November 26, 2024

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

RE: Docket ID ED-2023-OPE-0123

Dear Secretary Cardona:

This is a comment on the Department of Education's ("department's") proposed rule with regard to regulations involving various student loan programs, Docket ID ED-2023-OPE-0123. The proposal suffers from many fatal defects, including the stigma and other harms that come from the department automatically declaring that millions of borrowers are likely deadbeats.

(1) The Department Should Confess Error Due to Pretextual Rulemaking and Withdraw the Entire Proposed Regulation.

Proposed Subpart G—Waiver of Federal Student Loan Debts, in its entirety, is allegedly justified by the department to simply "clarify how the Secretary would exercise their authority to waive some or all outstanding loan debt in certain situations." But in reality, these proposed regulations are the latest departmental scheme to cancel as much student loan debt as possible as quickly as possible ("The Supreme Court blocked me, but it didn't stop me," according to President Biden). It is likely that if Subpart G, in any form, becomes a final regulation, it will be successfully challenged in court on grounds including the fully pretextual nature of the regulation.

5 U.S.C. § 706 specifies that a reviewing court shall "hold unlawful and set aside agency action" for various reasons, including failure to observe "procedure required by law." As explained recently by attorney Christopher Horner, agencies "aren't permitted to lie about their reasons for imposing a regulation—a doctrine known as the rule against pretext," and where the record of the agency's process discloses evidence of pretext, a court can and does set aside the regulation.[1]

The department should acknowledge its error now and withdraw the entire proposed regulation. Doing so would save the agency the costs involved in completing and then fighting for the legality of its pretextual regulatory process.

(2) The Proposed Regulation Fails the Major Questions Doctrine.

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[1] "Trump Will Want to 'Confess Error,'" *The Wall Street Journal*, Nov. 17, 2024, https://www.wsj.com/opinion/trump-will-want-to-confess-error-deregulation-agencies-06b5cb2b?st=mopq89&reflink=mobilewebshare_permalink.

While the Secretary of Education may have limited, truly individualized authority to waive some amounts of student loan debt collection, pursuant to the Major Questions Doctrine, the department does not have the authority either to automatically (§ 30.91(c)) waive debt amounts for millions of borrowers at a time or to systemically do so for millions of borrowers through an application (30.91(d)). The department is obligated not to exceed its powers, which powers are necessarily curtailed by the now well-established presumption that Congress did not delegate to the agency an issue of major political or economic significance, such as canceling billions to hundreds of billions of dollars of borrower debt[2]. The department will continue to lose in court on this point, whatever authority the department claims to find.

The department should acknowledge its overreach now and withdraw the entire proposed regulation. Doing so would save the agency the costs involved in completing and then fighting for the legality of its unauthorized regulations.

(3) The Department Relies in Part on an Argument from Race and Ethnicity, Subjecting the Proposed Regulation to Strict Scrutiny, Which It Cannot Overcome.

The department's justification for its proposed regulation, including both 30.91(c) and (d), includes an argument from race and ethnicity, citing the "greater prevalence of longer-term or repeated defaults among communities with greater shares of Black and Hispanic residents." Considering race and ethnicity has impermissibly affected the department's decision making without a sufficient justification (such as overcoming recent departmental discrimination in its operation of student loan programs and cancellation practices). Race-based decision making requires a tight causal connection between race and the department's practices, rather than a mere argument from general statistics. General statistics are not enough to meet a strict scrutiny standard. In fact, the proposed regulation includes a large number of factors, including a catch-all provision, that the Secretary may, discretionally, use when canceling debt. The wide discretion of the Secretary to use "Any other indicators of hardship identified by the Secretary" (30.91(b)(17)), besides the large number of other factors to be used, shows that the proposed regulation is not narrowly tailored to a compelling government interest, which is required when seeking to overcome strict scrutiny.

(4) The Extreme Discretion Afforded the Secretary Is Unreasonable, and the Cost of the Regulation is Too Unclear to Determine.

The extreme level of discretion afforded the Secretary under 30.91(b)(17) is unreasonable, making 30.91(c) and (d) arbitrary and capricious (30.91(c) gives no less discretion to the

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[2] The Department of Education estimates the proposed rule will cost $112 billion over ten years; others, such as the Committee for a Responsible Federal Budget (CFRB), suggest it could be closer to $600 billion—a burden that would fall on taxpayers. "Proposed Hardship Rule a Brazen Attempt at Student Debt Cancelation," *CFRB*, October 25, 2024, https://www.crfb.org/press-releases/proposed-hardship-rule-brazen-attempt-student-debt-cancelation.

Secretary than (d), since (c) would permit the Secretary to use factors “including but not limited to the factors described” in (b)). As a telling example, the department argues that a $0 monthly payment is not necessarily generous enough and that, therefore a loan could deserve to be canceled in full (“a borrower that is on an IDR plan with a $0 monthly payment might still be eligible for a waiver if the borrower would still be highly likely to experience similarly severe negative and persistent circumstances”). A zero-dollar payment is the very definition of affordability, providing the borrower with a clearly zero percent chance of default, which is far from the proposed 80% standard. This is patently absurd and unreasonable.

In addition, allowing for a subjective hardship clause that grants the Secretary limitless discretion could introduce significant risks of moral hazard that the department has not taken into account. As others have pointed out, such expansive authority might lead to “hardship” being interpreted by the department as something as routine as high auto-loan or credit card payments.[3] This level of flexibility creates the potential for a moral hazard: 30.91(d) borrowers will be more likely to take undue financial risks as well as more likely to act on the likelihood that additional loans can be taken without the expectation of full accountability, since irresponsibility with credit cards or other lenders can be rewarded by the department with cancelation. Notably, the department has failed to outline any safeguards against potential misuse or provide an analysis of the long-term fiscal impacts of the moral hazard in its proposed policy. It is unreasonable for the department to introduce a moral hazard of this scale without explicitly reckoning with its costs or explaining why it is unlikely to materialize at scale.

In addition, the extreme level of discretion afforded the Secretary, as described above, means that the formula to be used in 30.91(c) and the judgment in 30.91(d) are entirely unclear. The department has not revealed which factors it will use or how it will weigh the factors. The creative weighting of the factors could produce an extremely wide variation in the number of borrowers whose loan amounts are canceled. The department should reveal its formula so that the public has a substantial opportunity to comment on the proposed regulation. Absent the formula, and absent a clear understanding of the cost of the rule, this proposed rule is arbitrary and capricious.

(5) The Formula Might Not Account for Endogeneity and Might Never Be Able To.

The formula to be used in 30.91(c) and the judgment to be used in 30.91(d) might deeply confound endogenous factors among the proposed factors, such as “household income” and “Receipt of a Pell grant,” which directly depends on household income. As a result, the department and Secretary are very likely to make serious, substantial mathematical errors when using multiple factors to make a determination. The department acknowledges that

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[3] “Biden Snubs the Courts Again on Student Loan Forgiveness,” *Wall Street Journal*, October 25, 2024, https://www.wsj.com/opinion/biden-student-loan-forgiveness-supreme-court-education-department-7af30892?mod=politics_trendingnow_opn_pos1

"interactions among individual predictors" *might* be part of the formula, but does not guarantee that the department will do so. Yet, to avoid extreme mathematical errors, the department *must* do so.

Mathematically, it is incorrect to sum the percentage risk of two or more factors because the risks may be related. Using two factors that are highly correlated, but treating them as independent factors, is an extreme mistake. But the department does not show that it understands how serious such a mistake can be.

To properly assess the risk of default, the department must know not only the risk in each factor, but also must know *all* the interactions across *all* the factors used. With 16 factors plus the catchall, it may be practically impossible to produce enough data to reasonably determine when a borrower has met the proposed 80% threshold, or any chosen threshold. The proposed idea of using a formula with many factors is unreasonable, and both 30.91(c) and (d) should be abandoned as practically infeasible. Not doing so would be arbitrary and capricious.

Additionally, correlation is not causation. It is a mathematical error for the department to use correlations and presume that they are causative factors in default.

(6) The Department Has Failed to Reveal the Weighting of the Factors.

Related to concerns above, the department has not only failed to reveal which factors will actually be used in 30.91(c) and (d) determinations, but also has failed to reveal the weighting of the factors. This failure means that the department has given the public no opportunity to comment on a core element of the rule, which apparently will be executed off the page and could be executed differently for each borrower under 30.91(d). The failure to provide opportunity to comment on the weightings of the factors violates the Administrative Procedure Act.

(7) (Directed Question 2) The Proposed Threshold is Arbitrary and Capricious.

We appreciate Directed Question #2 on this matter. For the reasons given above, any threshold is arbitrary and capricious. Even so, we note that an 80 percent threshold functions similarly to a "clear and convincing evidence" standard. Since a decision to cancel student debt once and for all is not revisited, however, a higher standard of evidence should be required.

Furthermore, when the Department of Education declares that a borrower is very likely to be a deadbeat borrower for whatever reason, this designation is a black mark on the borrower. It **stigmatizes the borrower as a likely deadbeat**. This stigma could cause reputational harm to the borrower as well as make it harder for the borrower to get loans elsewhere in the future. These harms are inconsistent with the rule's purported intent to "improve [borrowers'] future economic outcomes." Before stigmatizing millions of borrowers as likely deadbeats and causing these harms, the department should be sure.

For these reasons, in the unlikely event that the regulation is able to survive all of its other deficiencies, we advise that the department use for its standard a 98 percent likelihood of default, give or take a percent. Relatedly, a borrower should be allowed to become exempt from automatic cancelation in order to avoid the stigma and other harms of being declared a likely deadbeat by the department. To more fully avoid stigmatizing millions of borrowers, the department should omit 30.91(c) automatic cancelation from the final rule; alternatively, the department should alert every 30.91(c) borrower about the impending stigma and require them to record, in their own words, why they should or should not be subject to being called a likely defaulter.

Additionally, any threshold is arbitrary and capricious because people in almost identical circumstances would either get full cancelation or zero cancelation under the proposed rule, in both 30.91(c) and (d). This proposed situation is unreasonable because it creates a benefits cliff. More appropriate is a sliding scale. Perhaps at 98 percent likelihood, there could be a presumption of full cancelation because, at some point, the cost of collecting outweighs the likelihood of repayment. But at lower likelihoods, it would be reasonable to presume different amounts of cancelation that could, for example, and on the model of other programs in the department, be tied specifically to income.

For such reasons, we again recommend that the proposed rule be withdrawn. Establishing any percentage threshold, even 98 or 99 percent, unjustly subsidizes borrowers who may have taken on loans without fully considering the financial responsibilities involved and encourages risky behavior going forward for anyone who may hope to qualify under 30.91(d). Ultimately, student loan debt is a contractual obligation, and borrowers should be expected to honor their commitments, especially when existing mechanisms already provide options for adjusted payments or temporary repayment pauses.

(8) (Directed Question 3) "Severe Negative and Persistent Circumstances" Should be Narrowly Defined

We appreciate the inclusion of Directed Question #3 regarding eligibility for the hardship waiver under proposed § 30.91(d). Specifically, the consideration of borrowers who are "highly likely to be in default, or experience similarly severe negative and persistent circumstances," raises the important point that in the case of a particular individual in especially dire circumstances, the Secretary would have a reason to consider abandoning efforts to collect the debt due to the extremely high likelihood of nonpayment. But the proposed definition is overbroad, and we instead recommend that "severe negative and persistent circumstances" be narrowly defined: it should be limited to exceptional, unpredictable events that are genuinely outside of the borrower's control.

We make this recommendation because borrowers facing such circumstances (such as long-term total medical disability or diagnosis of terminal cancer) already have access to existing

relief mechanisms. These include forbearance or deferment, which can temporarily postpone or reduce such borrowers' monthly payments based on their specific situations.

Forbearance is also available for reasons such as financial difficulties, medical expenses, or changes in employment, among other reasons, allowing borrowers to pause monthly payments for up to 12 months, with a cumulative limit of three years. Similarly, deferment options cover scenarios from cancer treatment to military service to economic hardship, among other options, and during that time, payments are temporarily suspended.

Given these existing options, the entire proposed rule is unnecessary. Even so, it is feasible that from the department's point of view, it is less expensive to remove a borrower in extreme circumstances from the books than to continually verify and process forbearances or zero-dollar payments.

We also note that most borrowers who would be covered by the proposed rule are people who recently benefited from an unprecedented payment pause from March 2020 to August 2023, during which student loan payments went into administrative forbearance, meaning all payments were paused, with interest rates at zero. This pause alone added nearly $208 billion to the nation's debt because of interest that was waived.[4] Such unique circumstances make unreasonable any analysis or cancelation in 2024 or 2025 under either 30.91(c) or (d). It would be arbitrary and capricious to infer "severe negative and persistent circumstances" using any factor related to the one-time upheavals during the years of the COVID-19–related payment pause. Instead, if the department persists with the proposed regulation, the department has the option of using existing tools for forbearance until it can make a reasonable determination, perhaps two years from now, regarding "severe negative and persistent circumstances."

(9) Presuming Total Cancelation Is Arbitrary and Capricious.

Just as, mathematically, there always will be borrowers on either side of any chosen threshold, there also will always be borrowers for whom temporary relief or partial relief is appropriate. Yet the department proposes an arbitrary presumption of complete cancelation for everyone. The department proposes to refuse to collect easily collectible debt in 30.91(c) in order to avoid the work of understanding how partial cancelation or other forms of relief would sufficiently help a particular borrower while enabling the department to collect on readily collectible debt.

(10) Creating Two Paths Violates the Equal Protection Clause.

The proposed rule would create two classes of borrowers: the likely deadbeats (30.91(c)) and the ones who must apply to show that they are likely deadbeats (30.91(d)). Then, the proposed rule's methods of determining eligibility for cancelation treat these two classes differently. The method the department may use in 30.91(c) could be dramatically different from the method

[4] "The State of Student Loan Forgiveness: September 2024," *CATO Institute*, September 3, 2024, https://www.cato.org/blog/state-student-loan-forgiveness-september-2024

used in 30.91(d). Furthermore, as stated above, without clarity on the formulas or judgment to be used, it is extremely unclear just how unequally and inequitably the department plans to be when addressing 30.91(c) versus 30.91(d) borrowers.

(11) Mass Cancelation Is Inherently Inequitable.

Ultimately, the department is proposing to incur more than $100 billion, perhaps hundreds of billions, in taxpayer costs to pay for the loan cancelation of people whom the department identifies as having some college education yet are likely deadbeats. Mass cancelation is also inequitable because it disregards individuals who have already paid off their loans, avoided taking on debt, or chose not to pursue higher education due to its cost—showing responsibility too soon to benefit from a one-time cancelation scheme. Mass cancelation also effectively shifts the burden of student loan debt from those who willingly borrowed to taxpayers, many of whom did not benefit from higher education or who have already fulfilled their financial obligations.

(12) "Has Experienced ... Hardship" Is Unreasonable Because It Concerns Only the Past.

Section 30.91(a) proposes that a borrower who "has experienced ... hardship" may qualify for loan cancelation even if the borrower is now fully free of all hardship. The past situation of a borrower is irrelevant if the borrower currently experiences no hardship. Including the borrower's past rather than his or her current experience is arbitrary and capricious. For example, someone who meets the criteria, including past circumstances, may have finally gotten a steady job and has become fully able to repay the entire amount of the student loan, yet 30.91(a) would ignore the reality and presume full cancelation anyway.

Additionally, 30.91(a) provides no limit on how far back the department can search for "hardship" factors. A Pell recipient from decades ago who is now a successful doctor, for example, depending on the weighting of this factor, could nevertheless be declared a likely deadbeat against all of the current evidence of the doctor's ability to pay.

Only a borrower's actual ability to pay should be considered; searching the past with no cutoff period is unreasonable.

(13) Cancelation Is Unreasonable, Whereas Extended Forbearance Is Reasonable.

The proposed rule would cancel debt for borrowers who might become able to pay in the future. By entirely canceling the debt instead of waiting to see what happens and extending forbearance for as long as someone meets a chosen threshold of likeliness of default, the proposed rule is unreasonable. The rule instead, if it can survive its other infirmities, should put the likely deadbeat on an extended forbearance with regular re-evaluations of the individual's circumstances.

(14) Violation of Federalism Executive Order.

Prior lawsuits have made it clear that states have significant financial interests when the department cancels billions of dollars in debt and completely removes debtors from the rolls. Yet the department claims no federalism concern whatsoever in the proposed rule. Accordingly, the department has thus far violated Executive Order 13132, which requires state input for a rule such as this one.

(15) Violation of Debt Collection Responsibility.

The proposed rule is in excess of statutory authority because 31 U.S.C. 3711 and 31 CFR 902 are binding on the Secretary, but this rule violates those requirements. That is, Section 3711 requires the Secretary to "try to collect a claim of the United States Government for money ... arising out of the activities of, or referred to the agency," and requires that the Secretary act under prescribed standards that are set forth in Part 902. The provisions of the rule proposed here exceed those strictures and instead "proclaim authority for broad-based compromises on any and all student loan balances" for millions of borrowers (*see* paragraphs 168 and 169, page 37, of the lawsuit filed on September 3, 2024, against the department regarding its most recent loan cancelation scheme before the current scheme, Case 2:24-cv-00103-LGW-BWC, *available at* https://ago.mo.gov/wp-content/uploads/1-Complaint-Student-Loans.pdf).

As an alternative, the department should focus on improving loan collection methods. For defaulted loans, recovery efforts typically yield about 80 to 85 cents on the dollar, even after collection costs.[5] This means that, with collection efforts, a significant portion of loans could be recouped rather than off-loaded onto taxpayers. This alternative, which it appears the department has not considered, would ensure that the Secretary and the Department of Education remain aligned with their statutory obligations outlined above.

(16) The Public Comment Period Is Insufficient and Inhibits Meaningful Public Participation in the Rulemaking Process.

Finally, we request an extension of the public comment period. A public comment period of only 30 days is insufficient for the public and interested parties appropriately, sufficiently, and meaningfully to participate in the rulemaking process. The range of factors and scenarios included demands that the public and interested parties receive a longer period to submit substantive and comprehensive comments.

Moreover, Executive Orders ("EOs") 12866 and 13563 support this contention. EO 13563, "Improving Regulation and Regulatory Review," states that "each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a

[5] "Does the Government Profit Off Of Student Loans?" *The College Investor*, October 12, 2023, https://thecollegeinvestor.com/39673/does-the-government-profit-off-of-student-loans/.

comment period that should generally be at least 60 days."[6] EO 12866 includes similar language: "[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days."[7] Best practice mandates that the agency allow a reasonable extension of the comment period—an additional 30 days, for a total of 60 days—for interested parties and members of the public to submit comments on the NPRM. Accordingly, we request an additional 30 days to provide a full opportunity to respond.

Thank you for the opportunity to comment. We would be delighted to answer any questions about this comment.

/s/

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/s/

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[6] *See* EO 13563, § 2(b).

[7] *See* EO 12866, § 6(a)(1).