year …, and when he got to the end of the list, he said, "So I wanted to begin just by thanking the for-profit industry for responding to the critical demands from people out there who need higher education. I'd like everybody to give them a hand."
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> If Shireman was genuinely expressing his gratitude, it didn't come through in the comments that followed, in which he compared for-profit schools to the Wall Street firms that melted down the economy. He analogized the accrediting agencies that validate and monitor institutes of higher learning to the rating agencies that rubber-stamped Wall Street's complex derivative bets on the housing market, and suggested that state regulators and especially the Department of Education needed more power to regulate for-profit schools.[3]

Fifth, we appreciate that ED is concerned about student accounts of recruiters who have misled them, and we understand why ED would want the institution to be held accountable. The proposed rule would permit the Secretary to hold institutions accountable for misrepresentations by recruiters, whether or not their representations are sanctioned by the institution. But the actions of an individual "rogue" recruiter, not directed by the institution and, for instance, in violation of the institution's own policies, should not be held against the institution by ED. For example, the unsanctioned "threatening or abusive" speech of a rogue recruiter, against an institution's policy, should not be held against the institution under paragraph (7). Likewise, inadvertently misstating a statistic is neither fraudulent nor aggressive. At most, in the case of truly fraudulent activity by a rogue recruiter, the institution should be expected to appropriately discipline the bad actor and appropriately refund the limited number of harmed borrowers.

Sixth, the bans on "pressure" in paragraphs (1) and (3) of section 668.501(a) are unreasonably vague because they do not define "pressure" and therefore chill far more expression than is necessary even to accomplish ED's acknowledged goals. If ED proceeds with this rulemaking, it should specify in considerably greater detail the type of "pressure" that is prohibited; such

[2] Allie Grasgreen, "Obama pushes for-profit colleges to the brink," *Politico* (July 1, 2015), https://www.politico.com/story/2015/07/barack-obama-pushes-for-profit-colleges-to-the-brink-119613 (accessed August 10, 2022).
[3] Stephen Spruiell, "The Obama Administration Attacks For-Profit Colleges," *National Review* (May 5, 2010), https://www.nationalreview.com/2010/05/obama-administration-attacks-profit-colleges-stephen-spruiell/ (accessed August 10, 2022).

specification is vital if recruiters at postsecondary institutions are to engage in candid conversations with students about the benefits and opportunities their institutions make available. Failure to provide additional specificity would have the additional effect of giving ED far too much authority in individual enforcement actions to interpret the standard however it would like.

Likewise, the vague "unreasonable emphasis" ban in paragraph (2) and the vague ban on discouragement in paragraph (4) of the same section fail for the same reasons.

Relatedly, while **§ 668.75** prohibits only the omission of "material" information, the examples are problematic:

- Paragraph (d) states as a prohibited omission "[t]he factors that would prevent an applicant from meeting the legal or other requirements to be employed, licensed, or certified," yet it is unreasonable for an institution to know all of the details and restrictions in all relevant professions. This prohibition is therefore unreasonably overbroad. Instead, this prohibition should be limited to cases in which the institution has actual knowledge of a material limiting factor applying to a student or prospective student and does not reveal it.

- Paragraph (e) is unreasonably vague in prohibiting omissions regarding "The nature of the institution's educational programs" and "the employability of the institution's graduates." The word "nature" is itself a vague term, with an extremely wide variety of descriptors available to describe an educational program's "nature." The rule would give the Secretary wide latitude to determine that an institution has erred in its use of descriptors. Also, while it is understandable that ED would want institutions to have accurate information about employability, institutions should not be expected to predict the future of the U.S. and world economies.

  If ED chooses to pursue the prohibitions in this paragraph, it should specify the kinds of omissions regarding "nature" that are material enough to trigger agency action, and the kinds of omissions regarding employability that are reasonably predictable enough to be material omissions about the future.

Relatedly, the proposed new **§ 668.72(n)** demonstrates an intention to punish institutions for mistaken publication regarding "[t]he classification of the institution (nonprofit, public or proprietary) for purposes of its participation in [T]itle IV, HEA programs, if that is different from the classification determined by the Secretary." ED's discussion in the *Federal Register* shows that this provision is especially intended to punish "for-profit to nonprofit" conversions. While it is reasonable to expect updates within a reasonable time, the proposed rule would permit the Secretary to act even in cases where the institution's website does not switch the designation at the exact right moment after the Secretary approves a change in classification. Inadvertent listings should not be punished, nor should be slowness in updating a website and related materials, nor should be statements by an institution official who happens to be mistaken about or unaware of a change in classification. Should this part of the rule move forward, at the least it should require no less than a reasonable period of time for making updates, such as 30 days after notification by the Secretary of a classification change.

Furthermore, prospective students (in fact, virtually no one at all) could be expected to know that the Secretary designates a special classification of nonprofit status for Title IV purposes apart from regular nonprofit status, so this provision is irrelevant to ED's goal of protecting students and, in fact, likely to lead to more, rather than less, confusion.

2. Regarding **PART 674—FEDERAL PERKINS LOAN PROGRAM**:

Proposed paragraph § 674.33 (g)(9)(ii) asserts that an "exceptional circumstance" could enable the Secretary to provide different treatment than usual if "[t]he school is or was placed on probation or issued a show-cause order, or placed on an equivalent accreditation status, by its accrediting agency for failing to meet one or more of the agency's standards." While it is understandable that ED would like to give the Secretary additional authority to intervene, this exception should be omitted.

Unfortunately, third-party accreditors too often take sides in legitimate decisions by institutions, and simply being on probation with a third party does not show sufficient legitimate risk of closure. For example, the accreditor known as SACS put the University of Virginia on "warning" over governance and began investigating the University of South Carolina over governance. Neither university was ever at any real risk of closing.

Even when a probation decision is not politicized, there often is no real risk of it closing. For example, SACS put the University of North Carolina at Chapel Hill on probation due to an athletics scandal, but the institution was never at any real risk of closing.

These examples show that actions by an accreditation agency, other than actually withdrawing accreditation, do not create or predict a reasonable risk of closure and therefore do not justify special treatment by the Secretary.

This comment also applies to **Part 682**, paragraph (d)(9)(ii). In any case, it appears that the Roman numerals in (d)(9) of Part 682 should be corrected to capital letters. (Most other such cases of errant numbering are not mentioned here, but ED should use the current rulemaking as an opportunity to fix all such technical errors.)

This comment also applies to the identical language in **Part 685 (Direct Loans)**.

3. Regarding **§ 674.61 (Discharge for death or disability)**:

- Section 674.61(b)(2)(v)(B) would permit, on an application form for a total and permanent disability discharge, "a nurse practitioner or physician's assistant licensed by a State or a licensed certified psychologist at the independent practice level" to certify that "the borrower is totally and permanently disabled." The Department should remove paragraph (B) from the rule.

  While it is understandable that ED would like to make it easier for a borrower to have a disability recognized, lower-level professionals have less expertise in the necessary judgments. While a licensed psychiatrist, for example, can reasonably certify the inability of a person to function productively in society, entrusting this determination to an individual psychologist without the requisite training invites not only fraud[4] but also incorrect determinations.

The risks of error and fraud should be weighed against the minor additional accessibility that would be available under the proposed rule, but these risks are not weighed in ED's proposal of the rule, rendering the rule arbitrary and capricious.

For these reasons, the Department should remove the entirety of paragraph (B) from the rule. This change should necessitate removing "nurse practitioner, physician's assistant or psychologist" from paragraphs (b)(2)(v) and (vii) of that section, as well as from (b)(3)(i)(A) and (b)(3)(iii) and (b)(3)(v) and (vi), and from (b)(4) and (b)(5).

In any case, it appears that an "or" is missing from paragraph (b)(2)(iv) in that it appears that its paragraphs (A), (B), and (C) are intended to be independent options for completing the application form.

Also, the language is inconsistent between (b)(3)(ii) and (b)(3)(vi) of that section. The former states that the Secretary determines whether the application "conclusively prove[s]" the disability, but the latter states only that the Secretary determines whether the application "support[s] the conclusion" that the disability qualifies. "Conclusively proves" is the right standard because a conclusion should be necessary. Mere support toward a conclusion does not determine the result.

For the same reasons above, non-physician certifiers should be removed from the rule changes in all instances in **Part 682 (FFEL)** and **Part 685 (Direct Loans)** as well. Also,

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[4] Disability fraud is widespread. For example, on January 27, 2022, a news outlet reported that California officials suspended 345,000 disability checks "because of fraud concerns" and "confirmed nearly all of those suspected claims were associated with criminals trying to trick the state into paying them" (Adam Beam, "California Says Most Halted EDD Disability Claims Are Fraudulent," KCRA, January 27, 2022, https://www.kcra.com/article/california-halted-edd-disability-claims-fraudulent/38918749 (accessed August 5, 2022)).

And in the exact area of student loan discharge discussed here, on June 15, 2022, the U.S. Attorney's Office of the Southern District of New York charged a nurse practitioner in a "$10.5 Million Disability Loan Fraud Scheme." "As alleged," FBI Assistant Director-in-Charge Michael J. Driscoll noted:

> [the nurse practitioner] fraudulently orchestrated the discharge of student loans in excess of $10 million on behalf of more than 100 borrowers she led to believe were eligible for various forms of student-loan relief. She ultimately reaped more than $1 million in ill-gotten gains by charging borrowers fees in exchange for her "services." The action we have taken today is yet another example of the FBI's commitment to protecting government programs from fraudsters who seek to undermine them for their own selfish purposes. (U.S. Attorney's Office, "U.S. Attorney Charges Nurse Practitioner In $10.5 Million Dollar Disability Loan Fraud Scheme," Southern District of New York, June 15, 2022, https://www.justice.gov/usao-sdny/pr/us-attorney-charges-nurse-practitioner-105-million-disability-loan-fraud-scheme (accessed August 4, 2022).)

While this alleged fraudster was caught, the revised rule would enable many more fraudsters to operate by enabling lower-level professionals to certify a total and permanent disability.

the same inconsistent language of "support[s] the conclusion" exists at § 682.402(c)(3)(v) and should be changed to "conclusively prove."

- Section 674.61(b)(2)(v)(B) (Discharge without an application) appears not to require sufficient evidence of a total and permanent disability. This paragraph states merely that it is enough to receive "data from the Department of Veterans Affairs (VA) showing that the borrower is unemployable due to a service-connected disability." In plain language, being "unemployable" appears to be a temporary and non-severe designation rather than a determination of total and permanent unemployability or disability. The VA also uses a specific definition of "individual unemployability" (IU) that distinguishes "substantially gainful employment" from "marginal employment."[5] The statutory standard for discharge in the ED context should not be assumed to be identical to the VA standard for individual employability.

  Other paragraphs in the proposed rule use the language of "unemployable" without having defined it only in terms of total and permanent disability, which again might be different from the definition used by the Department of Veterans Affairs.

  Instead, ED should maintain its own definition of a qualifying disability and make its own determinations, on an individual basis, on the basis of that definition.

  This comment applies to the identical language at § 682.402(9)(i). If the revised rule remains in place, it seems that the designations of (9)(i) and (9)(ii) should be corrected to read (9)(A) and (9)(B).

  This comment applies to the identical language at § 685.213(d)(1)(i).

- The proposed rule would remove paragraph (c)(7) from Part 682. That paragraph helps ensure against fraud by defining the borrower's responsibilities after a total and permanent disability discharge. These responsibilities include notification of income and notification of the Secretary if the borrower is no longer disabled. This paragraph not only should be retained as paragraph (c)(7) here, but it should be repeated with regard to all loan programs that permit discharge due to disability. In contrast to ED's proposed rule, the VA notes (as cited above) that "veterans may have to complete an employment questionnaire once a year for VA to continue to pay the IU benefit. This questionnaire verifies continued IU eligibility." ED's rule, omitting (c)(7) here, would create inconsistency between agencies in verification of a veteran's level of disability.

  ED also argues that removing this paragraph is a matter of "unnecessary paperwork" (*Federal Register*, pp. 41880 and 41938), but protecting federal funds from fraud and error is not unnecessary , as the existing regulation recognizes and as the VA also recognizes in this very context. To remove the paragraph without quantifying the supposed paperwork benefits is arbitrary and capricious.

[5] Veterans Benefits Administration, U.S. Department of Veterans Affairs, "Individual Unemployability," https://www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/IU.pdf (accessed August 9, 2022).

For the same reasons, the proposed rule should retain § 685.213(b)(8) in **Part 685** and § 682.402(c)(7) in **Part 682**..

4. We share the department's desire to increase the affordability of student debt. Removing interest capitalization, however, contributes only marginally to that goal. For example, at a five percent interest rate, a borrower accrues $5 in interest per $100 of debt per year. If the borrower has a six-month forbearance, $2.50 in interest per $100 would be capitalized. The $2.50 would need to be repaid with or without interest capitalization, so the proposed rule would affect only the five percent interest on that $2.50 going forward, which is 12.5 cents per year.

In other words, with the new rule, the borrower would save only $12.50 per $10,000 annually for each six months of forbearance. The discussion in the *Federal Register* does not account for the time involved for each borrower to understand and react to the new rule, and it does not account for the expense per borrower for ED and loan servicers to revise their software and systems. Considering the low amount of money saved per borrower (most of whom do not take advantage of forbearance) and the lack of balancing borrower costs against borrower savings, the proposed rule is capricious.

Furthermore, borrowers took out their loans under rules that required interest capitalization. Relieving borrowers of their contracted responsibility changes the terms of borrowers' loan agreements. If the rule is to proceed, it should affect only new borrowers. Even then, however, a new benefit-cost analysis may find that the change is not worth it.

For loan servicers, the change also slightly changes their calculations about whether it is financially worthwhile to remain a servicer, not only because of the slight change in revenue, but also because of the necessary changes in software and systems and the recognition that ED could make more such changes in the future. As ED completes its benefit-cost analysis in this area, we urge ED to account more fully for the relevant costs.

The assertion in the proposed rule that borrowers lack financial literacy and feel surprised about interest capitalization (*Federal Register*, p. 41919) does, however, suggest improved attention to financial literacy. In general, ED should address borrowers' lack of financial literacy by, for example, working more productively with the Financial Literacy and Education Commission in the Treasury Department.

5. Regarding "borrower defense" including, but not limited to, **Part 685—WILLIAM D. FORD DIRECT LOAN PROGRAM**:

ED's goal in this rule should not be to maximize the number of claims, to maximize the amount of discharge, or to make adjudication easier for ED staff, but to get to the truth of whether an institution has genuinely triggered a valid borrower-defense claim by a borrower and then, if that is true, to accurately discharge the amount the borrower is due.

- Definition of a school: ED "proposes to expand upon the definition of 'school/institution' to include principals of the institution, or of an institution under common ownership, who exercised substantial control over the institution." This definition, in different words at § 685.206(e)(1)(v), is intended to claw back funds primarily from owners or former owners of for-profit institutions.

But this definition increases the risk of holding the wrong people accountable. Determining the exact ownership role and responsibility of a party can require complex legal analysis. It is not necessarily true that, for the purposes of financial accountability in this context, responsible parties at a school include principals of the institution and those who exercise substantial control over it. Expanding the definition simply to make it easier to claw back funds from those parties, whether they reasonably are culpable or not, would be arbitrary and capricious. Therefore, the definition of a school or institution should not be changed or promulgated here or elsewhere in the proposed rule (such as in § 685.401(a)).

- Group claims and presumptive full discharge do not account for borrowers' unique, individual situations and should not be in the rule.

  The proposed rule defines financial harm in terms of monetary loss to an individual borrower "that is not predominantly due to intervening local, regional, or national economic or labor market conditions as demonstrated by evidence before the Secretary or provided to the Secretary by the borrower or the school." Such a calculation is not easy, is unique to each borrower in all cases except in genuine class actions certified by judges, and should be determined by a qualified professional. Permitting group claims, except following the conclusion of class actions, is prone to misstate the harm to many students and is inherently arbitrary and capricious.

  Section 685.402 should not enable the Secretary to initiate a group process unless a judge has already certified a class in a class action. Additionally, therefore, paragraph (c) should be removed from this part of the rule, and so should the entirety of § 685.404 (Group process based on prior Secretarial final actions).

  If ED plans to recover funds from an institution, it is particularly important to know how much value that institution provided to each individual in exchange for tuition and fees, minus the harm, as was the assumption during most of the previous Administration. The previous Administration's focus on individual borrowers was based on arguments such as are described below, and the individual nature of harms has not changed since then. This is not a case where the Department's experience can change the unique characteristics of individuals' experiences or borrowers' unique relationships with institutions. The arbitrary and capricious nature of permitting group claims and then presuming a full discharge for all students in the group will have material, negative repercussions for affected institutions. By misstating and exaggerating the extent of harm to many students, application of the proposed rule will cause ED to claw back more funds than an appropriately nuanced analysis would require.

  Presumptive full discharge is mistaken except in the unusual cases in which no value was provided to the student whatsoever (the rule already notes that opportunity costs are not calculated). Since there should be no presumption of full discharge and ED should not prejudge this question, **§ 685.408(a)(1)** should be omitted.

- ED's discussion in the *Federal Register* states that legal assistance organizations should *not* be able to submit requests for group claims. We agree. Yet, this is exactly what the proposed rule permits. ED's discussion states:

  > It was also suggested during the negotiations that the Department should allow more types of third parties to propose group claims, including individual borrowers and legal assistance organizations. However, the Department believes the State requestors have been the most consistent source of high-quality external evidence that have led to the approval of claims so far. While legal assistance organizations have provided useful information as well, the Department is concerned about the administrability of allowing dozens more entities to submit requests for a group process" (discussion at section 6.1).

  Yet, "685.215(c)(10) would provide for a new application to allow a … nonprofit legal services representative to submit a request to the Secretary for a group discharge" (p. 41970). And the proposed rule indeed does so, in multiple places. The rule is inconsistent with the rationale provided for the proposal, and a final rule containing such an inconsistency would be arbitrary and capricious.

- Regarding § 685.300(d)–(f): The proposed rule bans agreements between institutions and students that would prohibit class actions or dispute resolution via internal dispute resolution or arbitration.

  These sections would prevent a student borrower from freely entering into a contract with an institution on whatever terms are mutually agreeable, and would prevent institutions from enforcing their existing contracts as written and agreed by borrowers as a condition on further participation in the Direct Loan program. The Department risks legal action for interfering with such contracts.

  Therefore, the proposed provisions of § 685.300(d)–(f) should not be included in the rule.

  Conversely, § 685.304 paragraphs (a)(6)(xiii)–(xv) on this topic should not be removed.

- Section 685.403(c) states that merely "[u]pon receipt of a materially complete application," and before adjudication of a borrower defense claim has occurred, the Secretary "Places **all** the borrower's loans in forbearance" (emphasis added), regardless of which loan from which institution is to be reviewed.

  ED argues that it is too burdensome and confusing to put only the challenged loan into forbearance: "The Department is concerned that a partial pause would create confusion for borrowers who do not understand that they still owe payments on some loans but not others." Per our argument above, this policy presumes a uniform lack of sophistication among borrowers; this assumption is not only unproven, but demonstrably false, and basing policy decisions on it is irrational.

Even the most unsophisticated borrower understands that each loan is its own loan. For example, a loan from one college, taken out for different purposes in a different year, is obviously distinct from a loan from another college. Therefore, § 685.403(c) and (d) should state that only the challenged loan(s), including the entire amount of a consolidated loan that incorporated those loans, shall be put in forbearance.

In addition, § 685.403(d)(2) changes the time from one year to 180 days for the point at which ED will stop charging interest in cases when ED has not yet made a determination about a claim. Considering that ED has expressed concern about borrower confusion, it is better to leave the one-year rule in place without implementing yet another change. Also, the amount of interest during the six months at issue is so low that ED's proposed change is not a deciding factor compared to the potential discharge.

- Due process:

Sections 685.406 and 685.407 do not treat the accuser-borrower and the accused institution equally or equitably. Equality of treatment for the parties on both sides of an issue is a core element of due process. Yet, the proposed rule would create unequal treatment.[6]

For example, "If the Department official requires additional information from the school, the school must respond to the Department official's information request within 90 days." But ,"[i]f the Department official requires additional information from the individual, the individual must respond within a reasonable timeframe" (§ 685.406). The Department of Education should choose either 90 days or a "reasonable timeframe"—but should not treat the parties differently.

Also, in § 685.407, "[i]f the borrower defense is denied in full or in part, an individual may request that the Secretary reconsider their individual borrower defense claim," but if the claim is granted in full or in part, the accused institution is given no right to request reconsideration. This is inequitable. The accused institution must have the same ability to request reconsideration as the accuser-borrower.

The accused institution deserves the same "finality" that the accuser deserves. Nonetheless, in § 685.407(f)(1), "[t]he Secretary may reopen at any time"—*forever*—"a borrower defense application that was partially or fully denied." The lack of any time limit puts every institution under the gun forever regarding any claim, no matter how weak the claim, and no matter whether the applicant has already died. The rule must set a reasonable time limit for reopening an application. The Secretary lacks such authority with respect to an application that was fully granted.

Similarly, ED proposes to start various timelines as of the last date of attendance at the institution by the accuser. This idea produces the absurd result that a student who attended college in the 1970s and then returns to finish in 2023 could file a claim regarding the institution's promises in the 1970s. Today, many students take eight or more years and still

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[6] This lack of due process appears to characterize ED's propensity to take sides against an accused party, such as in ED's proposed rule reinterpreting Title IX on sex discrimination.

do not complete a degree, yet ED proposes that claims regarding treatment eight or more years prior could be adjudicated. At the same time, ED only requires that records be kept for three years.

Instead, ED must use an appropriate beginning date, such as the date on which the accuser received the allegedly fraudulent treatment. It is not a compelling argument to use an easily discernible recent date in order to make things "simpler" at the expense of the accused institution. Many state fraud statutes have limitations either longer or shorter than six years; six years from an actual fraudulent event is reasonable.

Furthermore, as stated above, ED acknowledges that the proposed rule will disproportionately affect for-profit institutions, and, in fact, ED acknowledges that the proposed rule is *designed* to do so. See especially *Federal Register* page 41958 ("Almost 90 percent of borrower defense claims are from the proprietary sector. …This is reflected in the school conduct assumption in Table 5.").

Because of such targeting by ED in an earlier regulation and by ED's former practice, which ran several for-profit institutions entirely out of business, it is likely that the proprietary sector believes it largely cannot trust ED to be a fair adjudicator, which is likely a key reason that this sector often seeks to reduce borrower defense claims that would go to ED for adjudication. Such self-defense should not be short-circuited by the proposed rule.

- Timeline for adjudication of a claim:

  ED proposes to discharge loans that ED has failed to adjudicate by its own self-imposed deadline. This proposal incentivizes ED to take claims, sit on them (which it already does), and then discharge loans due to inaction. Citizens should not trust ED to change its behavior and suddenly adjudicate claims on time. In the current political environment, there is already tremendous pressure to "forgive" education loans, so ED has additional incentive to be slow in order to automatically "forgive" loans that it may not legally discharge.

  Instead, such a deadline encourages tens of millions of borrowers to file marginally colorable claims at the same time and take their changes on slow ED action.

6. Regarding **§ 685.219** (**Public Service Loan Forgiveness**):

In general, the Public Service Loan Forgiveness Program (PSLF) is already a generous taxpayer subsidy, forgiving the balance of student loan debt for qualified borrowers after just 10 years. Making the program more generous through the rulemaking process would add to the significant burden already felt by U.S. taxpayers—the majority of whom do not hold college degrees. In general, expanding forgiveness is unfair in nature because the more educated, more wealthy would receive benefits that are not available to the less educated, less wealthy.

This rule would make the Public Service Loan Forgiveness Program more generous by allowing borrowers to get credit toward a PSLF discharge for the months when they were in deferment and forbearance by making a single payment and having those months count toward the PSLF discharge. It would also count late payments toward that end. ED proposes to "simplify" the process for claiming PSLF discharge eligibility by sharing data with other agencies in order to *automatically* grant PSLF for federal employees.

As a general matter, however, for most borrowers, student loan payments are manageable. The median payment is $222 per month, whereas the U.S. Department of Housing and Urban Development reports that the median U.S. family income is $90,000.[7] Making loan forgiveness more generous through expanded definitions of who qualifies for the PSLF discharge and the types of payments that qualify would lead to further inflation of college costs. For example:

- Tuition and fees at public universities more than doubled in real terms from 1991 to 2021, increasing from $4,160 to $10,740. When room and board are factored-in, those figures increase from $10,760 in 1991 to $22,690 in 2021.[8] Costs are increasing rapidly, in part due to open-ended federal subsidies.
    - During the past 30 years, total federal aid has increased 295 percent. Total aid—all student loans, grants, and tax benefits—increased from $34 billion in 1991 to $134 billion in 2021. Expanding the PSLF would throw fuel on that inflationary fire.
    - In one study, researchers Grey Gordon and Aaron Hedlund found that raising subsidized loan limits led to a 102 percent increase in tuition from 1987 to 2010. Absent that additional federal money, the authors estimate tuition would have only gone up by 16 percent on net.[9]
    - Another study by David O. Lucca, Taylor Nadauld, and Karen Shen of the Federal Reserve Bank of New York found additional evidence of the "Bennett Hypothesis" at play. The authors found that credit expansion (increasing subsidized federal student loans) leads to a tuition increase of 60 cents for every additional dollar of subsidized federal loans.[10]
- The PSLF program also inappropriately preferences government work over private sector work, which, as a general rule, policy should not do. This is one reason why some legislators argue that PSLF should not exist.

If this rule is to move forward, *at a minimum* it should amend its definitions of *non-governmental public service* and *school library* in paragraph (b) to clarify that work at a school library or in other school-based services includes public charter schools. In one commenter's (Kissel's) experience as Chairman of the West Virginia Professional Charter School Board, people often are unaware that charter schools are public schools, not private entities or for-profit entities. The recommended clarification would reduce confusion about eligibility in this area.

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[7] U.S. Department of Housing and Urban Development, "Estimated Median Family Incomes for Fiscal Year (FY) 2022," Notice PDR-2022-01 (April 18, 2022), Attachment 2, p. 5, https://www.huduser.gov/portal/datasets/il/il22/Medians-FY22-Notice.pdf (accessed August 10, 2022).
[8] "Trends in College Pricing 2021," The College Board, October 2021, https://research.collegeboard.org/media/pdf/trends-college-pricing-presentation-2021.pdf (accessed August 4, 2022).
[9] Grey Gordon and Aaron Hedlund, "Accounting for the Rise in College Tuition," NBER Working Paper No. 21967, https://www.nber.org/papers/w21967.pdf (accessed August 4, 2022).
[10] Federal Reserve Bank of New York, "Credit Supply and the Rise in College Tuition: Evidence from the Expansion in Federal Student Aid Programs," https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr733.pdf (accessed August 4, 2022).