

Hon. Miguel Cardona
Secretary
Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Re: Student Debt Relief Based on Hardship for the William D. Ford Federal Direct Loan Program (Direct Loans), the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program, Docket ID ED-2023-OPE-0123, RIN 1840-AD95

Dear Secretary Cardona:

Thank you for the opportunity to comment on the amendments to the Department's regulations proposed in the above-captioned release. I write to identify several grave defects in the proposal. These defects unfortunately make the proposal an inadequate means of dealing with the student debt crisis.

First, the proposal manifestly fails to give the regulated public the chance to prepare meaningful comments as required by the Administrative Procedure Act. The Department has offered the public only thirty-two calendar days to prepare comments. The inclusion of two holidays (Veterans Day and Thanksgiving) within the comment period means that commenters have only twenty business days to prepare comments on regulatory amendments of immense consequence. This dramatic foreshortening of the comment period is not merely unusual; it is shocking. I strongly urge the Department to afford, at the very least, the full comment period of sixty days contemplated by Executive Order 12866.

Second, the proposal's list of factors to assess hardship is woefully inadequate. The list includes several factors (for instance, household income and assets) that in many (though certainly not all) cases are subject to some substantial portion of borrower control. A borrower's income and assets say nothing, by themselves, about whether the borrower is able to repay his or her loans, because borrowers may be able to increase their income and assets by dint of their own action. To assess whether a borrower is really unable to repay his or her loans without experiencing substantial adverse effects, the Department needs to know a borrower's income and assets and also the reason why these may be insufficient to make full payments on his or her student loans, but the proposal's list does not include this all-critical factor. In many cases borrowers cannot reasonably increase their income or assets, but this fact does not justify the Department in disregarding the crucial distinction between borrowers who can and cannot do so.

Third, the proposal's attempt to guard against strategic behavior is insufficient. The proposal aims to prevent strategic behavior by requiring "that the borrower must be highly likely to be in default, or experience similarly severe negative and persistent circumstances, and that other options for payment relief would not sufficiently address the borrower's persistent

hardship.”¹ But requiring a high likelihood of default, far from preventing strategic behavior, would encourage it: the knowledge that a high risk of default is necessary for forgiveness would make borrowers *more* likely to engage in behavior that risks default, not less. Similarly, the proposal’s making forgiveness contingent on the inadequacy of IDR options would tend to make borrowers more likely to engage in behaviors that render IDR an inadequate remedy for their situation. The proposal never explains why the proposed requirements would tend to discourage strategic behavior; at the very least, the Department should offer such an explanation so the public can understand and critique the Department’s reasoning. To be sure, many borrowers would reject the possibility of strategic behavior on moral grounds, but the Department has no business incentivizing the contrary choice.

Fourth, the proposal fails to justify its conferral of the power to forgive loans before borrowers are in default. Inevitably, some borrowers the Department predicts will be unable to repay their loans in full would in fact be able to pay without suffering privation. The proposal would therefore result in forgiving more loans than if it were limited just to defaulted borrowers. The Department needs a reason for this over-inclusion. It claims to find such a reason in the need to prevent “the most significant consequences associated with student loan struggles, such as delinquency and default and their follow-on effects.”² But default is not itself an adverse consequence if the defaulted loan is to be forgiven. It is irrational to justify forgiveness of loans that *may* go into default by pointing to the need to prevent default when the Department could just as easily forgive loans that *in fact go into default*. The Department, then, needs to point to follow-on effects of default that justify its prophylactic approach. But the proposal merely gestures at such effects. The Department should issue a supplemental release explaining these effects and the reasons they justify its over-inclusivity for the public to evaluate.

Thank you for your consideration of this comment.

Cordially,

Paul J. Ray³

¹ 89 Fed. Reg. at 87148.

² 89 Fed. Reg. at 87137.

³ Director of the Thomas A. Roe Institute for Economic Policy Studies at the Heritage Foundation. I file this comment in my individual capacity rather than as an employee of the Heritage Foundation; information regarding my institutional affiliation is provided for informational purposes only.