This document is scheduled to be published in the Federal Register on 07/13/2022 and available online at **federalregister.gov/d/2022-14631**, and on **govinfo.gov**

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DEPARTMENT OF EDUCATION

34 CFR Parts 600, 668, 674, 682, and 685

RIN 1840-AD53, 1840-AD59, 1840-AD70, 1840-AD71

Docket ID ED-2021-OPE-0077

Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program.

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking (NPRM) covers student loans and affordability issues. This rulemaking specifically discusses issues involving loans under the William D. Ford Direct Loan (Direct Loan) Program, the Federal Perkins Loan (Perkins) Program, and the Federal Family Education Loan (FFEL) Program. The Secretary proposes to amend the regulations governing seven topics related to student loans administered by the U.S. Department of Education. First, we propose to amend the regulations governing the William D. Ford Federal Direct Loan (Direct Loan) Program to establish a new Federal standard and process for determining whether a borrower has a defense to repayment on a loan. We also propose to prohibit the use of certain contractual provisions regarding dispute resolution processes by participating

institutions, and to require certain notifications and disclosures by institutions regarding their use of arbitration. Additionally, we propose to amend the Perkins, Direct Loan, and FFEL Program regulations to improve the process for granting total and permanent disability (TPD) discharges by eliminating the income monitoring period and expanding allowable documentation allowing additional health care professionals to provide a certification that a borrower is totally and permanently disabled. We further propose to amend the closed school discharge provisions in the Perkins Loan, Direct Loan, and FFEL programs to expand borrower eligibility for automatic discharges and eliminate provisions pertaining to reenrollment in a comparable program. We further propose to amend the Direct Loan and FFEL regulations to streamline the regulations governing false certification discharges. We propose to amend the Direct Loan regulations to eliminate interest capitalization in instances where it is not required by statute. Finally, we propose to amend regulations governing Public Service Loan Forgiveness (PSLF) in the Direct Loan program to improve the application process, and to clarify and expand definitions for full-time employment, qualifying employers, and qualifying monthly payments. The proposed changes would bring greater transparency and clarity and improve the administration of Federal student financial aid programs to

assist and protect students, participating institutions, and taxpayers.

DATES: We must receive your comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For more information regarding submittal of comments, please see SUPPLEMENTARY INFORMATION. Comments must be submitted via the Federal eRulemaking Portal at Regulations.gov. However, if you require an accommodation or cannot otherwise submit your comments via Regulations.gov, please contact Mr. Jean-Didier Gaina, U.S. Department of Education, 400 Maryland Ave., SW, room 2C172, Washington, DC 20202 or by phone at (202) 453-7551 or by email at jean-didier.gaina@ed.gov.

Federal eRulemaking Portal: Please go to www.regulations.gov to submit your comments electronically. Information on using Regulations.gov, including instructions for finding a rule on the site and submitting comments, is available on the site under "FAQ."

FOR FURTHER INFORMATION CONTACT: For assistance to individuals with disabilities for reviewing the rulemaking record, contact Valerie Lefor at (202) 453-7724 or valerie.lefor@ed.gov. For further information related to interest capitalization, contact Vanessa Freeman at (202) 453-7378 or by email at vanessa.freeman@ed.gov. For further information related to borrower defenses or pre-

dispute arbitration, contact Rene Tiongquico at (202) 453-7513 or by email at rene.tiongquico@ed.gov. For further information related to TPD, closed school, and false certification discharges, contact Brian Smith at (202) 453-7440 or by email at brian.smith@ed.gov. For further information related to PSLF, contact Tamy Abernathy at (202) 453-5970 or by email at tamy.abernathy@ed.gov.

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7-1-1.

SUPPLEMENTARY INFORMATION:

Submission of Comments

The Department will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that the Department does not receive duplicate copies, please submit your comments only once. Additionally, please include the Docket ID at the top of your comments.

The Department strongly encourages you to submit any comments or attachments in Microsoft Word format. If you must submit a comment in Adobe Portable Document Format (PDF), the Department strongly encourages you to convert the PDF to "print-to-PDF" format, or to use some other commonly used searchable text format. Please do not submit the PDF in a scanned format. Using a print-to-PDF format allows the Department to electronically search and copy

certain portions of your submissions to assist in the rulemaking process.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Commenters should not include in their comments any information that identifies other individuals or that permits readers to identify other individuals. If, for example, your comment describes an experience of someone other than yourself, please do not identify that individual or include information that would allow readers to identify that individual. The Department will not make comments that contain personally identifiable information (PII) about someone other than the commenter publicly available on www.regulations.gov for privacy reasons. This may include comments where the commenter refers to a third-party individual without using their name if the Department determines that the comment provides enough detail that could allow one or more readers to link the information to the third party. If your comment refers to a third-party individual, to help ensure that your comment is posted, please consider submitting your comment anonymously to reduce the chance that information in your comment about a third party could be linked to the third party. The Department will also not make comments that

contain threats of harm to another person or to oneself available on www.regulations.gov.

Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

Executive Summary

Purpose of This Regulatory Action: College affordability and student loan debt have been significant challenges for many Americans. Student loan debt has risen over the past 10 years as student loan repayment has slowed, while the inability to repay student loan debt has been cited as a major obstacle to entry into the middle class.[1]

This NPRM proposes several significant improvements to existing programs authorized under the Higher Education Act of 1965 (HEA), 20 U.S.C. 1001, et seq., that grant discharges to borrowers who meet specific eligibility conditions. Despite the presence of these discharge authorities for years, if not decades, the Department is concerned that too many borrowers have been unable to access loan relief through these opportunities. In some situations, this has been due to regulatory requirements

[1] R. Chakrabarti, N. Gorton, and W. van der Klaauw, "Diplomas to Doorsteps: Education, Student Debt, and Homeownership," Federal Reserve Bank of New York *Liberty Street Economics* (blog), April 3, 2017, http://libertystreeteconomics.newyorkfed.org/2017/04/diplomas-to-doorsteps-education-student-debt-and-homeownership.html.

that have created unnecessary or unfair burdens for borrowers.

These proposed changes relate to discharges available to borrowers in the three major Federal student loan programs: Direct Loans, Federal Family Education Loan (FFEL), and Perkins Loans. The most significant effects would be in the Direct Loan program, which has been the predominant source of all Federal student loans since 2010. In this program the Department makes loans directly to the borrower and then contracts with private companies known as student loan servicers to manage the borrower's repayment experience on behalf of the Department. Several of the components of these proposed regulations, such as interest capitalization, borrower defense to repayment, the ban on the use of mandatory pre-dispute arbitration, the prohibition on class action waivers, and the Public Service Loan Forgiveness program are only related to Direct Loans. Other provisions, such as closed school discharge, total and permanent disability discharges, and false certification discharges, would affect Direct Loans as well as loans previously issued under the FFEL Program and the Perkins Loan Program.[2] In the FFEL program, private lenders issue Federal student loans using their own funds, then receive both a Government guarantee against most of the

[2] No new student loans are currently issued under either the FFEL and Perkins Loan programs. There have been no new FFEL loans issued since June 30, 2010, and the Perkins Loan program stopped issuing new loans on September 30, 2017.

losses in the case of default and quarterly Federal subsidies. In the Perkins program, institutions of higher education (institutions) issue Federal student loans using a combination of Federal and institutional funds.

Borrower Defense to Repayment, Arbitration, and Class Action Waivers

The proposed regulations for the borrower defense to repayment program, which applies only for Direct Loan borrowers, would expand the current basis for a borrower to receive a discharge for loans obtained to attend a particular institution. As proposed, a borrower defense discharge would occur when the Department determines an institution engaged in substantial misrepresentations or substantial omissions of fact, breached a loan contract, engaged in aggressive academic recruitment, or was subject to a judgment based on Federal or State law in a court or administrative tribunal of competent jurisdiction for any of the above behaviors. The proposed changes to the regulations governing borrower defense discharges are designed to further protect student loan borrowers from the financial effects of certain predatory practices. Where a borrower defense discharge is warranted, the proposed regulations would also enhance the Department's recoupment authorities, making it easier for the Department to hold institutions accountable for costs, reducing the financial impact to taxpayers. It would also include a process for

the Department to recoup the cost of these discharges from institutions. The proposed changes are in direct response to numerous instances observed by the Department over time in which students borrow to attend an institution only to find that the institution's promises were untrue, leaving the borrower with a loan for a substandard education and often lacking the ability to obtain the employment they were promised. The proposed changes to the borrower defense regulations would apply to both public and private institutions. To date, much of the concerning evidence of unacceptable institutional practices comes from private for-profit colleges and universities; a large share of whose enrollment is Black students, Latino students, students who are older, students who are working full-time while enrolled in college, and students who did not enroll in postsecondary education directly from high school. However, the regulations would not be limited to only private for-profit schools but would cover conduct at public and private nonprofit institutions as well.

As proposed, the regulations would also prevent institutions wishing to participate in title IV programs from requiring either the use of mandatory arbitration or waiver of class action lawsuits, including prohibiting putting such requirements within the loan contract for a Direct Loan.

Interest Capitalization

The proposed regulations would eliminate most interest capitalization on Direct Loans by removing the current regulatory provisions that require capitalization under circumstances when capitalization is not required by statute.[3] As proposed, accrued interest would no longer be capitalized when: a borrower enters repayment; upon the expiration of a period of forbearance; annually after periods of negative amortization under the alternative repayment plan or the ICR plan; when a borrower defaults on a loan; when a borrower who is repaying under the income-driven repayment Pay as You Earn (PAYE) plan fails to recertify income or chooses to leave the plan; and when a borrower who is repaying under another income-driven repayment the Revised Pay As You Earn (REPAYE) plan fails to recertify income or leaves the plan. These proposed changes would decrease the rate at which a borrower's principal loan balance grows over time.

Public Service Loan Forgiveness

The Public Service Loan Forgiveness (PSLF) program authorizes Direct Loan borrowers engaged in public service to receive a discharge of remaining loan balances after making the equivalent of 10 years of qualifying payments.[4] The Department, however, is concerned that the current regulations around this program are too restrictive,

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[3] Currently, accrued interest is added to the outstanding principal balance and the new principal balance is used for future accumulation of interest.

[4] Section 455(m) of the HEA.

particularly in the requirements for a payment to qualify toward forgiveness. For instance, the Limited PSLF Waiver announced in October 2021 has helped more than 1 million borrowers receive on average an additional year of credit toward PSLF by addressing many of the same challenges in regulations that these proposed regulations would seek to fix. Accordingly, the regulations propose to improve the PSLF application process and allow borrowers to receive credit toward PSLF for months during which they are in certain deferment and forbearance periods while working for a qualified employer.

Total and Permanent Disability Discharges

The Higher Education Act provides for borrowers to receive a student loan discharge if they have a total and permanent disability. The proposed regulations would allow more borrowers who meet the statutory requirements for one of these discharges to receive a discharge by allowing additional categories of disability determinations by the Social Security Administration to qualify for a discharge. They would also allow additional types of medical professionals to certify that a borrower has a total and permanent disability. The regulations would also allow more borrowers who received a discharge to avoid having their loans reinstated by removing the 3-year income monitoring period that currently exists in regulation. The

net effect of these changes would be a program that is simpler for eligible borrowers to access and navigate.

Closed school discharges

Borrowers whose college closes while they are enrolled or shortly after they have left can receive a closed school discharge so long as they have not graduated. The Department proposes to clarify and streamline the eligibility requirements for closed school discharges by providing more automatic discharges for borrowers within one year of their college closing. The proposed regulations would also clarify existing rules that limit discharges for borrowers who enroll in a comparable program to only apply in instances where a borrower accepts and completes an approved teach-out program.

False certification discharges

Borrowers are eligible for a false certification discharge under the HEA if the institution that certifies the borrower's eligibility for the loan does so under false pretenses, such as when the borrower did not have a high school diploma or equivalent and did not meet alternative criteria; when the borrower had a status that disqualified them from meeting legal requirements for employment in the occupation for which they are training; or if the institution signed the borrower's name without authorization. A confusing web of regulations has established different standards and processes for false

certification discharges depending on when the loan was disbursed. Furthermore, some borrowers who may be eligible for a discharge have not received it because the requirements are difficult to navigate. The proposed regulations would streamline the false certification discharge process for student loan borrowers by establishing standards that apply to all claims, regardless of when the loan was first disbursed, and providing for a group discharge process.

Summary of the Major Provisions of This Regulatory Action:

The proposed regulations would—

- Amend the Direct Loan regulations to establish a new Federal standard for borrower defense claims applicable to applications received on or after July 1, 2023. Applications pending before the Secretary on July 1, 2023 would also be considered under the proposed new standard. In addition, the NPRM would expand the existing definition of misrepresentation, provide an additional basis for a borrower defense claim based on aggressive and deceptive recruitment practices, and allow claims based on State law standards.

- Establish processes for group borrower defense claims that may be formed in response to evidence provided by State requestors or based on prior Secretarial Final Actions identifying conduct that could lead to an approved borrower defense claim under the Department's regulations

if application were made. Secretarial Final Actions would include, but not be limited to, program reviews, suspension, or termination actions.

- Stop interest accrual on borrowers' loans 180 days from the initial grant of forbearance or stopped collections if the Department does not make a determination on the borrower defense claim within certain timeframes. Interest accrual would resume once a decision on the claim is made.

- Establish a reconsideration process for review of denied borrower defense claims.

- Require schools to disclose publicly and notify the Secretary of judicial and arbitration filings and awards pertaining to a borrower defense claim.

- Prohibit schools that wish to participate in title IV programs from requiring borrowers to agree to mandatory pre-dispute arbitration agreements or waiver of class action lawsuits.

- Eliminate interest capitalization on Direct Loans where such capitalization is not required by statute to address growth in principal balances.

- Modify the Perkins, FFEL, and Direct Loan regulations to streamline the application process for a TPD discharge by expanding the Department's use of Social Security Administration (SSA) codes beyond "Medical

Improvement Not Expected" when deciding if a borrower qualifies for TPD discharge.

- Revise the Perkins, FFEL, and Direct Loan regulations to eliminate the 3-year post-discharge income monitoring period for borrowers eligible for TPD discharge to allow borrowers to retain their discharges to retain their discharges without unnecessary paperwork burden.
- Allow borrowers to receive a TPD discharge if the onset of their disability as determined by SSA was at least 5 years prior to the application to better align the regulations with statutory requirements for a TPD discharge.
- Expand the list of health professionals who may certify that a borrower is totally and permanently disabled to include licensed nurse practitioners (NPs), physician's assistants (PAs), and clinical psychologists to help borrowers more easily complete the application for a TPD discharge.
- Amend the Perkins, FFEL, and Direct Loan regulations to simplify the closed school discharge process by expanding access to automatic discharges and eliminating the requirement that borrowers who reenroll in a comparable program lose eligibility for a discharge.
- Streamline the FFEL and Direct Loan false certification regulations to provide one set of regulatory

standards that would cover all false certification discharge claims.

- Clarify that the Department would rely on the borrower's status at the time the loan was originated for a Direct Loan, and at the time the loan was certified for a FFEL loan, to determine eligibility for a false certification discharge.

- Revise the regulations for PSLF to improve the application process, expand what counts as an eligible monthly payment, expand the definition of "full-time" employment, and provide additional clarifying definitions of public service employment to reduce confusion and to clearly establish the definitions of qualifying employment for borrowers.

Please refer to the Summary of Proposed Changes section of this NPRM for more details on the above proposals.

Costs and Benefits: As further detailed in the Regulatory Impact Analysis, the benefits of the proposed regulations include: (1) a clarified process for borrower defense discharge applications assisted by the creation of a single upfront Federal standard to streamline the Department's consideration of applications, while affording institutions an opportunity to respond to allegations contained in borrower defense claims; (2) increased opportunities for borrowers to seek relief from

institutional misconduct by prohibiting the use of mandatory pre-dispute arbitration and class action waivers; (3) improved school conduct and reduced cost to taxpayers, by holding individual institutions financially accountable for borrower defense discharges and deterring misconduct; (4) increased automated discharges for borrowers and additional flexibilities in establishing eligibility for PSLF and other loan discharges; and (5) improved access to and expanded eligibility for, where appropriate, closed school, TPD, and false certification discharges.

Costs to taxpayers in the form of transfers include borrower defense claims that are not reimbursed by institutions; additional relief through closed school, PSLF, TPD, and false certification discharges to borrowers through programs to which they are legally entitled in the HEA; and the foregone interest where capitalizing interest is not required. The paperwork burden associated with reporting and disclosure necessary to ensure compliance with the proposed regulations represents an additional cost to institutions.

Invitation to Comment: We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to clearly identify the specific section or sections of the proposed regulations that each of

your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 and their overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's programs and activities. During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request we will provide a reasonable accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under FOR FURTHER INFORMATION CONTACT.

Background

The Department seeks to address longstanding concerns regarding Federal student loan debt by improving, streamlining, expanding, and strengthening regulations governing the title IV, HEA programs. Specifically, we

propose to modify the regulations for loan discharge programs to strengthen institutional accountability, expand program access for eligible borrowers, and provide more efficient and borrower-friendly processes overall. After analyzing the public's input provided during public hearings and written comments submitted in response to the notice of our intent to establish negotiated rulemaking committees, the Department identified 12 issues for consideration by a negotiated rulemaking committee. These 12 issues are: improving the process for TPD discharges, improving borrower access to closed school discharges, eliminating interest capitalization where it is not required by statute, improving the PSLF application process, clarifying employer eligibility and full-time employment under PSLF, improving the borrower defense adjudication process, strengthening borrower defense post-adjudication processes, ensuring accountability by recovering borrower defense claims from institutions, prohibiting institutional use of pre-dispute mandatory arbitration clauses or class action waivers, improving borrower access to false certification discharges, creating a new income-driven repayment plan, and establishing regulations for institutions to maintain a prison education program. Proposed regulations addressing 10 of the 12 issues listed above are included in this NPRM. Proposed regulations relating to a new income-driven repayment plan

and to establish Pell Grant eligibility for incarcerated individuals enrolled in qualifying prison education programs will be published in a future NPRM or NPRMs.

Throughout this NPRM, the Department is proposing changes that would allow the Secretary to use automated application processes for granting discharges as well as leverage other information available to the Secretary, consistent with regulations and statute governing the use and sharing of borrower data. The proposed regulations would also result in more borrowers receiving discharges for which they are eligible by eliminating the need for individual applications where possible, expand eligibility categories for TPD discharges, authorize use of additional documentation for TPD and false certification discharges, clarify eligibility requirements for PSLF and closed school discharges, and expand and clarify ways in which a borrower can establish a borrower defense claim. Increased discharges reduce repayments from borrowers, resulting in a transfer from taxpayers to the affected borrowers. For some discharges, especially borrower defense and closed school discharges, the Department will seek to recover funds from the institutions involved, but that is not expected to reimburse the full amount. Increased discharges are expected to increase the cost of the student loan programs to taxpayers, as detailed in the Regulatory Impact Analysis. Despite these increased costs in the form of transfers, the Department believes the benefits of these

changes exceed the costs. The discharge programs addressed by these proposed regulations were all authorized by Congress. The Department does not believe it would be reasonable to presume that when Congress created those programs, it intended to limit the cost of those programs through the types of operational and administrative barriers the Department is proposing to remove in this notice of proposed rulemaking. The proposed changes would thus make these discharge programs more successful at delivering promised benefits under the HEA.

Public Participation

The Department engaged the public in developing this NPRM through analysis of written comments submitted by the public outside of this NPRM comment solicitation, three public hearings, and three negotiated rulemaking sessions.

On May 26, 2021, the Department published a notice in the *Federal Register* (86 FR 28299) announcing our intent to establish multiple negotiated rulemaking committees to prepare proposed regulations on the affordability of postsecondary education, Federal student loans, and institutional accountability.

The Department developed a list of proposed regulatory provisions for the Affordability and Student Loans Committee (Committee) from advice and recommendations submitted by individuals and organizations in testimony at three virtual public hearings held by the Department on June 21, June 23, and June 24, 2021. Transcripts of the public hearings are

available at https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html?src=rn.

In addition to oral testimony, the Department accepted written comments on possible regulatory provisions from interested parties and organizations. You may view the written comments submitted in response to the May 26, 2021 *Federal Register* notice on the Federal eRulemaking Portal at www.regulations.gov, within docket ID ED-2021-OPE-0077. Instructions for finding comments are also available on the site under "FAQ."

Negotiated Rulemaking

Section 492 of the HEA requires the Secretary to involve the public in the development of proposed regulations prior to publication for programs authorized by title IV of the HEA. After obtaining advice and recommendations from the public, including individuals and representatives of groups involved in the Federal student financial assistance programs, the Secretary must establish a negotiated rulemaking committee and subject the proposed regulations to a negotiated rulemaking process. All proposed regulations that the Department publishes on which the negotiators reached consensus must conform to final agreements resulting from that process, unless the Secretary reopens the process or provides a written explanation to the participants stating why the Secretary has decided to depart from the agreements. Further information on

the negotiated rulemaking process can be found at: https://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html.

On August 10, 2021, the Department published a notice in the *Federal Register* (86 FR 43609) announcing its intention to establish the Committee to prepare proposed regulations for the title IV, HEA programs. The notice set forth a schedule for the Committee meetings and requested nominations for individual negotiators to serve on the Committee. In the notice, the Department announced the topics that the Committee would address.

The Committee included the following members representing their respective constituencies:

- Accrediting Agencies: Heather Perfetti, Middle States Commission on Higher Education, and Michale McComis (alternate), Accrediting Commission of Career Schools and Colleges.

- Dependent Students: Dixie Samaniego, California State University, and Greg Norwood (alternate), Young Invincibles.

- Departments of Corrections: Anne L. Precythe, Missouri Department of Corrections.

- Federal Family Education Loan Lenders and/or Guaranty Agencies: Jaye O'Connell, Vermont Student Assistance Corporation, and Will Shaffner (alternate), Higher Education Loan Authority of the State of Missouri.

- Financial Aid Administrators at Postsecondary Institutions: Daniel Barkowitz, Valencia College, and Alyssa A. Dobson (alternate), Slippery Rock University.
- Four-Year Public Institutions: Marjorie Dorime-Williams, University of Missouri, and Rachelle Feldman (alternate), University of North Carolina at Chapel Hill.
- Independent Students: Michaela Martin, University of La Verne, and Stanley Andrisse (alternate), Howard University.
- Individuals with Disabilities or Groups Representing Them: Bethany Lilly, The Arc of the United States, and John Whitelaw, (alternate) Community Legal Aid Society.
- Legal Assistance Organizations that Represent Students and/or Borrowers: Persis Yu, National Consumer Law Center, and Joshua Rovenger (alternate), Legal Aid Society of Cleveland.
- Minority-serving Institutions: Noelia Gonzalez, California State University.
- Private Nonprofit Institutions: Misty Sabouneh, Southern New Hampshire University, and Terrence S. McTier, Jr. (alternate), Washington University.
- Proprietary Institutions: Jessica Barry, The Modern College of Design in Kettering, Ohio, and Carol Colvin (alternate), South College.

- State Attorneys General: Joseph Sanders, Illinois Board of Higher Education, and Eric Apar (alternate), New Jersey Department of Consumer Affairs.
- State Higher Education Executive Officers, State Authorizing Agencies, and/or State Regulators: David Tandberg, State Higher Education Executive Officers Association, and Suzanne Martindale (alternate), California Department of Financial Protection and Innovation.
- Student Loan Borrowers: Jeri O'Bryan-Losee, United University Professions, and Jennifer Cardenas (alternate), Young Invincibles.
- Two-year Public Institutions: Robert Ayala, Southwest Texas Junior College, and Christina Tangalakis (alternate), Glendale Community College.
- U.S. Military Service Members and Veterans or Groups Representing Them: Justin Hauschild, Student Veterans of America, and Emily DeVito (alternate), The Veterans of Foreign Wars.
- Federal Negotiator: Jennifer M. Hong, U.S. Department of Education.

The Committee agreed to add an additional constituency for Departments of Corrections during its second session and approved the membership of Anne L. Precythe of the Missouri Department of Corrections. In addition, there were two non-voting advisors available during the negotiations: Rajeev Darolia, advisor on Economic and/or

Higher Education Data, University of Kentucky, and Heather Jarvis, advisor on PSLF Issues, co-founder of FosterUs.

The Committee met to develop proposed regulations during the months of October, November, and December 2021.

At its first meeting, the Committee reached agreement on its protocols and reviewed the 12 issues on the agenda. The facilitators reminded the Committee that consensus means that there is no dissent by any member of the Committee and that consensus checks would be taken issue-by-issue.

At its final meeting in December 2021, the Committee reached consensus on the proposed regulations addressing four of the 12 issues on its agenda: eliminating nonstatutory interest capitalizing events, improving the process for TPD discharges, streamlining the processes for false certification discharges, and establishing a framework for Pell Grant Eligibility for Prison Education Programs. This NPRM includes proposed regulations on the first three of these consensus items, as well as the remaining seven items on the Committee's agenda, summarized generally above. Proposed regulations for the fourth item on which consensus was reached, Pell Grant Eligibility for Prison Education Programs will be included in a later NPRM. We will also include Income-Driven repayment, on which consensus was not reached, in a future NPRM.

The proposed regulations also include technical changes to the regulations that are needed to reflect recent amendments to the HEA and to correct certain technical errors.

These types of changes are not normally subject to the statutory requirements for negotiated rulemaking and public notice and comment. However, since these changes affect the proposed regulations, the Secretary included them in the material considered by the Committee to ensure that the Committee evaluated the full scope of the proposed changes.

More information on the work of the Committee can be found at: https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html?src=rn.

Summary of Proposed Regulations

We group major issues according to subject, with appropriate sections of the proposed regulations referenced in parentheses. We discuss other substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory provisions that are technical or otherwise minor in effect. Any such change not explicitly mentioned in this summary remains open for public comment.

1. Borrower Defense to Repayment

Background: Section 455(h) of the HEA authorizes the Secretary to specify which acts or omissions of an institution of higher education a borrower may assert as a defense to the repayment of a Direct Loan (i.e., a borrower defense). 20 U.S.C. 1087e(h).

The Department first issued borrower defense regulations in 1994, which went into effect in 1995. The 1994 borrower defense regulation at § 685.206(c) provided that any act or omission of the institution attended by the student that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided, giving rise to a cause of action against the institution under applicable State law (the "State law standard"), is a "borrower defense."

In response to the precipitous closure of Corinthian Colleges, Inc. (Corinthian) in 2015 and the related influx of borrower defense claims submitted by individuals who attended institutions owned by Corinthian, the Department realized the need to update the borrower defense regulations. The Department developed new borrower defense regulations in 2016 that were supposed to take effect in 2017 to establish a more accessible and consistent borrower defense standard (the "Federal standard"). We issued the final regulations on November 1, 2016, and those final regulations generally applied to borrowers with new loans that were made on or after July 1, 2017. 81 FR 75926 (Nov. 1, 2016). The new Federal standard clarified and streamlined the borrower defense claim process. While the Federal standard only applied to loans issued after July 1, 2017, the borrower defense claim process applied to loans

regardless of their disbursement date. The 2016 regulation also enhanced protections for borrowers and improved the Department's ability to hold institutions financially accountable for their actions and omissions that resulted in loan discharges.

In accordance with the master calendar, the 2016 borrower defense regulations were originally scheduled to be effective on July 1, 2017. However, these regulations did not take effect on their original effective date. After a legal challenge was filed, the Department took several actions to delay the effective date. See, e.g., 82 FR 27621 (June 16, 2017). In addition, the Department initiated a new negotiated rulemaking process to develop new regulations, and on July 31, 2018, the Department published a NPRM (2018 NPRM). 83 FR 37242 (July 31, 2018). Soon thereafter, in September 2018, a Federal court invalidated the Department's actions delaying implementation of the 2016 regulations, and the 2016 regulation went into effect in October 2018. *Bauer v. DeVos*, 325 F. Supp. 3d 74 (D.D.C. 2018). *See California Ass'n of Private Postsecondary Schs. v. DeVos*, 344 F. Supp. 3d 158 (D.D.C. 2018). Meanwhile, the Department did not withdraw the 2018 NPRM and on September 23, 2019, following consideration of public comments on the 2018 NPRM, the Department published new final borrower defense regulations that applied to loans made on or after July 1, 2020. 84 FR

49788 (Sept. 23, 2019). Those regulations became effective on July 1, 2020, for loans disbursed on or after that date.

The 2019 regulations established a more limited Federal standard for borrower defense claims by (1) requiring borrowers to prove that the institution engaged in a misrepresentation that was made with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth, (2) eliminating the possibility of using common evidence to adjudicate claims on a group basis, (3) requiring the borrower to document the amount of harm suffered, and (4) setting a 3-year limitation period on filing a claim.[5] The 2019 regulations do not include a reconsideration process. The 2019 regulations only applied to loans first disbursed on or after July 1, 2020.

The three borrower defense regulations are hereinafter referred to as "1994 regulation," "2016 regulation," and "2019 regulation" after the respective years in which the final regulations were issued.

The Department believes that the more restrictive standard for approving a borrower defense claim and the relatively narrow statute of limitations for filing claims under the 2019 regulations created a standard that placed burdens on borrowers to obtain relief that were far more

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[5] In *New York Legal Assistance Group ("NYLAG") v. Cardona*, Case No. 20-CV-1414 (S.D.N.Y. Mar. 17, 2021), the District Court found that the Department did not comply with rulemaking standards in promulgating the 3-year statute of limitations for affirmative claims and remanded consideration of that rule to the Department for further consideration.

onerous than any State standard, and went far beyond evidentiary requirements and argumentation that a reasonable borrower could be expected to provide. In particular, the Department is concerned that expecting a borrower to independently document and corroborate the misrepresentation and specifically show the amount of financial harm they suffered in the manner contemplated in the 2019 regulations would require borrowers to possess a level of data and knowledge about local and national labor market trends that would be unrealistic for an individual to possess, and would result in overly subjective judgments by the Department into how a borrower should conduct a search for employment. Moreover, without being able to rely upon evidence generated from in-depth investigations that other oversight bodies possess, including the ability to demand documents, borrowers face unreasonable set of requirements. The result would be that many borrowers who were subject to misrepresentations or other wrongdoing by their institutions would fail to receive an approved claim and discharge because they were being judged under an unreasonably high standard. The Department's experience reviewing borrower defense applications shows that many of the schools' substantial misrepresentations are made orally, and/or relate to high pressure sales tactics. Additionally, many schools do not provide enrolling or enrolled students with written evidence of the

misrepresentations, which could result in the Department denying borrowers' claims due to a lack of documentation, despite the fact that many borrowers do not and cannot keep such documents over years. When the Department issued the 2019 regulations, the Regulatory Impact Analysis with that rule estimated that only 7.5 percent of the volume of borrower defense claims would ultimately be approved. This was a decline from 65 percent under the 2016 regulation. The Department believes that such a significant change in approval amounts suggests that the 2019 regulation would result in denials for too many claims that should have a reasonable prospect of being meritorious upon consideration of evidence from additional oversight entities. Moreover, the anticipated low approval rate is an added concern because the 2019 regulations did not contain a reconsideration process, meaning that any borrower whose claim was unfairly denied, including through an administrative or technical error, would have to go to court to have their claim properly addressed.

While the 2019 regulations went into effect for new loans disbursed on or after July 1, 2020, the Department has yet to adjudicate any claims under the 2019 regulations. This is due to several factors. First, the Department is still in the process of adjudicating significant numbers of claims covered by the 1994 and 2016 regulations, which represent a larger share of currently

pending claims. Second, repayment of and interest accrual on all Federal loans held by the Department have been paused since March 2020, so borrowers who may have been subject to conduct that may give rise to a borrower defense claim may not have felt the need to apply yet because they do not currently have to make loan payments.

Over the last several years, the Department has gained significant experience and expertise through its adjudication of claims and review of evidence. Doing so has put the Department in the best position to understand how to manage the borrower defense program efficiently. This includes identifying areas for improvement and refinement that would not have been apparent in prior rulemakings when the Department had not had as much experience reviewing claims.

In this current NPRM, the Department proposes to build upon the lessons learned from implementation of those previous borrower defense regulations and a review of the 2019 regulation to construct a borrower defense process that is simpler and fairer for all affected parties. This process would maintain what was available to borrowers during the more than two decades between the 1994 and 2016 regulations; build on the clearer processes in the 2016 regulation to ensure more consistency for borrowers; and, incorporate some further refinements of elements from the 2019 regulation such as including institutional responses

and clarifying certain types of allegations that would not lead to a valid borrower defense claim. The proposed process would be simpler by establishing a single upfront Federal standard so that borrowers are not subject to differential treatment, varying from a full discharge to a complete denial, for enrollment at the same institution depending solely on the date their loans were issued. The proposed process also would be fairer by establishing claim approval requirements that recognize all possible sources of evidence, including information gleaned from State attorneys general, rather than relying on the borrower to prove their entire case on their own.

While the Department has modified the regulations several times in recent years, based on our ongoing and growing experience reviewing and adjudicating borrower defense claims, we have determined that the current 2019 rules are too limiting to fairly and accurately adjudicate claims, and that further regulations are needed to address issues that have continued to arise during the Department's claim review. The current rules require evidence that is highly unlikely to be available to the borrower, especially within the timeframes following their departure from the institution that the borrower must meet to have their claim considered. The current rules also exclude evidence of school activity in the Department's possession, gleaned from other Department activity, that would support

borrowers' claims. These proposed regulations would incorporate additional information about the nature of claims that the Department receives, the types of evidence received from borrowers, and procedural improvements to help ensure timely decisions for borrowers. They would also more clearly establish the importance of the institutional response process and leverage existing procedures used for establishing and collecting liabilities to seek recoupment from institutions.

To achieve these goals, the Department proposes to streamline multiple regulatory requirements, establish a new Federal standard for the initial adjudication of a borrower defense claim that would be easier for borrowers and affected parties to understand, and clarify the conduct that could result in an approved borrower defense claim. The Department believes that this approach, and the proposed use of common evidence, would facilitate a clearer and faster process for adjudication of group claims. The Department also proposes to clarify how discharge amounts will be determined for approved claims, including establishing a rebuttable presumption of full discharge; designing a structured process for reconsidering decisions; eliminating the limitations period for borrowers; and adopting a revised limitations period for institutional recoupment. These proposed regulations would incorporate additional information about the nature of claims that the

Department receives, the types of evidence received from borrowers, and procedural improvements to help ensure timely decisions for borrowers. They would also more clearly establish the importance of the institutional response process and leverage existing procedures used for establishing and collecting liabilities to seek recoupment from institutions.

Finally, to protect the title IV programs and ensure accountability, the Department believes it is critical that borrower defense regulations contain a process for the Department to recover the cost to the taxpayer caused by discharging all or a portion of loans associated with approved claims from institutions, separate and apart from the borrower claim adjudication process. The Department proposes to administer this recoupment process through its existing procedures for collecting other institutional liabilities. Separating the recoupment process from the borrower defense approval process also ensures that institutions will not face financial consequences from claim approvals tied to loans issued prior to July 1, 2023, unless the claim would have been approved under the borrower defense regulation in effect at the time the loans were issued.

The recoupment efforts described above complement other executive and regulatory actions contemplated by the Department to increase institutional accountability. The

Department anticipates that efforts to dissuade institutions from harmful behavior as well as increases in other forms of oversight would result in a reduction in future conduct that could lead to a borrower defense approval, thus reducing instances in which the Federal taxpayers would assume the costs of discharging loans. These action items include reinstating the Office of Enforcement within the Department's Federal Student Aid office and changes announced earlier this year to increase the frequency with which entities that own institutions are required to sign Program Participation Agreements and thus potentially face financial consequences if there are liabilities against the institution.[6] The Department is also currently in the process of proposing new regulations around the 90/10 rule to implement a requirement included in the American Rescue Plan that proprietary institutions derive at least 10 percent of their revenue from non-Federal sources.[7] This is a change from previous requirements, which allowed Federal money for veterans and servicemembers to count toward the 10 percent revenue minimum. The inclusion of those benefits had in turn been a contributing factor toward aggressive recruitment of veterans and servicemembers.

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[6] https://www.ed.gov/news/press-releases/us-department-education-announces-steps-hold-institutions-accountable-taxpayer-losses-0.

[7] See 90/10 resources under "Institutional and Programmatic Eligibility Committee" https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html.

During the public hearings and negotiated rulemaking sessions in 2021, the Department heard from a broad range of constituencies on the elements of an appropriate borrower defense framework. At the negotiated rulemaking sessions, negotiators expressed interest in developing a regulation that would provide for fair treatment of borrowers who had been harmed by an institution's act(s) or omission(s). Some negotiators expressed support for reviving the group claims process and establishing a reconsideration process that is fair for all affected parties.

One negotiator expressed concern about the potential reputational harm to institutions from frivolous and unsubstantiated borrower defense claims. This negotiator also did not support recovering funds from institutions when a borrower defense claim is successful.

Areas proposed for negotiation during the negotiated rulemaking sessions included the Federal standard under which a borrower may assert a defense to repayment; the applicable evidentiary standard; creating a group process for the adjudication of borrower defense claims; consideration of adverse Department actions against an institution as grounds for a group borrower defense claim; the ability of individuals to bring borrower defense claims; the borrower's status during adjudication of a claim, including a pause on interest accrual for a borrower

with an individual application after 180 days if the Department fails to make a decision on the claim by that time; a defined limitations period for bringing borrower defense claims; an opportunity for the institution to respond to borrower defense claims filed against it; the time frames associated with adjudicating a claim; and issues pertaining to loans made under the FFEL Program.

In the first session, the Department reviewed the issue papers with negotiators and provided a high-level summary of borrower defense issues with proposed solutions. In the second session, the Department provided proposed regulatory text to negotiators. In the final session, the Department provided revised and additional regulatory text based on negotiator feedback and explained the substantive changes made between sessions two and three. By the end of the negotiated rulemaking sessions, most negotiators expressed general support for the proposed changes to the borrower defense regulations. At the final consensus check, 16 negotiators indicated they would agree to the proposed borrower defense regulations, while one negotiator dissented. Because the committee's protocols required agreement from all negotiators, consensus was not reached. Materials from the borrower defense negotiated rulemaking sessions may be found on the Department's website at: https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html.

Borrower Defense to Repayment–Adjudication (§§ 685.206, 685.222)

Statute: Section 455(h) of the HEA (20 U.S.C. 1087e(h)) requires the Secretary to specify in regulations which acts or omissions of an institution a borrower may assert as a defense to repayment of a Direct Loan, except that the borrower may not recover from the Secretary more than the amount the borrower has repaid on the loan.

Current Regulations: The current borrower defense regulations provide different acts or omissions that could lead to an approved borrower defense claim, depending on when a borrower's loan was first disbursed:

- Claims pertaining to loans first disbursed before July 1, 2017, are adjudicated according to the substantive standard set forth in the 1994 borrower defense regulations in § 685.206(c), and use the State law standard. The 1994 borrower defense regulations do not contain a definitions section.

- Claims pertaining to loans first disbursed between July 1, 2017, through June 30, 2020, are adjudicated according to the substantive standard set forth in the 2016 borrower defense regulations in § 685.222 and uses the regulatory process for claims pertaining to loans first disbursed prior to July 1, 2017. These claims use definitions in § 685.222, which defines the terms

"borrower" and "borrower defense," and apply the Federal standard.

- Claims pertaining to loans first disbursed after July 1, 2020, are adjudicated under the borrower defense regulations in § 685.206(e), using definitions set forth in § 685.206(e)(1).

Proposed Regulations: Proposed 34 CFR Part 685, subpart D would establish a framework for uniform borrower defense discharges based on applications received following, or already pending with the Secretary on, the effective date of these regulations, rather than based on a loan's disbursement date. Under the proposed rules, institutions would not face recoupment for conduct approved solely under the new Federal standard if the conduct occurred prior to July 1, 2023. Nor would they face larger amounts of recoupment if the amount of a discharge is greater than it would have been under the applicable prior regulation.

The scope and purpose section of proposed subpart D is in proposed § 685.400 and would set forth the provisions under which a borrower defense could be asserted. Subpart D would apply to borrower defense applications received on or after July 1, 2023, and to borrower defense applications pending with the Secretary on July 1, 2023. These are the dates the regulation would become effective under the master calendar requirements in the HEA.

Proposed § 685.401 contains the general definitions applicable to subpart D, including definitions for the following terms: "borrower," "borrower defense to repayment," "Department official," "Direct Loan," "school/institution," and "State requestor."

Proposed subpart D also includes regulations regarding the adjudication of a borrower defense claim, which are described in greater detail below.

Finally, §§ 685.109 and 685.499 would make clear that, if any part of the proposed regulations is held invalid by a court, the remainder would still be in effect.

Reasons: The Department heard from representatives of a broad range of constituencies, including the non-Federal negotiators in the negotiated rulemaking meetings, on what they thought was an appropriate basis for a borrower defense. The Department believes a general definitions section to this new subpart D is critical to ensure clarity in these proposed regulations. For these proposed regulations, the Department incorporates the following terms wholly or in part as those in the 2019 regulations: "borrower," "borrower defense to repayment," and, "Direct Loan." Because these proposed regulations envision a new borrower defense framework, it is necessary to develop some additional new terms. The Department first proposes a definition of "Department official," which would be a senior Department official or their designee to administer

the borrower defense process. The Department also 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. Finally, the Department proposes a definition of "State requestor" to clarify which entities may suggest the formation of a group claim as described in other sections of this NPRM.

Direct Loans and FFEL

Section 455(h) of the HEA provides that the Secretary may discharge a loan pursuant to a borrower defense for a loan made "under this part," a reference to the Direct Loan Program. This includes Direct Consolidation Loans made under § 455(g) of the HEA. Under the statute, borrowers may not recover more than they have repaid. During negotiated rulemaking, the Department received inquiries about whether the borrower defense process applies to FFEL Program loans, in which private lenders issued Federal loans using their own funds and receive a Federal guarantee against most losses in the case of default as well as quarterly Federal subsidies. FFEL Program loans are authorized in a different part of the HEA. As the Department noted in the preamble of the 2016 regulations, the HEA generally requires that Direct Loans be made under the same "terms, conditions, and benefits" as FFEL Program loans. 20 U.S.C. 1087a(b)(2), 1087e(a)(1). See 81 FR at

75930. In 1995, the Department clarified the relationship between Direct and FFEL Program loans in a Dear Colleague Letter:

> Congress intended that schools participating in either FFEL or Direct Loan programs should receive parallel treatment on important issues, and the Department has already committed during negotiated rulemaking to apply the same borrower defense provisions to [both] the Direct Loan and FFEL programs. Therefore, schools that cause injury to student borrowers that give rise to legitimate claims should and, under these proposals, will bear the risk of loss, regardless of whether the loans are from the Direct Loan or FFEL Program.

Dear Colleague Letter GEN-95-8 (Jan. 1,1995).[8]

In the 2016 and 2019 regulations, the Department took the position that a FFEL borrower could raise a defense to repayment claim and have that claim reviewed and approved, but that receiving any relief tied to an approval of such a claim would require the borrower to consolidate any FFEL Program loans associated with the approved claim into a Direct Consolidation Loan. However, the time limits on filing a claim in the 2019 regulation plus the terms of the

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[8] See https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/1995-01-01/gen-95-08-direct-loan-program-schools-will-not-face-greater-potential-liabilities-ffelp-schools.

new consolidation loans determining the applicable borrower defense regulation meant that it would be almost impossible for FFEL borrowers to receive any borrower defense relief after July 1, 2020, regardless of when they originally borrowed. For instance, under the 2019 regulation, a FFEL borrower who took out a loan in 2009 and left school in 2010 could have a claim approved today under the standards of the 1994 regulation but would have no way to access the associated relief under that regulation because as soon as they consolidate their claim, they would fall under the 2019 regulation and be denied under the three-year limitations period. The Department is concerned that the 2019 regulation results in the application of a stricter regulation to their claim that was not in effect at the time their original loans were disbursed. Applying the standard proposed in these regulations regardless of disbursement date would both solve this problem going forward and address the inequitable situation that would otherwise exist for FFEL borrowers from July 1, 2020 through June 30, 2023.

The Department is also proposing sub-regulatory improvements beyond the regulations that would help FFEL borrowers more easily receive a discharge for approved borrower defense claims, further streamlining and simplifying the process for borrowers. The Department has the authority to make Direct Consolidation Loans under §§

451 and 455(g) of the HEA. FFEL borrowers must consolidate their loans into a Direct Consolidation loan to obtain a borrower defense discharge; however, the Department would allow FFEL borrowers to file and receive a decision on their borrower defense applications before their loans are consolidated. The 1994 and 2016 regulations allow borrowers with FFEL Program loans to have their claims reviewed and approved by the Department, but they must consolidate their FFEL Program loans into a Direct Loan through a separate process to receive the benefit of any loan discharges associated with an approved claim. The Department has heard, both from borrowers and from their representatives at negotiated rulemaking, that the separate consolidation requirement creates confusion and roadblocks for borrowers. The requirement also results in unequal treatment for borrowers with different types of loans. To address this concern, the Department proposes to streamline the borrower defense application process by having the application for borrower defense also serve as a Direct Loan consolidation application for borrowers with FFEL and Perkins loans, which would only be executed if the borrower's claim is approved, giving the borrower a streamlined process for receiving discharge of their loans.

State Requestor

State requestors, such as State attorneys general, have been a significant and important source of evidence

for many of the Department's approvals of borrower defense claims and the Department anticipates they will continue to be an important source of evidence. For example, while investigating student complaints, State attorneys general may find institutions engaging in patterns of misrepresentation. The Department believes State partners are critical in providing evidence that--as part of an independent assessment by the Department that also includes evidence in its possession, submissions from borrowers, responses from institutions under proposed 485.405, and other relevant sources--could result in approving borrower defense claims. Because this evidence often includes information about widespread institutional policies or practice, evidence from State requestors could be particularly beneficial for decisions around whether to form and/or approve a group borrower defense claim, which is when the Department makes a decision about whether to approve borrower defense relief for a set of similarly situated borrowers, including those who have not applied. These State requestors have fostered, and could continue to foster, a more efficient borrower defense adjudication process by supplying needed evidence to support the potential approval of claims or expanding the Department's ability to quickly develop the facts in cases by identifying systemic issues at an institution resulting in several borrowers potentially being eligible for relief.

To give these State requestors regulatory recognition in the consideration of whether to establish a group process, the Department proposes to define "State requestors" to include States, State attorneys general, or State oversight or regulatory agencies with authority from the State (such as a State consumer financial protection agency with civil investigative demand authority from that State). The Department proposes limiting requestors only to State requestors based on the Department's experience that State parties have been the sources of the highest-quality evidence in past adjudications of borrower defense applications. Additionally, the Department believes that inviting States to share information is consistent with the HEA's expectation that States, accrediting agencies, and the Department will conduct shared oversight through the program integrity "triad." Already, States and the Department share considerable information about institutions through oversight and enforcement work; these established relationships have yielded critical support for the Department's work to ensure institutions comply with Federal laws and regulations, including those that could give rise to borrower defense claims for discharges of Federal student loans.

The proposed position is a change from the Department's conclusions in the 2019 regulation and is based upon the agency's experience in continuing to review

and approve borrower defense applications. In 2019, the Department dismissed the importance of State enforcement actions on the grounds that they cover broader issues than what may be allowed under borrower defense. This conclusion discounted the role of evidence from State parties in processing borrower defense claims. The evidence generated from State investigations and enforcement actions has repeatedly given the Department important information to conduct a thorough and rigorous review of borrower defense claims against institutions such as Corinthian Colleges, Inc., ITT Technical Institute, the Court Reporting Institute, Minnesota School of Business and Globe University, and Westwood College.[9] In several of these instances the Department received from State attorneys general internal company documents, presentations, emails, and memos that assisted in establishing that these institutions engaged in misrepresentations. In all these instances, the Department is not proposing to simply accept the State-offered evidence unquestioned and issue approvals based on it. It is recognizing the importance of considering evidence from

[9] See U.S. Department of Education press releases: https://www.ed.gov/news/press-releases/department-education-announces-approval-new-categories-borrower-defense-claims-totaling-500-million-loan-relief-18000-borrowers; https://www.ed.gov/news/press-releases/education-department-approves-415-million-borrower-defense-claims-including-former-devry-university-students; https://www.ed.gov/news/press-releases/department-education-approves-borrower-defense-claims-related-three-additional-institutions.

all available sources and creating a simpler process for receiving such information from States.

Effective Date of Regulations, Claims Covered Under Proposed Regulations

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. Section 410 of the General Education Provisions Act (GEPA) provides the Secretary with authority to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operations of, and governing the applicable programs administered by, the Department. 20 U.S.C. 1221e-3. Under Section 414 of the Department of Education Organization Act, the Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department. 20 U.S.C. 3474.

Current Regulations: The "1994 regulations" at 34 CFR 685.206(c) cover loans first disbursed before July 1, 2017 and became effective July 1, 1995 (see 59 FR 61664, December 1, 1994); the "2016 regulations" at 34 CFR 685.222 cover loans first disbursed on or after July 1, 2017 and before July 1, 2020 and became effective July 1, 2017 (see 81 FR 75926, November 1, 2016); and, the "2019 regulations"

at 34 CFR 685.206(e) cover loans first disbursed on or after July 1, 2020 and became effective July 1, 2020 (see 84 FR 49788, September 23, 2019).

Proposed Regulations: Proposed 34 CFR Part 685, subpart D would establish a framework for uniform borrower defense discharges based on applications received following or already pending with the Secretary on the effective date of these regulations, rather than based on a loan's disbursement date. However, institutions would not be subject to recoupment actions for applications that are granted based upon this regulation that would not have been approved under the standard applicable based upon the loan's disbursement date, which could be the 1994, 2016, or 2019 regulations. Institutions would also not be subject to recoupment for amounts greater than what would have been approved under the applicable regulation at the time the loans were disbursed.

Reasons: Tying the applicability of borrower defense regulations to the date of a loan's disbursement can create significant complexity for administering the program and create inconsistent outcomes for borrowers. With regulations tied to a loan's disbursement date, it is possible for a single borrower to submit a single borrower defense to repayment claim that is covered by all three sets of regulations, despite involving the same act or omission at the same institution. The confusion is further

exacerbated if a borrower consolidates their loans, since borrowers may have had original loans disbursed under one set of regulations, but the Department treats the date of the consolidation loan as the one used to determine what regulation their claim should be adjudicated under.

To streamline and simplify the process, the proposed regulations provide uniform borrower defense regulations for applications pending with the Secretary on or after the effective date of these regulations. This approach would ensure that all borrowers whose claims are filed or pending within this timeframe are subject to the same regulatory framework. In promulgating the prior borrower defense regulations, the Department did not choose to apply this single standard because it would have changed the types of claims that could be approved in ways that might have left some borrowers worse off than the regulation in place at the time they took out their loan. For example, borrowers with loans issued prior to July 1, 2017 could bring a claim under a State law standard, which includes some instances where a borrower might not have to show they relied upon a misrepresentation depending on the relevant State law being applied. The 2016 regulation, however, included a requirement that a borrower demonstrate reliance on the misrepresentation without a presumption of reasonable reliance for an individual claim. Applying that standard to those prior loans would thus be more restrictive in

certain circumstances. The same is true of the 2019 regulation and its effect on loans issued on or after July 1, 2020. That regulation requires borrowers to produce a more individualized documentation of harm and eliminates the prospect of adjudicating similarly situated claims as a group, in contrast to what is available under the 2016 regulation. It would thus not have been feasible to have the 2016 regulation cover claims from loans that would have previously been associated with the 1994 regulation, nor would the 2019 regulation have been able to cover claims previously associated with either the 1994 or the 2016 regulations. This proposed regulation would permit borrowers to bring claims under a series of acts or omissions that not only encompasses what would have been available to them under any of the three prior applicable regulations, but also under some additional circumstances. The result is that no borrower would be worse off under this regulation than they would be under the regulation in place at the time they borrowed. Given that, the Department believes it is appropriate to adopt a single standard that applies to all claims pending with the Secretary or submitted on or after July 1, 2023. As discussed in greater detail in the *Recovery from Institutions* section, the Department does not propose to apply this single framework for the purposes of institutional recoupment in all cases. The Department does

not think it would be appropriate to hold an institution financially liable when the standard in place at the time the loan was disbursed would not have resulted in an approved claim, since the institution would not have had a way of knowing that certain types of conduct could later lead to financial consequences. The Department believes that this approach would also protect against any concerns institutions might raise related to the reputational consequences of an approved borrower defense claim. The approval of a borrower defense claim concerns the legal interaction between the Department and the borrower, not the institution. Moreover, the Department is unaware of any evidence demonstrating reputational harm to institutions that are still operating resulting from approved borrower defense claims. Given that lack of evidence, the Department believes whatever reputational harms to the institution might occur based on this regulatory change are outweighed by the benefits to the borrower. This is because this proposed change makes the borrower defense program more administrable and therefore overall better able to serve both borrowers and institutions through more efficient and effective adjudication.

While the proposed coverage of this regulation could lead to some increased costs to the Federal Government in the form of greater transfers to borrowers, the Department

notes that this regulation is just one component of a larger set of executive and regulatory efforts aimed at increasing institutional oversight and accountability that should deter future conduct that could lead to approved borrower defense claims. These efforts include the re-establishment of an Office of Enforcement within Federal Student Aid, which is tasked with conducting in-depth investigations of institutions. Releasing the results of investigations will teach institutions what types of risky conduct to avoid in the future. The Department also announced earlier in 2022 that it would start increasing the number of entities that sign Program Participation Agreements to include more outside owners of institutions. Doing so will make more entities and individuals responsible for liabilities against an institution, further deterring harmful behavior. The Department is also currently conducting separate rulemaking efforts to implement a statutory change included in the 2021 American Rescue Plan to require private for-profit institutions to derive 10 percent of their revenue from non-Federal sources, not just Federal student aid programs administered by the Department. That change will reduce incentives for institutions to aggressively pursue veterans and service members in particular, which had been a source of aggressive recruitment in the past.

Federal Standard (§§ 685.206, 685.222, & part 668)

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution a borrower may assert as a defense to repayment of a Direct Loan, except that a borrower may not recover from the Secretary an amount in excess of the amount that the borrower has repaid.

Current Regulations: In the current regulations, three different regulatory standards and limitations periods apply, depending on when a borrower's loan was first disbursed:

- Loans first disbursed prior to July 1, 2017, are addressed under the 1994 borrower defense regulations in §685.206(c). That section provides that a borrower may assert a defense to repayment under applicable State law. The borrower may bring a claim at any point during the period in which the loan is being collected.

- Loans disbursed between July 1, 2017, and June 30, 2020, are adjudicated under the 2016 borrower defense regulations in § 685.222, which explains the acts or omissions that could give rise to a borrower defense claim are judgments against the institution, breaches of contract, and substantial misrepresentation. Further, the borrower may bring such a claim at any time but may only assert a right to recover amounts previously collected by the Secretary on the grounds of that same breach of contract or substantial misrepresentation within 6 years of

the alleged breach or of the date on which the substantial misrepresentation reasonably could have been discovered.

- Loans disbursed on or after July 1, 2020, are adjudicated under the 2019 borrower defense regulations in § 685.206(e), which allow a borrower to assert a defense to repayment if the institution at which the borrower enrolled made a misrepresentation of material fact upon which the borrower reasonably relied, and the borrower was financially harmed by such misrepresentation. Claims adjudicated under these regulations have three years from the date the student is no longer enrolled at the institution to file a claim with the Department.

Proposed Regulations: In proposed § 685.401(b), a claim could be brought on any of five grounds:

- Substantial misrepresentation,
- Substantial omission of fact,
- Breach of contract,
- Aggressive and deceptive recruitment, or
- A Federal or State judgment or Departmental adverse action against an institution that could give rise to a borrower defense claim.

Also, as proposed, a violation of State law could form the basis for a borrower defense claim, but only if the borrower or, in the case of a group claim brought by a State requestor, that State requestor requests reconsideration of the Secretary's denial of a claim. Each

is discussed further below. Borrowers would not be subject to a limitations period.

The proposed Federal standard in § 685.401(b) would incorporate the existing description of misrepresentation in part 668, subpart F, which currently defines and sets forth three categories of misrepresentation, each containing examples of violative conduct. However, the Department proposes to expand the examples in those categories, relating to the nature of educational programs, the nature of financial charges, and the employability of graduates. Proposed § 668.75 also would establish a new misrepresentation category in the regulations that separately would give rise to a borrower defense claim under the Federal standard: "omission of fact."

Proposed § 668.79 would make clear that, if any part of the proposed regulations is held invalid by a court, the remainder would still be in effect.

We propose to add a new subpart R to part 668, which would define and prohibit aggressive and deceptive recruitment tactics or conduct (aggressive recruitment). As proposed, aggressive recruitment would be one of five types of acts or omissions that comprise the Federal standard for borrower defense claims such as: obtaining the borrower's contact information through websites that falsely present themselves as providing assistance with finding a job or obtaining government benefits, falsely

claiming that enrollment spots are limited, taking advantage of a student's lack of understanding to pressure the student to enroll, pressuring the student to make an immediate loan decision, discouraging the student or prospective student from consulting with an independent party prior to signing documents, failing to respond to a student's request for additional substantive information on enrollment or loan obligations, using threatening or abusive language, or engaging in repeated unsolicited contact.

Finally, proposed § 668.509 would make clear that, if any part of the proposed regulations is held invalid by a court, the remainder would still be in effect.

Reasons: The Department has issued three different sets of regulations in the past on borrower defense: 1994, 2016, and 2019. Those regulations include different acts and omissions as the basis for borrower defense claims and included different processes. Even where some similarities appear to exist across the three regulatory structures--for example, all generally list misrepresentation as a basis for a borrower defense--the regulations set different requirements for what a borrower must prove to have their application approved. For example, in the 1994 regulations, a borrower could have their application approved because their State had a standard for misrepresentation that did not require a demonstration of

reliance. That same borrower under the 2016 regulation could also receive an approval due to a misrepresentation but would have to show that they relied upon that misrepresentation in making the decision to enroll. For both the 1994 and 2016 regulations, the borrower's claim could be supported by common evidence in the Department's possession, such as records from a college obtained by a State attorney general and shared with the Department. Under the 2019 regulation, that borrower not only has to show they relied upon the misrepresentation but that the institution had knowledge the misrepresentation was false, misleading, or deceptive, or acted with reckless disregard for the truth. The borrower must also document the specific amount of financial harm suffered. As a consequence, an identical misrepresentation by the same institution could yield different outcomes solely based upon the loan's disbursement date.

In reviewing the hundreds of thousands of claims received from borrowers across the country, as well as different State laws that could be applied to bring a defense to repayment application under the 1994 regulations, the Department has identified other categories of improper actions that it believes should give rise to a defense to repayment, and examples of the types of common misrepresentations that fall within those categories.

As listed above, the proposed Federal standard identifies five categories of acts or omissions as bases for a borrower defense claim: (1) substantial misrepresentation, (2) substantial omission of fact, (3) breach of contract, (4) aggressive recruitment, and (5) State or Federal judgment or Departmental adverse action against an institution that could give rise to a borrower defense claim. For substantial misrepresentations and substantial omissions of fact, the Department proposes to use a presumption of reasonable reliance for both an individual and group claim.

Each element of the proposed Federal standard is discussed in greater detail below.

Substantial Misrepresentation and Omission of Fact

The Department proposes returning to the 2016 regulations' use of substantial misrepresentation where a misrepresentation is defined in 34 CFR 668, subpart F, instead of a standalone definition in the borrower defense regulation. But, as part of adopting that framework from the 2016 regulation, we also propose adopting a presumption of reasonable reliance for all borrowers.

Misrepresentation was a component in both the 2016 and 2019 regulations and has been a common source for approving claims under the 1994 regulation. Substantial misrepresentations constitute most of the claims that the Department has approved to date and have consistently

served as a basis for borrower defense discharges across the several sets of regulations.

The Department believes requiring borrowers to prove a substantial misrepresentation occurred is a more reasonable standard to use than the stricter one required in the 2019 regulation that also required a borrower to show that an institution's misrepresentation was made with knowledge that it was false, misleading, or deceptive or with reckless disregard for the truth. In constructing the proposed standard, the Department considered what evidence it sees borrowers regularly provide, based upon its review of hundreds of thousands of claims. This allows the Department to gauge what is a reasonable expectation of borrowers and what types of information that most claims are likely to include. Those reviews demonstrate that even the most detailed and extensive information provided by borrowers rarely if ever includes information on whether an institution had knowledge that a misrepresentation was false or misleading, nor an ability to gauge if the institution acted with a reckless disregard for the truth. When the Department obtains such information, it generally comes through internal company records that require the authority to require institutions to turn over documents, such as through a civil investigation demand, a lawsuit, or a request by a Federal agency. The use of such a strict standard for a borrower thus exceeds what even the most

detailed individual applications received to date are able to include. While the Department has in the past indicated that this standard could be met by showing information provided by employees does not match information in formal marketing materials, the Department is concerned that such an approach does not provide a reasonable path for a borrower subject to the more common situation the Department has found in which the official placement rates are themselves false or calculated in a way that produces a misleading result.

Moreover, the Department does not believe the intent of the institution is relevant when determining whether to provide the borrower with relief due to a misrepresentation. Intentional or not, the actions by the institution have resulted in harm to the borrower and the Department's obligation is to provide relief to ameliorate that harm when the evidence warrants. Issues related to institutional knowledge are better suited for considerations about the extent of the school's liability. As between the school and the borrower, the school is better equipped to prevent, and, where appropriate, to bear the cost of, a misrepresentation that turns out to be inadvertent.

To meet this proposed substantial misrepresentation threshold, the borrower would have to articulate to the Department the misrepresentation made by the institution

(e.g., they were told credits would transfer and they did not, they were guaranteed to get a job, they were told the job placement rate was 90 percent, etc.). That misrepresentation would then have to be one that they would have relied upon to make the decision to take out a Direct Loan. A borrower can achieve that goal by relaying with some detail the story of their recruitment experience or some other interaction with the school.

The Department similarly proposes to remove the requirement that a borrower demonstrate individualized harm from the definition of a misrepresentation and instead to require that the borrower demonstrate that the misrepresentation caused the borrower to take out a loan to their detriment. The Department is concerned that the requirements to demonstrate financial harm in the 2019 regulation created a requirement far beyond what a reasonable borrower should have to do. This concern outweighs the taxpayers' risk that a borrower could receive relief even without significant financial harm, particularly given the Department's statutory obligation to provide access to defenses to repayment for borrowers affected by the acts or omissions of the institutions in which they enroll. For instance, the 2019 regulation requires borrowers to prove that they could not get a job for reasons besides local or national recessions, or the borrower would have to document the quality of their job

search and subsequent inability to find employment. The Department does not believe it is reasonable for a borrower to have to act as a labor economist to show they were harmed by an institution's misrepresentations. Moreover, the approach of individualized harm required in the 2019 regulations has the unintended effect of potentially penalizing a borrower who succeeds despite their program. The Department has received many borrower defense applications from individuals who asserted under penalty of perjury that they were more likely to find employment when removing the institution they attended from their resume. Under the 2019 regulations, these individuals would risk having a claim not approved because they did obtain a job, even if the institution was a hindering factor in their ability to do so.

Reliance is the final component of the substantial misrepresentation standard. This requires a borrower to show that they were not only subject to the misrepresentation but that they relied upon it in their decision to take out a Direct Loan. While the Department believes reliance should be an element of a successful borrower defense claim that alleges a misrepresentation, we are concerned that an overly narrow view of what a borrower had to do in order to demonstrate reliance could result in a borrower's application being denied for lack of the use of specific phrasing. In particular, we are worried that

there could be instances where a borrower lays out a misrepresentation that from the narrative provided by the borrower was a key factor in their decision to take out a loan but because the borrower did not directly specify they relied upon it their claim is denied. To address this concern the Department proposes that if the claimant does not demonstrate reliance, then the Department would find reasonable reliance if a prudent person would believe and act upon the misrepresentation if told it by another person.

The Department also proposes to use a similar presumption of reasonable reliance for group borrower defense claims. The removal of requirements for borrowers to demonstrate individualized harm and that they could personally prove that an institution engaged in a misrepresentation that the institution made with the knowledge that it was false, misleading, or deceptive or made with reckless disregard for the truth means that the Department can and should consider claims from similarly situated borrowers who attended the same institution as a group. Because the idea behind a group claim is that all the borrowers in the group may have been affected by the same misrepresentation or omission, the Department believes it is also reasonable to use an assumption of reasonable reliance for group members.

The Department has determined based on reviews of claims that, particularly where misrepresentations were especially widespread, the benefits of reduction in burden by presuming reliance, rather than individually determining it, exceed the costs. Efforts to individually evaluate these claims have substantially delayed--by years, in some cases--the provision of relief to borrowers. This has negative ramifications for borrowers whose financial circumstances are affected by their outstanding student loan debt in the meantime.

The Federal Trade Commission (FTC) follows a similar approach to the Department's proposal to allow the Secretary to establish a presumption of reliance, whereby it can establish a rebuttable presumption that all purchasers relied on the defendant's material misrepresentations or omissions if they were widely disseminated and "were of a kind usually relied upon by reasonable prudent persons." *FTC v. BlueHippo Funding*, 762 F.3d 238 (2d Cir. 2014); *FTC v. Kuykendall*, 371 F.3d 745, 765 (10th Cir. 2004); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993); *FTC v. Sec. Rare Coin & Bullion Corp.,* 931 F.2d 1312, 1316 (8th Cir. 1991). Once the FTC establishes the presumption, courts typically accept the total revenue from the sale of the good or service as the amount of monetary relief. Accordingly, while the Department proposes a substantial

misrepresentation standard to bring a successful borrower defense claim, the Department proposes to incorporate a presumption of reasonable reliance into that standard to reflect natural consumer behavior that the reasonable and prudent consumer would "usually" rely on.

Substantial Misrepresentation-Definitions

With regard to the specific types of actions that could be considered a misrepresentation, the Department believes using the definition of a misrepresentation in subpart F instead of a separate definition of the term in borrower defense would reduce confusion for both borrowers and institutions and ensure a more consistent approach. In the 2019 regulation, the Department chose to include its own definition of misrepresentation. However, it did so with a non-exhaustive list of 11 items, many of which bear significant resemblance to requirements that already exist in subpart F. This creates unnecessary ambiguity for borrowers and institutions. Since the list in the regulation is non-exhaustive it is unclear whether that would mean anything else in subpart F might also still qualify as a misrepresentation, providing other requirements are met. Using the single consistent definition from subpart F thus removes that ambiguity and ensures that there is a clear message to borrowers and institutions how borrower defense and other oversight and enforcement activities can interact.

In reviewing the definition of misrepresentation in subpart F, the Department has identified other types of misrepresentations that it believes should both serve as potential grounds for approving a borrower defense application as well as possible future enforcement actions. These changes address areas of concern the Department has identified in the course of adjudicating borrower defense claims in recent years.

The Department proposes to revise the regulations in § 668.72, which covers misrepresentation based on the nature of the educational program or institution. The Department proposes to amend the leading text by adding the phrase "which may be included in the institution's marketing materials, website, or communications to students," to clarify where misrepresentation could occur and to ensure congruence with the other types of misrepresentation in § 668.73 and § 668.74. The Department also proposes to remove sub-section (h) in § 668.72, which relates to misrepresentations of the nature and availability of equipment needed for educational programs, because that element is effectively incorporated into § 668.72(f), which addresses facilities and equipment. The Department proposes to remove sub-section (j) in § 668.72, related to the availability of employment or other financial assistance, because that element would be effectively

covered in § 668.73, which governs misrepresentations related to the nature of financial charges.

In new § 668.72(m), the Department proposes to add false, erroneous, or misleading statements concerning institutional selectivity rates or rankings as a form of misrepresentation, because it has observed institutions leveraging false data reported to widely recognized national rankings that result in a higher institutional or program rank than they would otherwise have received, inducing enrollment under false pretenses. Accordingly, the Department believes it is in the public interest to include misrepresenting selectivity rates or rankings or misrepresenting the data underlying the selectivity rates or rankings, as a form of misrepresentation.

In new § 668.72(n), the Department proposes to add misrepresenting the classification of the institution as nonprofit, public, or proprietary for purposes of its participation in the title IV programs as another basis for a borrower defense claim. An institution would be deemed to misrepresent its classification if it leads students or parents to believe that its status for purposes of title IV participation is something other than the institution's official classification on file with the Department for purposes of the title IV programs. The Department believes that obfuscating the classification of the institution for purposes of the title IV programs should be considered a

misrepresentation because there are meaningful distinctions between the governance and treatment of revenue in excess of expenses at for-profit and nonprofit businesses. A student who chooses a college that markets itself as nonprofit may believe they are entering into a transaction in which additional revenue will be reinvested in the college and that those leading the institution do not have a direct financial stake in it. Institutions may not represent to students that they are a nonprofit institution for purposes of title IV when they have not met the applicable legal standards for nonprofit status. This also would apply to institutions that are in the process of converting from for-profit to nonprofit status; such an institution may not represent itself as nonprofit until the Department has confirmed it meets the standards for a nonprofit institution and memorialized that determination in the classification on file with the Department. An institution that acts inconsistently with this requirement would have misrepresented its classification for purposes of a borrower defense claim.

In new § 668.72(o), the Department proposes to add misrepresenting the existence of certifications or other approvals for the institution and/or its programs that were not actually obtained, and the institution's failure to remove such certifications or approvals from marketing materials after they are revoked or withdrawn. These

certifications and other approvals include approvals from the State to offer certain programs, such as approval to offer a nursing program. They also include certifications for occupations such as medical assisting where a license may not be required but there are certifications that carry greater labor market value. The Department has observed that some institutions lagged in updating their marketing materials with the latest certifications or approvals or promised students that they would obtain certain certifications or approvals by the time the student graduated but where the institution never in fact obtained these items. The result is that when the student went to find employment, they discovered they were either unable to find a job or would be less competitive in the workforce than they expected to be when they enrolled in the program.

Similarly, the Department proposes to add new § 668.72(p), which would address misrepresentations about student externships or other similar opportunities, because the Department has observed that some institutions have made false promises about the availability of externships for their students or falsely represented that they held contracts with externship sites. The Department has observed that students relied on these marketing materials to inform their decision about whether to enroll at the institution.

The last two proposed changes to § 668.72 are new § 668.72(q), misrepresentation about the institution offering assistance to obtain a high school diploma or General Education Development certificate (GED), and new § 668.72(r), misrepresentation about the pace of completing the program or the time it would take to complete the program contrary to the stated length of the educational program. With the rise of eligible career pathway programs and use of "ability to benefit" mechanisms to provide for title IV aid eligibility for qualifying students without a high school diploma or its recognized equivalent, the Department has observed an increase in the number of institutions making false promises of assistance to obtain a high school diploma or GED, including through program reviews and other oversight mechanisms in which a large number of students at the institution make similar allegations. Finally, the Department has seen that some institutions engage in widespread substantial misrepresentations about the time it would take to complete an educational program, including misrepresentations related to programs that require completion of an externship or similar program, and programs that are self-paced and rarely completed in the advertised time. These institutions wrongly characterize the necessary pace or time commitment, such as presenting program cost over four years when it takes 5 years to finish under the schedule

set by the institution. Accordingly, the Department believes it is in the public interest to include these additional misrepresentation elements because greater enforcement and oversight of institutions' unlawful practices would both ensure such behavior is investigated and ended more quickly and provide borrowers with clearer regulations governing the borrower defense discharge standards and, at least in some cases, better evidence. Including these misrepresentations in the regulations would also ensure that borrowers have more accurate information about the costs of their programs.

We also propose changes to § 668.74. In the course of adjudicating borrower defense claims, the Department has persistently seen misrepresentations about the employability of graduates. These include job placement rate (JPR) misrepresentations, which are reflected in § 668.74. The Department is explicitly including, as a form of JPR misrepresentation, placement rates that are inflated through manipulation of data inputs. This would help ensure that students have access to accurate information about the employability of graduates and provide access to relief when they do not. These additions highlight the Department's concerns about how institutions calculate job placement rates, which students often rely on in making an informed decision about enrolling in an institution or program.

The Department sought input from negotiators as to whether our proposed language addressed known examples of JPR manipulation and how the proposed language could interact with existing placement rate requirements used by accreditors and/or States. One negotiator supported a required disclosure of information regarding graduate employability but expressed concern that there is no standardized metric for institutions to use. To be clear, the Department does not propose to create a standardized JPR metric. Instead, we outline examples of past problematic institutional JPR calculations because they were misleading to students. These include institutions that, for example, excluded students who were searching for work from the denominator of the placement rate calculation if those students did not conduct a job search in the exact manner set by the institution, or published a JPR that included large numbers of students who obtained employment well before graduating from the institution, many of whom likely found such employment or were already employed even before enrolling. These also include institutions that disclosed an employment rate, as required by their State or accreditor, but calculated the rate in a manner inconsistent with the applicable State or accreditor methodology. Proposed § 668.74 also contains a provision that allows the Department to verify that an institution correctly calculated its JPR; an institution must furnish

to the Secretary documentation and other data that was used to calculate the institution's employment rate calculations.

Substantial Omission of Fact

The 2019 and 2016 regulations included an omission of fact as a component within the definition of misrepresentation, meaning that either false information provided or true information omitted could give rise to an approved borrower defense claim.

The Department proposes to continue allowing omissions to give rise to a borrower defense claim, but to expressly provide it in a separate category by adding § 668.75 to address substantial omissions of fact. Doing so recognizes that omissions of fact have the same misleading effect on borrowers as other forms of misrepresentation, except that it occurs through the absence of information that would otherwise have affected the borrower's decision to enroll or take out loans. The Department proposes to list it separately from misrepresentation to assist borrowers and institutions in better understanding the Federal standard for initial adjudication, but because it would remain closely tied to misrepresentation, we propose adding it within subpart F.

The addition of more text to clarify an omission of fact allows the Department to provide borrowers and institutions greater clarity about what must be disclosed

to avoid an omission of fact. The Department proposes moving to "substantial omission of fact" in place of the 2019 treatment of omission of fact for the same reasons we are proposing to shift from misrepresentation to substantial misrepresentation as outlined above. Similar to substantial misrepresentation, an omission of fact would be substantial if a borrower would not have otherwise enrolled at the institution, obtained a loan, or chosen that program. We believe that omissions of fact should include a reliance requirement to identify whether an omission is serious enough to have influenced a borrower's decision to enroll. As with substantial misrepresentations, we propose to include a presumption of reasonable reliance, which ensures that claims by borrowers--who relied in fact on the omission--are not denied simply because their applications fail to include the specific statement that the borrower relied upon the omission. We propose to apply this presumption of reasonable reliance to both individual and group claims.

The Department derives its definition of omission of fact, in part, from the 2016 amendments to § 668.71(c), where the Department refers explicitly to the ways in which omissions are considered in the regulations. See 81 FR at 76072. The Department also sought feedback last year from negotiators on the parameters of omission of fact, including a review of States' unfair, deceptive, and

abusive acts or practices (UDAP) laws. The Department also consulted with the FTC and thoroughly analyzed Federal laws on UDAP that could help inform the Department's formation of a definition of an omission of fact. The Department consulted with FTC because of that agency's long-standing enforcement work regarding unfair and deceptive acts and practices under Sec. 5 of the Federal Trade Commission Act (FTC Act). After considering the States' use of omission of fact in consumer protection contexts, and the FTC's authorizing statute under the FTC Act, the Department is proposing to adopt language that appears in similar forms in Delaware, Illinois, Iowa, and New Jersey consumer laws. These States have the most comprehensive language related to omission and state that the "concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission" is an unlawful act.[10] We propose to adopt, in part, that concept of omission of fact, but without the elements of "intent," which appears in all the states' statutes cited above; or "knowing," which is only included in New Jersey's statute. As discussed earlier in justifying the movement away from

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[10] This language is taken from Delaware's definition of an unlawful practice, but the phrasing is similar for the other states with minor wording changes. Delaware Code Ann. Title 6, §2513 https://delcode.delaware.gov/title6/c025/sc02/index.html; 815 Illinois Comp. Stat. Ann. §505/2), from Ch. 121 1/2, par. 262, https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2356&ChapterID=67 ; Iowa Code §714.16, *et. seq.* https://www.legis.iowa.gov/docs/code/714.16.pdf; New Jersey's Consumer Fraud Act, New Jersey Statutes Annotated. 56:8-2 *et. seq.* https://www.njconsumeraffairs.gov/Statutes/Consumer-Fraud-Act.pdf.

the 2019 definition of misrepresentation that included a requirement that the borrower show the institution had knowledge that a misrepresentation was false, deceptive, or misleading or given with a reckless disregard for the truth, the Department is concerned that it is unreasonable to expect a borrower to be able to document the intent or knowledge possessed by an institution. While there are circumstances where a borrower could potentially meet this bar if the information provided by a recruiter, such as placement rates, is different from information provided in other public materials, the Department has seen to date that most circumstances where an institution misrepresents student outcomes such as placement rates it does so in such a way that all the public numbers used are wrong and only the private internal numbers reflect the actual results. That type of information would only be obtainable through some way of accessing institutional employees or records, which is something that takes years of work by Federal and State regulators to acquire.

The 2019 regulations required that misrepresentations were those "made with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth" (see 34 CFR 685.206(e)(3)). Upon further consideration of these policies and their implications both for borrowers and taxpayers, the Department does not believe that misrepresentations or omissions that are made

without knowledge or a reckless disregard should be exempt from the Department's oversight. Borrowers who relied on such misrepresentations, even if they were made unintentionally, may still have experienced the harm of attending a particular institution or borrowing Federal student loans on the basis of untruths or omissions. Similarly, institutions are not permitted under Section 487(c)(3) of the HEA to make misrepresentations, even if unintentional. And an unintentional omission of fact still can result in harm for the borrower.

As proposed, the definition of omission of fact would include a non-exhaustive list of examples that could amount to an omission of fact in the borrower defense context. Examples include, but are not limited to, concealing, suppressing, or failing to provide material information regarding the entity that is actually providing the educational instruction; the availability of slots, or requirements for obtaining admission, in a program where the institution places students in a preprogram at the time of enrollment; and factors that would prevent an applicant, for reasons such as a prior criminal record or preexisting medical condition, from qualifying to meet requirements that are generally needed to be employed in the field for which the training is provided. In its oversight and compliance work, the Department has found some institutions omitted material information about the nature of their

educational programs that, if disclosed upfront, could have resulted in a different outcome for the student and forgone the need for a defense to repayment. The Department invites comments on this proposed definition and whether the proposed definition is sufficiently expansive to address known types of omissions in which some institutions engage.

Finally, the Department believes that each of the proposed borrower defense provisions discussed in this NPRM pertaining to misrepresentation serves one or more important, related, but distinct, purposes. Each of the requirements provides value to students, prospective students, and their families; to the public, taxpayers, and the Government; and to institutions separate from, and in addition to, the value provided by the other requirements. In particular, we believe that including more examples of misrepresentations in the regulations would more accurately reflect the Department's experiences in overseeing institutions; and would inform institutions about their obligations, as well as provide clearer indications to borrowers about what may constitute a borrower defense claim. If the Department is able to cite to these additional regulatory provisions in its enforcement work, it will also be able to protect taxpayer interests and end unlawful behavior more quickly and effectively. To best serve these purposes, we propose including an

administrative provision in the regulations to make clear that the regulations are designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision should not affect the remainder of the provisions.

Breach of Contract

The 2019 regulations removed breach of contract as an element that could give rise to an approved borrower defense to repayment application even though it was included in the 2016 regulation. The 2019 regulation argued that the majority of defense to repayment applications submitted to the Secretary did not allege breach of contract, concluding that the borrower defense standard should be tailored to the types of claims borrowers alleged. See 84 FR 49810-12. The 2019 regulations further rationalized that a standard breach of contract claim was potentially overbroad, and thus inappropriate as a basis for relief since it is not necessarily limited to the provision of educational services.

With the benefit of reviewing additional borrower defense claims, and considering additional input from negotiators, including a request from a negotiator to be more definitive as to what constitutes breach of contract,[11] for the reasons discussed below the Department believes

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[11] https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/nov3pm.pdf.

that breach of contract should be restored as a part of the Federal borrower defense standard. As an initial matter, the 2019 concern with overbreadth is inapplicable, because the Department proposes to clarify in new § 685.401(a) (the definition of "borrower defense to repayment") that an act or omission supporting a borrower defense must be related to the making of a Direct Loan or the provision of educational services for which the Direct Loan was intended. With that appropriate qualification, inclusion of a breach of contract is appropriate. As explained in 2016, breach of contract may be an appropriate basis for borrower defense relief when an institution fails to fulfill a specific contractual promise to provide certain training or courses. 81 FR 39341 (June 16, 2016). Breach of other terms of the contract that relate to the making of a Direct Loan or the provision of educational services may also serve as an appropriate basis for borrower defense relief. The Department would grant relief commensurate with the specific contractual injury alleged. For example, the Department is aware of students bringing loan-related breach of contract claims against postsecondary institutions or for provisions of educational services for which those loans were intended. See, e.g., Supplee v. Miller-Motte Bus. Coll., Inc., 768 S.E.2d 582 (N.C. Ct. App. 2015); Eckols et al. v. Earle et al., No. 2016CI18165 (37th Jud. Dist., Bexar County), Pltfs.' Orig. Pet.,

Applic. for TRO and Applic. for Temp. Inj. at 10 (Oct. 18, 2016). This type of claim would clearly be appropriate for borrower defense adjudication if the breach is related to the making or provision of educational services intended for the Direct Loan but may not fall under the other four elements of the Federal standard depending on the nature of the contract and its breach. Moreover, even if there is some overlap between the types of conduct that would constitute a breach of contract and would otherwise constitute a basis for a borrower defense claim, in some instances, borrowers may be able to allege breach of contract claims more readily. The Department would investigate and adjudicate claims related to breaches of contract to determine whether a claim meets the requirements for a defense to repayment.

Aggressive Recruitment

The Department is also proposing to add a new category related to aggressive and deceptive recruitment to capture other types of acts it believes should serve as a basis for a borrower defense claim. While this category was not included in the 2019 regulation, the Department considered aggressive recruitment as a factor in the 2016 regulations in determining whether a misrepresentation was substantial enough to merit approval. It was not, however, conduct that could lead to approval on its own in that regulation. In other words, the conduct had to be a substantial

misrepresentation in the form of aggressive recruitment to qualify for relief pursuant to the 2016 rule.

The Department first raised the proposal for aggressive and deceptive recruitment during negotiated rulemaking. Some negotiators agreed with including aggressive recruitment as a basis of a borrower defense claim and indicated that some institutions aggressively recruit certain specific groups of vulnerable students, such as students who are older, are the first in their families to attend postsecondary education, are attending while working full-time and or caring for families, or who come from low-income backgrounds. To date, the Department has received applications from well over 100,000 borrowers who have made allegations relating to admissions and urgency to enroll. This includes allegations that institutions recruited students who lack the basic tools needed to succeed in their courses, such as recruiting students for online programs who have no access to the internet because they are homeless. The Department has also seen institutions discourage students from consulting family and friends for additional information if they raise concerns about enrolling by calling them "dreamkillers." And, it has received allegations detailing situations where recruiters tried to shame borrowers into enrolling by criticizing them for not providing more for their families.

Because many existing State consumer protection laws include this sort of claim in different forms, the Department reasoned that including it in the Federal standard would ensure a more comprehensive Federal standard and ensure equitable treatment for borrowers regardless of where they live.

In developing its proposed definition of aggressive recruitment, the Department incorporated negotiators' proposals and language from the 2016 regulations. The Department also consulted with the FTC and thoroughly analyzed Federal laws on UDAP. The Department consulted with FTC because of that agency's long-standing enforcement work regarding UDAP under Sec. 5 of the FTC Act. Similar to the Consumer Financial Protection Bureau (CFPB) and other Federal banking regulators, the Department remains convinced that UDAP can cause significant financial injury to consumers, erode consumer confidence, and undermine the financial marketplace. The FTC Act has also helped other Federal banking regulators in crafting their oversight and enforcement activities over UDAP. Thus, the Department believes that consulting with the FTC which has applied its standards through case law, official policy statements, guidance, examination procedures, and enforcement-- actions could help inform the Department's work regarding UDAP, to include elements of aggressive recruitment.

Most negotiators supported the idea of including aggressive recruitment in the Federal standard. Some negotiators, however, expressed concern with the potential subjectivity of the concept and the risk of sweeping in innocuous encouragement or other similar recruiting contact by admissions representatives, enrollment management professionals, or other contractors engaged by an institution. These negotiators indicated that in the course of an admissions representative's day-to-day work, contact with prospective students may include something as simple as reminding them of a May 1 enrollment deadline, and there was some concern that such a reminder may be considered a form of aggressive recruitment. The Department believes the clarity of this definition demonstrates that isolated instances of well-intentioned recruiter behavior would not result in an approved claim. Rather, this definition would capture the types of sustained and aggressive behavior the Department has seen across more than 100,000 borrower defense applications.

The Department is proposing to include aggressive and deceptive recruitment as its own category that could lead to an approved borrower defense claim because it captures an important type of behavior that the Department has seen institutions engage in where the way a borrower is coerced into enrolling is so aggressive that even if the information presented to them was accurate and without

omissions the borrower is not able to make a full and informed choice. The result of that is often a borrower enrolling in a program that is not providing them what they were expecting--such as a certificate in an allied health field when they wanted to become a nurse--or comes at a price that they cannot possibly afford and did not freely and fairly take on. The Department has seen instances, discussed above, where these aggressive recruitment tactics prevented or strongly discouraged students from being able to make an informed choice. Other Federal regulators have also seen instances where students were affected by aggressive recruitment practices that played a role in borrowers' decisions to take out private educational loans.[12] Borrowers were told not to worry about concerns that they voiced, such as whether they would graduate or get a job. They were pressured to enroll either through artificial time constraints (such as falsely claiming there were a limited number of seats or the only opportunity to enroll would expire in just a few days) or by exploiting the borrower's lack of experience with higher education. Because the recruiter has greater information at their disposal than the potential borrower and is acting in a position of authority and power, the recruiter is in a position to influence the prospective student's decision to enroll. In these circumstances, even absent a

[12] https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-for-profit-college-chain-itt-for-predatory-lending/

misrepresentation, such as a falsified job placement rate, the entire recruitment experience can impede the ability of the borrower to understand and appreciate what they are signing up for and the financial and educational implications of their decision.

The Department also thinks it is important to include aggressive recruitment in order to clarify the interaction between what a recruiter may tell a prospective student who later enrolls, and the information the student may receive in written form. All institutions are required to disclose various information (see §§ 668.41, 668.47, and 668.164, among others) providing students with disclosures and information when they enroll, including through course catalogs. These printed or digital materials may contain factually accurate statements that differ from what prospective students have been told by a recruiter—such as a more accurate presentation of job placement rates, the role of accreditation, the ability to transfer credit, or other issues that would be important to prospective students and their families. In responding to the allegations in borrower defense claims, some institutions have asserted that written statements, even if buried in material provided to the students, are sufficient to correct inaccurate information from recruiters. The Department disagrees with this view. As a practical matter, the recruiter is providing personal support to the

borrower. The recruiter is often the borrower's first interaction and gateway to apply for and eventually obtain Federal student aid, including Federal student loans. Even if the borrower examines the written disclosures closely before enrolling, the information from the recruiter may overshadow the disclosures.[13] Given the information asymmetry between the recruiter and the borrower, and that perceived relationship of trust, the aggressive tactics of the institution may themselves constitute a valid claim for borrower defense.

Moreover, the Department acknowledges that the statutory ban on incentive compensation for recruiters or admissions employees has not fully achieved the intended result which was to protect students from the harms of aggressive recruitment. The incentive compensation rule bans incentive payments to recruiters based on their enrollment success because such payments might lead recruiters to mislead students in order to earn a financial bonus. 20 U.S.C. § 1094(a)(20). Aggressive recruitment continues to proliferate in institutions as the pressure for increased enrollment, and in turn, receipt of Federal student assistance, drives institutions' continued use of such tactics. The Department believes enrollment that stems from such tactics should provide a path to an

[13] https://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf

approved borrower defense claim as a form of aggressive recruitment.

The Department is aware of instances where institutions will, either directly or through a third party, falsely appear to help individuals seeking Federal, State or local benefits. For example, in the FTC's action against Career Education Corporation (CEC), CEC obtained individuals' contact information from websites where the institution presented itself, through lead generators, as a portal for receiving other government benefits, such as unemployment insurance, or for job seeking.[14] These individuals unwittingly provided their personal information to the lead generator believing submission of their information was a portal for government benefits. Those individuals, in some cases, later enrolled at the institution after providing their information under the guise that they would obtain government benefits. An individual could not reasonably be expected to understand that such websites were lead generators that the institution used to increase their enrollments.

The Department considered including an aggressive recruitment provision in the 2016 regulations, but at that time was concerned about the potential difficulty of developing clear, consistent standards for aggressive

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[14] *Federal Trade Comm. v. Career Educ. Corp., et al.*, Case No. 1:19-cv-05739 (N.D. Ill. Eastern Dist. Oct. 9, 2019).

conduct. 81 FR at 39343. The 2016 regulations did, however, include aggressive recruitment as an aggravating factor in determining whether a borrower relied, or reasonably would have relied, on a misrepresentation, an indication of the Department's degree of concern about such behavior and its likelihood that borrowers' decisions would be affected by it. *Id*. After five more years of receiving borrower defense claims, and addressing concerns raised by non-Federal negotiators during negotiated rulemaking,[15] the Department is confident that an appropriate standard can be articulated and enforced in the borrower defense context and that such an element is a necessary addition to address gaps in the Federal standard. Additionally, as described above and through program reviews, audits, and other investigations, the Department has seen that institutions engage in aggressive tactics. Such tactics include imposing pressure on potential students to make enrollment or loan decisions immediately, taking advantage of a student's lack of understanding of the process, stifling efforts for the borrower to consult with a third party, persistent and unsolicited contact with a prospective student, and other actions under which an institution exerts unreasonable pressure to induce a student to enroll or obtain Federal student financial aid. These abuses have

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[15] https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/transc103pm.pdf.

been well documented and result in findings against the institution under State or Federal laws,[16] but they currently do not meet the standards for a borrower defense claim. In light of the Department's discovery of extensive acts of aggressive recruitment and the harm to students, the Department is proposing to include aggressive recruitment in the Federal borrower defense standard.

The Department modeled the proposed aggressive recruitment provision in part 668, subpart R, after the misrepresentation regulations in part 668, subpart F, because the subpart F framework was the most logical structure already in place: it had a definitions section and outlined a non-exhaustive list of factors that could lead to a misrepresentation. In defining the types of aggressive recruitment under the subpart, § 668.501, the Department balanced the need to establish specific guidelines to curb institutions' exertion of unreasonable pressure on prospective students with the need for general standards that broadly cover other forms of aggressive recruitment. Placing the standard for aggressive recruitment in its own subpart instead of within borrower defense also would ensure the Department applies consistent standards for aggressive recruitment across its other oversight and compliance work, which could in turn result

[16] See, for example, https://www.ftc.gov/news-events/news/press-releases/2019/08/operator-colorado-technical-university-american-intercontinental-university-will-pay-30-million.

in an approved borrower defense claim. Additionally, this increased oversight and compliance may help to deter such behavior from institutions going forward, helping to ultimately reduce the need for borrowers to submit defense to repayment claims.

To ensure that institutions and the public have clear standards for what constitutes aggressive recruitment, for purposes of borrower defense, the Department seeks the public's input on how the Department can identify the extent to which an institution engages in any form of aggressive recruitment and the means to document this misconduct through program reviews and audits. Policies and procedures that law enforcement uses to curb these actions would be especially helpful. The Department also provides a non-exhaustive list of acts that could warrant an aggressive recruitment claim in proposed § 668.501.

Finally, the Department believes that each of the proposed provisions discussed in this NPRM pertaining to aggressive recruitment serves one or more important, related, but distinct, purposes. Each of the requirements provides value to students, prospective students, and their families; to the public, taxpayers, and the Government; and to institutions separate from, and in addition to, the value provided by the other requirements. To best serve these purposes, we would include this administrative provision in the regulations to make clear that the

regulations are designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision should not affect the remainder of the provisions.

Judgments Against Institutions and Department Actions

In the 2016 regulations, the Department included as a basis for a borrower defense claim a nondefault, contested judgment obtained against an institution based on any State or Federal law, whether obtained in a court or in an administrative tribunal of competent jurisdiction. Under those regulations, the borrower has a defense to repayment if the borrower was personally affected by the judgment; that is, the borrower must have been a party to the case in which the judgment was entered, either individually or as a member of a class that obtained the judgment in a class action lawsuit, and the act or omission must have pertained to the making of a Direct Loan or the provision of educational services to the borrower. The Department believes retention of this provision is in the public interest for the reasons discussed below.

We believe the Department did not fully consider the importance of the lawsuits students brought against institutions when it removed this provision in the 2019 regulation. Although judgments are not as common as allegations of misrepresentation, they are a clear finding by a court that the institution engaged in misconduct.

See, e.g., Supplee v. Miller-Motte Bus. Coll., Inc., 768 S.E. 2d 582 (N.C. Ct. App. 2015).

In its rationale to include a judgment against an institution as part of the Federal standard, in 2016 the Department stated that including judgment against an institution would allow for recognition of State law and other Federal law causes of action, but would also reduce the burden on the Department and borrowers of having to make determinations on the applicability and interpretation of those laws. See 81 FR 39340-41. To ensure that the scope of the judgment relates only to borrower defense claims, the favorable judgment against an institution would still be required to relate to the making of a Federal student loan.

Finally, the Department proposes to include Departmental final actions as part of a judgment against an institution standard. Institutions that participate in the title IV programs sign a Program Participation Agreement (PPA) with the Secretary. If the Secretary or auditor identifies through Final Program Review Determination (FPRD) or Final Audit Determination (FAD), for example, that an institution breached its PPA, a borrower who was impacted by that final action could have a defense to repayment claim.

It is important for the Department to consider all information available to it, including its own prior

investigation and oversight work, to reach findings. FPRDs are not only the result of the Department's own findings, but schools would have also had an opportunity to respond to the findings therein. But more importantly, where the Department has evidence that schools have engaged in conduct that constitutes the basis for a borrower defense, the Department would act on its own evidence rather than requiring borrowers to independently produce this information, which is not available to them.

State Law Standard (§§ 685.206, 685.222)

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution a borrower may assert as a defense to repayment of a Direct Loan, notwithstanding any other provision of State or Federal law, except that a borrower may not recover more from the Secretary than the amount that the borrower has repaid on the loan.

Current Regulations: In the current regulations, three different regulatory standards and limitations periods apply, depending on when a borrower's loan was first disbursed:

- Loans first disbursed prior to July 1, 2017, are addressed under the former 1994 borrower defense regulations in § 685.206(c). That section provides that a borrower may assert a defense to repayment under applicable State law.

- Loans disbursed between July 1, 2017, and June 30, 2020, are adjudicated under the former 2016 borrower defense regulations in § 685.222, which does not provide for any adjudications under applicable State law.

- Loans disbursed on or after July 1, 2020, are adjudicated under the current borrower defense regulations in § 685.206(e), which does not allow any adjudications under applicable State law.

Proposed Regulations: In proposed § 685.401(b), a violation of State law could form the basis for a borrower defense claim, but only if the borrower, or a State requestor in the case of a group claim brought by a State requestor, requests reconsideration of the Secretary's denial of a claim.

Reasons: Achieving the goal of a uniform Federal standard that could be applied to all claims pending or filed after July 1, 2023 requires crafting a regulation that covers all borrower defense claims that are pending as of that date and claims that could be filed in the future. However, claims filed under the 1994 regulation are based upon violations of State law. To ensure that no borrower risks losing access to the State law standard as a result of the uniform Federal standard, the Department proposes allowing borrowers to seek reconsideration of a claim under a State law standard if their initial claim is denied or approved only for a partial discharge. This approach covers the

range of acts or omissions that the Department has determined should form a basis for a valid borrower defense to repayment application. It also ensures institutions are not unfairly subject to the costs of approvals for conduct that occurred prior to this regulation by indicating that the Department may only seek to recoup the cost of claims that would have been meritorious under the borrower defense regulation that would have been in effect at the time of the conduct that led to the approval.

Limitations Period (§§ 685.206, 685.222, & part 668)

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan, except that a borrower may not receive more relief than the borrower has repaid.

Current Regulations: In the current regulations, three different limitations periods apply, depending on when a borrower's loan was first disbursed:

- Loans first disbursed prior to July 1, 2017, are addressed under the former 1994 borrower defense regulations in § 685.206(c). The borrower may bring a claim at any point during the period in which the loan is being collected.

- Loans disbursed between July 1, 2017, and June 30, 2020, are adjudicated under the former 2016 borrower

defense regulations in § 685.222. The borrower may bring such a claim at any time but may only assert a right to recover amounts previously collected by the Secretary on the grounds of that same breach of contract or substantial misrepresentation within 6 years of the alleged breach or of the date on which the substantial misrepresentation reasonably could have been discovered.

- Loans disbursed on or after July 1, 2020, are adjudicated under the current borrower defense regulations in § 685.206(e), which require borrowers to file a claim within 3 years from the date the student is no longer enrolled at the institution to file a claim with the Department.

Proposed Regulations: The Department proposes that borrowers with outstanding loans would not be subject to a limitations period.

Reasons: The Department proposes to remove the limitations period for a borrower to assert a borrower defense claim under these regulations or to receive refunds of amounts previously paid on loans still outstanding. This is a change from the 2019 regulation, which required borrowers to file claims within 3 years of the date the borrower left the institution. The 2019 regulation imposed this limit primarily because of the time period institutions would be expected to keep records. However, the U.S. District Court for the Southern District of New York held that the 3-year

limitations period for claims that were subject to a collections proceeding (referred to in the 2019 regulation as "defensive claims") was not a logical outgrowth of the rulemaking and remanded that provision to the Department.[17]

The Department believes removing any limitations period on loans that are still outstanding is appropriate for several reasons. First, as discussed in the section on record retention, the records limitation discussed by the Department in the 2019 regulation relates to specific financial aid records that are unlikely to be relevant to the allegations most borrowers raise based upon what the Department has seen in applications for borrower defense to date. Most borrower defense applications to date relate to allegations around what an institution promised during the recruitment process and how that aligned with either the education the borrower ultimately received, such as whether they were able to get a job, if they could transfer credits, or if key data provided during the recruitment process such as job placement rates were accurate. The typical financial aid records that have a three-year retention requirement would not have any bearing on those allegations since they do not include records of recruitment activities, but rather cover items like the disbursement record of aid. Similarly, the Department does not believe it would be appropriate to set statutes of

[17] New York Legal Assistance Group ("NYLAG") v. Cardona, Case No. 20-CV-1414 (S.D.N.Y. Mar. 17, 2021).

limitations on loans that are still outstanding the way many State laws do by tying them to the date that a borrower knew or could reasonably have been expected to know the misconduct occurred. As noted in the 2019 regulation, properly enforcing such a statute of limitations is administratively burdensome. It would entail information that may not be included in a borrower's application and could also rely on other factors such as when a State opened an investigation or publicized its findings. Moreover, the concept of limitations tied to when a borrower could reasonably have known about misconduct would not align with the Department's proposal to allow group claims. Since one of the purposes of a group claim is to not require an individual application, the Department would not be receiving information from a borrower about when they knew about misconduct.

The Department also considered whether it would be appropriate to establish separate statutes of limitations for forgiving balances that are still outstanding versus refunding amounts previously paid on loans that are still outstanding. The Department does not believe it would be appropriate to place a limitation on discharging remaining loan balances. Since there is no statutory time limit on repayment or collections activity, the Department does not want to create a situation where a borrower is still obligated to repay a loan on which the Department has

concluded that the borrower should have received a discharge due to the institution's misconduct solely because the individual did not fill out an application in time. Such an approach is not in keeping with any of the Department's other discharge authorities, such as closed school discharge, false certification discharges, or total and permanent disability discharges, none of which require borrowers to apply for a discharge within a set period of time.

Similarly, the Department does not believe it would be appropriate to set a separate statute of limitations for refunding amounts previously paid on loans that are still outstanding. None of the Department's other discharges limit the refunding of amounts previously paid based on when a borrower applies, and the statute does not specify a separate treatment for borrower defense. There are no limitations on the issuing of refunds when a borrower receives a closed school discharge. Other discharges limit refunds to the point at which the borrower became eligible for the discharge, which is also not tied to applying within a certain period. For false certification, refunds are limited to the point after the borrower meets the eligibility criteria for a discharge, though in essentially all cases this means refunding all payments since most borrowers meet the eligibility criteria for a discharge prior to taking out a loan. Similarly, a borrower may

receive refunds when approved for a TPD disability discharge back to the date the borrower's eligibility for a discharge was established. Refunds for PSLF and Income-Driven Repayment, meanwhile, are provided for payments made beyond the 120, 240, or 300 qualifying payment threshold, depending on the program. Finally, applying a statute of limitations only to refunds of amounts paid would create significant operational challenges for the Department.

Exclusions

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution a borrower may assert as a defense to repayment of a Direct Loan, except that a borrower may not receive more relief than has been repaid.

Current Regulations: The 1994 borrower defense regulations do not explicitly address the acts or omissions that are excluded from a borrower defense to repayment claim. The 2016 regulations at § 685.222(a)(3) explicitly provide that an institution's violation of the title IV regulations alone does not constitute a basis for a borrower defense claim unless that violation would fulfill one of the bases for a borrower defense claim. Similarly, under the 2019 borrower defense regulations at § 685.206(e)(5), the Department explicitly excludes an institution's violation of an HEA requirement or Department regulation as a basis for a borrower defense claim unless the violation would

otherwise constitute the basis for a successful borrower defense to repayment. Under current regulations, misrepresentations related to civil rights violations are not a basis for a borrower defense claim.

Proposed Regulations: Proposed § 685.401(d) would provide exclusions that would not constitute a basis for a borrower defense claim. Specifically, an institution's violation of institutional eligibility or compliance rules under the HEA or other laws would not form the basis for a defense to repayment claim unless the violation would constitute a defense to repayment under the Federal standard and occurred in connection with the making of a loan or provision of educational service for which the loan was intended. For example, an institution's failure to meet the Constitution Day requirements in 36 U.S.C. 106 would not form the basis for a borrower defense to repayment claim.

Reasons: The Department's consistent position since 1994 has been that the Department will acknowledge a borrower defense to repayment only if the act of omission of the institution directly relates to the loan or to the institution's provision of educational services for which the loan was provided. See 60 FR 37768, 37769 (July 21, 1995); 81 FR at 75941, 75944.

As a result, the Department consistently has not considered claims such as personal injury torts,

harassment, or a violation of Federal civil rights laws to be grounds for alleging a defense to repayment. In the 2019 regulations, the Department provided a non-exhaustive list of circumstances that would not constitute, in and of themselves, borrower defenses to repayment that were directly related to the borrower's loan or the provision of educational services. This list included, among others, slander or defamation, property damage, and allegations about the general quality of the student's education or the reasonableness of an educator's conduct in providing educational services. See 84 FR at 49802, 49824. The Department emphasizes that, although the current regulations and the proposed regulations exclude a violation of civil rights as a basis for alleging a borrower defense to repayment, the Department's Office for Civil Rights (OCR) enforces several Federal civil rights laws related to education, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990. Individuals who believe that a recipient of Federal funds or a public entity that is subject to Title II has violated these Federal civil rights laws can file a complaint with OCR. OCR's authority includes obtaining reimbursement of tuition and other costs for injured parties when appropriate. The availability of this form of relief

encourages individuals to file promptly with OCR. The Department believes that OCR's enforcement authority is better suited to addressing civil rights harms than including them as a new basis for a borrower defense to repayment.

The proposed regulations reflect these positions.

Group Process and Group Timelines

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution a borrower may assert as a defense to repayment of a Direct Loan, except that a borrower may not receive more relief than has been repaid.

Current Regulations: The current borrower defense regulations under § 685.206 require an individualized review of every borrower defense application and thus do not permit a group review process. Under the 2016 standard, § 685.222(f) outlined a process for evaluation of a group claim. Upon consideration of factors including, but not limited to, common facts and claims, fiscal impact, and the promotion of compliance by the institution or other title IV, HEA program participant, the Department could initiate a process to determine whether a group of borrowers identified by the Secretary, has a borrower defense. Members of the group may be identified from individual applications or from any other source. The Department may consolidate applications that have common

facts and claims and resolve the borrowers' claims as group claims. The Department established separate group process procedures with respect to loans made by institutions that have closed in § 685.222(g) and for those that remain open in § 685.222(h). The 1994 regulations did not specify a group process, though the Department did employ a group process using those regulations, including in granting a group claim for students who attended American Career Institute in early 2017.

Proposed Regulations: The Department proposes two processes for pursuing group claims in new § 685.402. Under the first process, in proposed § 685.402(a) and (b), the Department reserves the right to determine if a group of borrowers it identifies have a common defense to repayment at the same institution, including multiple campuses of the same institution. Under such a Department-initiated group process, the Department would have the discretion to create a group based on any of the following borrower defense basis: actions by the Federal Government, State attorneys general or other State agencies/officials or law enforcement activities; class action lawsuits related to educational programs at one institution; or State or Federal judgments against institutions awarded to several borrowers for reasons related that could give rise to a defense to repayment claim; or a group of individual borrower defense claims.

Under the second process, in proposed § 685.402(c), the Department may initiate a group process upon request from a State requestor, on the condition that the State requestor submit an application and other required information to the Department to determine if it should form a group. Such an application ensures the Department has a consistent and clear process for addressing requests to form a group but does not confer the ability of the State requestor to otherwise represent the group during the Department's process of reviewing and adjudicating the claims. The Secretary would further be able to consolidate multiple group applications related to the same institution or institutions. The proposed provision would require the Department to respond to a materially complete State requestor's submission within 365 days. That response would indicate whether the Department decided to form the requested group and, if not, would provide the State requestor an opportunity to seek reconsideration of the group formation decision. In both group processes, the Department would include any individual claims submitted by a borrower under new proposed § 685.403 if that borrower is deemed part of the group. That borrower's claim would then be treated as part of the group claim, including with respect to timelines for adjudication.

If the Department agrees to form a group under this proposed section, the Department would designate a

Department official to adjudicate the borrower defense claim.

For group claims, the Department proposes placing those loans in forbearance if they are in repayment and stopping collection activity if they are in default. While every effort would be made to identify the group members during the initial group formation stage, in some cases that may not be possible. Any borrower who was not initially identified[18] could opt into the group, however, and would be granted forbearance or stopped collection, as appropriate. The Department would retroactively apply forbearance or stopped collections to the loans of any such borrower, and no other consequences would apply to any borrower that the Department adds to a group after the group's initial formation.

Reasons: Upon its review of all three borrower defense regulations the Department believes it is better to return to allowing group processes, as was permissible for more than two decades under the 1994 regulation and explicitly allowed under the 2016 regulation. The 2019 regulation excluded the ability to conduct a group process on the

[18] It may not be possible to initially identify the full number of borrowers in every potential group due to data limitations. For example, the Department does not have reliable data on program-level enrollment prior to the 2015-16 financial aid award year. That means the Department would not be able to accurately identify all members of a group claim based on enrollment in a specific program prior to that year. In situations where data quality prevents the Department from identifying all group members, for example, the Department would make every effort to identify all members of the group and would reserve the opportunity for individuals who the Department could not initially identify to be included in an opt-in basis.

grounds that each borrower defense claim had to be subject to a highly individualized review. This included requiring a borrower to prove that a misrepresentation was made with the knowledge that the statement was false, deceptive, or misleading, or made with reckless disregard for the truth. It also required the borrower to make an individualized showing of harm. As already discussed under the *Substantial Misrepresentation and Omission of Fact* section, the Department is proposing to remove both of those requirements for a misrepresentation out of concerns that expecting a borrower to prove knowledge of a misrepresentation's falsity or disregard for the truth sets a bar that would be essentially impossible for any reasonable individual to meet because they are not going to have inside knowledge of the way an institution was operating. Similarly, the Department is concerned that the harm documentation as required in the 2019 regulation risks penalizing borrowers for success achieved regardless of their education or to prove a level of employment analysis best reserved for labor economists.

Removing these two components of the definition of a misrepresentation allows the Department to then determine the effects of a misrepresentation across a group of borrowers as opposed to an individual approach. While the Department does not believe that every instance of an alleged type of behavior that may result in an approved

claim should be reviewed for a group of borrowers, the flexibility to do so when appropriate would result in a process that is more efficient for borrowers, institutions, and the Department.

As discussed in the 2016 final regulations, Congress authorized the Department to determine subordinate questions of procedure for borrower defense cases, including but not limited to the scope and nature of alleged acts or omissions that satisfy borrower defense requirements, how to process borrower claims, and whether claims should be heard successively or as a group. See 81 FR at 75965 (generally citing *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)). The Department thus has general authority to adjudicate claims as a group.

The Department believes that, where appropriate, the most efficient way to evaluate borrower defense claims is to jointly adjudicate the claims of similarly situated borrowers that are based on common evidence. This is consistent with how the Department has adjudicated and approved claims to date under the 1994 and 2016 regulations. Considering the applications of similarly situated borrowers as a group rather than reviewing all of them individually allows addressing the conduct that is often pervasive and affects many borrowers at once. At the same time, a group process may benefit the institution by allowing it to present its response to the same allegations

by a group of borrowers once rather than having to respond to numerous individual claims.

The Department is mindful of the privacy of borrowers' financial information. Under these proposed regulations, information about a borrower's individual financial circumstances would not be shared with other borrowers that are part of the group claim. Many negotiators supported the Department's creation of a new group process for considering borrower defenses to repayment claims. They asserted that groups of borrowers who were all subject to the same act or omission by an institution should have their defenses considered as a group, and that a group process would be more efficient and result in more equitable treatment of similarly situated borrowers.

In the 2016 regulations, the Department reserved the sole right to form groups for purposes of borrower defense adjudication. Although the Department welcomed cooperation and information from non-Federal partners, including State attorneys general and legal assistance organizations, the Department did not extend the right to request group formation to these external entities. The Department's recent experience with borrower defense, however, particularly the influx of individual borrower defense applications, has convinced the Department that State partners can provide critical assistance in assessing borrower defense claims. For instance, every set of

approved borrower defense to repayment findings to date except for those at Marinello Schools of Beauty and DeVry University was based at least in part on evidence provided by a State attorney general. The Department has also found that allowing for the formation of a group process without a formal process for applications has led to confusion where States are not told what would be useful information to submit and are not given a timeline for a response. The more structured process would address this confusion and make it easier for the Department to successfully administer the borrower defense program. For these reasons, the Department proposes to create a framework where "State requestors" may request the formation of a group borrower defense claim. This process would allow requestors to share their evidence with the Department. The requestors however would not represent the group in Department proceedings and the Department would retain the sole responsibility to adjudicate the claim.

The Department initially considered allowing legal assistance organizations to also submit a group request and would have referred to this process as a "third-party group request." However, on further consideration, the Department believes that it is best to limit this process to State requestors. The Department has consistently and repeatedly received information from States that played a key role in approving borrower defense applications. This

evidence often comes from multi-year investigations that included the State entity obtaining internal institutional records through its investigatory tools. To date, the investigatory authorities granted to State attorneys general have yielded the type of high-quality evidence that the Department needs to fully evaluate a claim. Limiting this process to State requestors also ensures the Department would administer this process by working with a more limited group of entities. However, nothing in this approach precludes legal assistance organizations from working with State requestors and the Department encourages them to collaborate and share any additional evidence they may possess that could be of use for a group request.

To further ensure the potential effectiveness of group claims, the Department would require that all State requestor group process applications include several items to be considered materially complete. These items include the necessary identifying information to define the group, such as the institution, campus or campuses involved, the time period, and the type of allegation. The Department also proposes requiring that any group application contain evidence beyond sworn borrower statements. While borrower statements are a crucial form of evidence, the Department has found that additional evidence brought by third parties such as training materials, internal communication, statements of former staff of the institution, or evidence

of policies and procedures have been among the most effective ways of demonstrating that conduct was widespread.

In accepting these group claim applications from State requestors, the Department changes the position it took in the 2019 regulation, in which it suggested that State attorneys general should work with their own State authorizing and regulatory entities when they are concerned about an institution rather than coming to the Department. While the Department agrees that State attorneys general should pursue matters within their own States as appropriate, failing to accept evidence that may assist the Department in its own efforts to administer the borrower defense program would be an unnecessary limiting of the triad of the Department, States, and accreditors. While each part of the triad has its own unique area of responsibilities, the whole system is more effective when it engages in collaboration and information sharing; and, it would be a disservice to students, institutions, and taxpayers for the Department to ignore evidence it could easily obtain that would help it make fair and accurate determinations as to the validity of a borrower defense application.

Finally, the Department proposes that any individual claim filed under new § 685.403 that is also part of a group claim be adjudicated with the group claim, to allow

the Department to more easily apply any additional evidence used to form the group to that individual borrower's claim. If the group claim is ultimately denied, individual claims that were included in a group would then be adjudicated as individual claims. Treating an individual claim as part of a group until the group process is concluded ensures that borrowers are not subject to multiple simultaneous processes and the Department believes this approach would give borrowers a greater likelihood of approval.

Evidentiary Standard

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan, except that a borrower may not recover from the Secretary an amount in excess of the amount that the borrower has repaid.

Current Regulations: Under both the 2016 and 2019 borrower defense regulations, the Department uses a preponderance of the evidence evidentiary standard. The 1994 regulations do not include an evidentiary standard.

Proposed Regulations: Under the proposed regulations, the Department would continue the practice in the 2019 and 2016 regulations of using a preponderance of the evidence standard in resolving individual and group borrower defense claims, as set forth in proposed § 685.401(b).

Reasons: The Department believes that it is appropriate to use the preponderance of the evidence standard to adjudicate all borrower defense claims pending or filed after July 1, 2023. The adoption of this standard is consistent with both the 2016 and 2019 regulations, as well as the Department's practice in other proceedings regarding borrower debt issues. See § 34.14(b), (c) (administrative wage garnishment); § 31.7(e) (Federal salary offset). During negotiated rulemaking sessions, the Department proposed to continue using the preponderance standard, and almost all negotiators expressed support for this position. One negotiator believed that the Department should use a stricter clear and convincing evidentiary standard. The Department declined to accept this suggestion as it would be a higher bar than the Department uses for any other similar process, including what is used in the 2016 and 2019 regulations.

Forms of Evidence

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan, except that the borrower may not recover from the Secretary an amount in excess of the amount that the borrower has repaid.

Current Regulations: The 1994 regulations do not specify the types of evidence acceptable to the Secretary in order

to adjudicate a claim. The 2016 and 2019 borrower defense regulations specified some types of evidence that could be considered but did not address whether borrower defense applications themselves (attestations from the affected borrower) would be considered evidence.

Proposed Regulations: As to evidence the Department official might consider in adjudicating a group claim, § 685.406(b)(1) specifically would permit consideration of: evidence submitted as part of the group application; evidence submitted in connection with individual claims that are part of the group; evidence within the Department's possession; evidence or other information from the institution; and other relevant information. The Department official would also consider the group and individual applications as evidence.

Reasons: Under the proposed regulations, the Department would consider information on the application (and other information appended to the application package) as a form of evidence to foster a more uniform and fair adjudication process. Because each borrower defense claim will depend on the circumstances, the Department does not want to provide an explicit list that limits what could constitute evidence. Doing so might inadvertently exclude some type of evidence that is relevant in some applications. Instead, the proposed regulations make clear that the application itself, including the borrower's sworn statement, is a form

of evidence. The proposed regulations also list other items that could be considered evidence, such as information about the institution in the possession of the Secretary that are material to the borrower defense claim, evidence or other information provided by the institution during the institutional response process, and any other relevant information that the Department official may obtain to adjudicate the claim. Using a broader definition of evidence would take any unique circumstances into account and would avoid concerns that prior rules were not sufficiently clear that a borrower's sworn statements are a form of evidence. Borrowers may often have first-hand knowledge of the alleged act or omission, and the information they furnish through a borrower defense application may provide supporting evidence in areas that the Department does not regularly review in a routine program review or audit.

The Department proposes in this NPRM to allow institutions to provide other relevant information for the Department official's consideration during the adjudication of the borrower defense claim, because other information from the institution could help the Department official determine the veracity of the borrower defense claim and to ensure a fair process. The only exception to this process would be for claims approved based upon final Secretarial actions, which are other oversight and enforcement actions

taken by the Department for conduct that also could support a borrower defense claim such as findings in a final program review determination that an institution engaged in misrepresentations, or other actions to fine, limit, suspend, or terminate an institution, and other actions that result in a loss of title IV eligibility. In those cases, the institution would have already had an opportunity to provide its evidence to the Department through the appropriate processes.

Institutional Response Process

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan, except that a borrower may not recover from the Secretary an amount in excess of the amount that the borrower has repaid.

Current Regulations: The 1994 borrower defense regulations do not include a process for an institutional response to a borrower defense claim.

Under the 2016 regulations, the Department designates a Department official to conduct a fact-finding process to adjudicate the borrower defense claim and considers any additional information, including any response or submission from the institution. The Department official notifies the institution of the borrower defense application and of any opportunity for the institution to

respond. Upon request, the Department will provide the borrower any available information about the borrower defense claim (including information that the Department has about the institution).

The 2019 borrower defense regulations at § 685.206(e)(10) contain a more detailed process. Upon receipt of a borrower defense to repayment application, the Department notifies the institution of the pending application and provides the institution with a copy of the borrower's request and any supporting documents, a copy of any evidence otherwise in the possession of the Secretary, and a release of information signed by the student permitting the institution to provide the Department with information from the student's education record relevant to the defense to repayment claim to the institution. The institution is given at least 60 days to respond, and the borrower is given at least 60 days to reply to the institution’s response.

Proposed Regulations: In proposed § 685.405, the Department proposes to continue to provide for an institutional response process but to clarify the role of an institutional response in the adjudication of a borrower’s claim, give institutions more time to respond, and ensure institutional responses are held to the same standards as what is expected of borrowers. Under the proposed regulations, the Department official would notify

the institution of the borrower defense claim, and the institution would have 90 days to respond. With its response, the institution would be required to execute an affidavit confirming that the information contained in the response is true and correct under penalty of perjury, the same requirements that are placed on the borrower's application. If the institution fails to respond, the Department would presume that the institution does not contest the allegations in the borrower defense claim. If the institution has closed, the Department would use the best contact information it has for the former owners or operators to notify the institution of the claim and give it a chance to respond; however, the Department would not continue to notify former owners or operators after repeated instances of nonresponse. As discussed further below, the limitations period would not apply if the Department provided notification to the institution of a claim prior to the end of the limitations period (see *Time Limit for Recovery from Institutions* section).

Reasons: The Department believes it is vital to give institutions an opportunity to respond to allegations in a borrower defense claim. An institutional response would give the Department a more complete record on which to evaluate the borrower's application. At the same, the Department is concerned that prior regulations that included an institutional response process did not provide

sufficient clarity about how the response would factor into the Department's adjudication process. Nor did those prior regulations specify that responses would be held to the same standards as the submission made by the borrower.

To timely adjudicate a claim, the Department proposes to give institutions 90 days to respond. The Department chose to give institutions 30 days beyond what was afforded in the 2019 regulation to align it with the maximum response time afforded to institutions in the program review process. This is a similar situation in which the Department seeks feedback from an institution in response to identified issues with its administration of the Federal financial aid programs. Before issuing a Final Program Review Determination (FPRD), the Department affords institutions an opportunity to respond to the Program Review Report (PRR) in writing within 30 to 90 days (see 6-2 of the 2017 *Program Review Guide*).[19] The program review process bears a lot of similarities to the borrower defense process. In both situations, the Department reviews evidence related to an institution. In the case of borrower defense, this comes from applications by a borrower or State requestor or evidence in the Department's possession. In the case of program reviews, it is based upon the Department's review of the institution's student records, policies, and procedures. For program reviews,

[19]https://fsapartners.ed.gov/sites/default/files/attachments/programrevguide/2017ProgramReviewGuide.pdf.

the Department then seeks a response from the institution to clarify or challenge the findings reached by the Department. The institutional response process here fulfills a similar role in giving the institution an opportunity to review the borrower defense claim and provide its own evidence to the contrary. Accordingly, giving institutions the same amount of time to respond to a borrower defense application that they receive at the maximum for a program review is reasonable. In addition to this initial institutional response, the Department may seek additional information from an institution later if it deems it necessary. The institution would also have a separate opportunity to respond to a claim during any recoupment proceeding.

Process Based on Prior Secretarial Actions

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan, except that a borrower may not recover from the Secretary an amount in excess of the amount that the borrower has repaid.

Current Regulations: The 1994 and 2016 borrower defense regulations do not specifically provide for a process for adjudicating borrower defense claims based on prior Secretarial actions, which are other oversight and enforcement actions taken by the Department for conduct

that also could support a borrower defense claim. These include FPRDs; actions to fine, limit, suspend, or terminate an institution; and other actions that result in a loss of title IV eligibility. The fact-finding adjudication process in § 685.222(e)(3)(i) that is applicable in both sets of regulations includes consideration of Department records, however, which could include prior Secretarial actions, and so these changes make clearer the process for considering prior Secretarial actions rather than adding a new basis for a borrower defense claim.

The 2019 borrower defense regulations, § 685.206(e)(9)(ii), permit the Department to consider information in its possession, which could include prior Secretarial actions, if the institution and the borrower have an opportunity to review the evidence and submit additional evidence.

Proposed Regulations: Proposed § 685.404 would establish a process by which the Department could consider prior final Secretarial actions against an institution in the context of determining whether to form and approve a group borrower defense claim. Such final action could include a FPRD or final audit determination (FAD); an institution's failure to meet the administrative capability requirements that relate to the provision of educational services; an institution's loss of eligibility due to, for example, a

high cohort default rate (CDR); a fine, limitation, suspension, or emergency action relating to an institution's misrepresentation or aggressive recruitment; or other final Departmental actions. Because any action the Department would consider in this context is already "final," the institution would not have another opportunity to provide an additional response to the allegations, beyond the ample opportunities already afforded it in the prior context, before the Department makes a decision on the group claim.

Reasons: The Department conducts a significant amount of oversight and compliance work to ensure compliance by institutions with various accountability provisions in the HEA. Some of these actions may uncover or relate to acts or omissions that also would provide a basis approving borrower defense claims. These oversight and compliance processes include multiple opportunities for institutions to appeal or challenge the findings. In the context of a program review, for example, an institution may respond to program review findings before the Department issues a final determination. Similarly, institutions have options for appealing actions to fine them or otherwise limit, suspend, or terminate their participation in the Federal student aid programs.

The Department proposes in § 685.404 to codify a process that better integrates such oversight and

compliance work with borrower defense adjudication, by allowing findings generated in the course of other Departmental action to directly lead to the approval of borrower defense claims. Doing so minimizes duplication of work for the agency as well as the need for the institution to respond multiple times to the same set of findings. For example, if an FPRD or FAD reveals that an institution misrepresented job placement rates to students in a particular program, the Department may use those FPRD or FAD findings to form a group and eventually grant borrower defense discharges to affected borrowers assuming the findings also give the Department grounds to presume reasonable reliance for the members of the group. In the case of findings based upon a FPRD or FAD, the institution will have already had opportunities to respond to the findings before they are final, as well as appeal any liabilities to the Office of Hearings and Appeals as well as the Secretary. Because of those existing response and appeal opportunities the institution would not be given an additional opportunity to respond during the adjudication process.

Note that the group process determination is distinct from the process of collecting the amount of discharged loans from an institution, which is discussed below. If the Department initiated an action to collect the amount of the discharged loans from the institution, the institution

would have the opportunity to explain why it should not be liable. As also noted below, an institution would only be subject to a recoupment action if the claim would have been approved under the borrower defense regulation in place at the time the loans that are being approved were disbursed. That means an institution would not be subject to a recoupment action for loans disbursed prior to July 1, 2023, under this section unless those claims also would have been approved under the 1994, 2016, or 2019 regulations, as applicable.

Record Retention

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. Moreover, Section 443 of GEPA (20 U.S.C. 1232f) provides that each recipient of Federal funds under a Department program is required to keep records that disclose "the amount and disposition of those funds," and to "maintain such records for three years after the completion of the activity for which the funds are used.

Current Regulations: The three sets of borrower defense regulations are silent as to record retention periods, but since all the loan programs eligible for borrower defense claims are derived from title IV regulations, the record retention regulations for purposes of title IV apply. This

means an institution must retain certain records related to the management of its financial aid program in accordance with the timeframes prescribed in § 668.24, which is generally three years unless otherwise directed by the Secretary.[20] The same provision also contemplates longer retention periods, as appropriate, for all records involved in any loan, claim, or expenditure questioned in connection with a title IV, HEA audit. Any such records must be retained until the later of the record retention period or until the questioned claim has been resolved.

Proposed Regulations: The Department does not propose new record retention periods.

Reasons: The Department believes that existing record retention provisions are adequate. During negotiated rulemaking, some negotiators expressed concern about whether the three-year retention requirement in § 668.24 was compatible with the potentially longer timeframes contemplated for borrowers to submit borrower defense claims. Negotiators were concerned that, if an institution no longer has access to student records, it might be unable to adequately defend itself from a borrower defense claim.

Current regulations establish a minimum for records retention, not a maximum period. And, the Secretary has

[20] As provided in 20 U.S.C. 1232f, each recipient of Federal funds under a Department program is required to keep records that disclose "the amount and disposition of those funds," and to "maintain such records for three years after the completion of the activity for which the funds are used."

the discretion to order a longer time as appropriate. In circumstances involving open claims, moreover, the regulations require institutions to retain records until the claim is resolved.

Moreover, the records affected by the three-year limitations period are unlikely to be the most relevant records to a defense to repayment claim. To date, approved defense to repayment claims have centered on evidence related to institutional promises made to borrowers about the ability to transfer credits or obtain a job, or how many former students were successfully placed. The records supporting these types of claims would likely be based on administrative training manuals, marketing materials, call logs between admissions representative and borrowers, internal secret shopping programs, and other centralized documentation rather than the financial aid records of individual borrowers which are covered by § 668.24.

Other elements of the proposed regulations would protect institutions from concerns about a lack of relevant records to respond to a borrower's claim. First, institutions would not be subject to any recoupment activity not related to a Federal or State judgment that occurs outside of the 6-year limitations period, which is discussed elsewhere in this NPRM. That means the institution would be aware of any claim for which it might have to repay the Department within 6 years after the

borrower's last attendance at the institution. Because institutions would receive formal notification of the claims against them through the institutional response process, they would be informed about the effects of the tolling of the limitations period. This formal notification would provide institutions with sufficient notice to retain pertinent records while protecting taxpayers and the Department's ability to recuperate funds from an institution.

Second, as noted elsewhere in this document, the Department would not conduct a recoupment process against an institution for any claims approved under this regulation that would not have been approved by the relevant borrower defense regulation that was in place at the time the loans associated with the approved claim were disbursed. That further limits the likelihood that the lack of relevant records would result in financial consequences for the institution.

Borrower Status During Adjudication

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. Furthermore, Section 432(a)(6) of the HEA authorizes the Secretary to enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption (settlement and compromise authority).

Current Regulations: When a borrower files a borrower defense claim, the 1994 and 2016 regulations in § 685.222(e), and the 2019 borrower defense regulations in § 685.206(e)(8), provide for forbearance on any of the borrower's nondefaulted loans that are associated with the borrower defense claim. The 1994 and 2016 regulations, in addition, cease collection activity on defaulted loans that are associated with the borrower defense claim. The 2019 regulations do not include a pause on collections activity for defaulted loans on which a borrower has submitted a defense to repayment application.

Proposed Regulations: Proposed §§ 685.402(d)(2) and 685.403(c)(3) would provide that, during adjudication of a borrower defense claim, all of the borrower's title IV nondefaulted loans would be placed in forbearance and all title IV loans in default would be placed in stopped

collection status, regardless of whether they are associated with the borrower defense claim.

Reasons: The proposal to pause all a borrower's loans instead of just those associated with the claim would align the regulations with the practice the Department has used for borrowers who apply for other types of discharges or forgiveness that have been in place for years without material consequences. While the 2016 and 2019 regulations only require the Department to pause loans associated with the borrower defense claim, the Department has found that there are significant issues with data accuracy related to who owned different institutions at various points in time, as well as ensuring that enrollment and loan data align. Servicers would also have to manually pause relevant loans, adding another opportunity for error. The Department can ensure it only discharges appropriate loans when approving claims because doing so requires an individualized review of a borrower's loans, but it is concerned that doing such a review on the front end would take significant time that would be better spent on the review and adjudication of the borrower's claim. Pausing all loans thus reduces the likelihood of errors that would harm a borrower and allows the Department to devote its resources to rendering timely decisions on applications.

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. It is also possible that a borrower would file a defense to repayment claim that pertains to some but not all of the loans underlying in a Federal Direct Consolidation Loan, in which case there is no way to offer borrowers a partial pause pertaining only to the loans related to the borrower defense claim. Placing all of a borrower's loans in forbearance or stopped collection status would allow the Department to automate the adjudication process more easily.

The Department recognizes that any interest-free pause for a borrower with an individual claim increases the cost to the Government in the form of foregone payments and interest accumulation. At the same time, the Department is concerned that borrowers with potentially valid claims may be dissuaded from applying for borrower defense because they are concerned about how much interest could accumulate during the months, if not years, it takes to review a claim. Implementing in the regulation a benefit it has already been providing to cease interest accrual after an individual claim has been pending for a set period balances the increased costs to the Government from pausing interest with the concerns about dissuading potentially strong claims. Allowing interest to accumulate for some time would provide an incentive for borrowers to file strong claims but not face overly punitive consequences if the

Department needs multiple years to decide a claim. Providing such a benefit also minimizes the amount of harm a borrower may suffer from the time their claim is pending.

Under current practice, the Department ceases interest accrual once a claim has been pending for one year. In § 685.403 the Department proposes to reduce this time to 180 days from the initial grant of forbearance or stopped collections for an individual borrower if the Department does not make a determination on the borrower defense claim within that timeframe. This practice also helps institutions with approved claims because it means any ultimate liability would not also include months or years' worth of additional interest. The Department believes the 180-day period is appropriate because it is concerned that making all borrowers face a year of interest accumulation could be too strong a disincentive for a borrower to file an application for fear of the potential added interest costs. The Department also believes this time frame is appropriate because it anticipates it could need multiple years at least at first to review a pending claim and a borrower would thus face less potential harm from the Department's own administrative limitations. The Department chose 180 days because the Department does not believe it would be reasonable to charge interest on a borrower's loans for the entirety of the time needed to

review a claim, which could be longer than a year depending on the complexities.

To avoid accruing interest during adjudication, individual borrowers would have the option to decline forbearance and continue making payments, including making payment through an income-driven repayment plan or, for borrowers in default, declining the stopped collection on those defaulted loans and making voluntary payments to rehabilitate a defaulted loan. Borrowers who decline the forbearance or pause on collections would also continue normal interest accumulation policies. The Department believes it is critical to build in advantageous treatment of borrowers' Federal student loans during adjudication, while also giving borrowers the choice to decline ceased payment options, so that borrowers do not forego filing a borrower defense claim for fear of facing higher accrued interest after adjudication.

Unlike individual borrowers, identifiable borrowers who are covered by group claims would have their loans placed in an interest-free forbearance or stopped collections activity, as applicable, upon group formation. The Department believes it is appropriate to also provide these borrowers an opt-out forbearance upon group formation because it does not want borrowers to have to continue to make payments in situations where a claim might be approved and a borrower would then receive a discharge. This also

ensures that a borrower currently in repayment would not fall into delinquency or default while the Department is reviewing the group claim. The Department proposes different treatment for these borrowers in a group claim as to interest accumulation, because it would be pausing the loans of someone who had not applied for borrower defense and thus not been presented with a choice to pause their loan payments and interest. The Department is concerned that it would unfairly harm borrowers if it paused a borrower in a group's loans without also ceasing interest accumulation. Ceasing interest accumulation for these borrowers immediately thus ensures the Department does not cause a borrower's loan balance to grow when they have not explicitly asked to be removed from active repayment. This treatment of group claims also reduces the potential ultimate liability for an institution if the group claim is approved. Were the Department to continue to allow interest to accrue, then the total cost of a full or partial discharge, and any resulting liability, would be larger.

Timelines to Adjudicate

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan.

Current Regulations: None of the current borrower defense regulations imposes a timeline for adjudicating a borrower defense claim.

Proposed Regulations: Proposed § 685.406 includes timelines for adjudicating borrower defense claims. Group claims formed in response to a State requestor would be adjudicated within two years of the point at which the Department notified the State requestor that it would be forming the requested group. Individual claims would be adjudicated within 3 years from the submission of a materially complete application package. These adjudication timelines, however, would not apply to a reconsideration request or an additional review under a State law standard. A borrower who submitted an individual claim that was then included in a group claim that was only partially approved or denied would have their 3-year timeline paused while the group claim is under consideration. The timeline for reviewing that individual borrower's application would not have any effect on the timeline for adjudicating the group claim. Under the proposed regulations, the Department would commit to providing interim updates one year after the commencement of the adjudication, with expected timelines. The Department's failure to render a decision by the end of the timeline would render the loans unenforceable. An institution would not face a recoupment action for the cost

of a loan being deemed unenforceable under this requirement because it would not be viewed as having received an approved borrower defense claim.

When an individual claim is subsequently included in a group process, the processing timeline for that individual claim would convert to the group timeline. The individual adjudication timeline and notification requirements would pause until the group claim is resolved.

Reasons: The Department is concerned that in the past, borrowers have not received decisions on their borrower defense application in a timely fashion. While properly reviewing the evidence around a borrower defense application is not something that can happen immediately, the Department believes it is important to provide clearer expectations for borrowers about how long it may take to process their claim.

Many negotiators strongly supported the Department's proposal to codify adjudication timelines in the regulations. The proposed regulation generally imposes a two-year timeline to adjudicate a borrower defense claim under a group process, and a 3-year timeframe for an individual claim. The Department chose two years for group processes because this is customarily the time it takes to conduct a program review. This two-year adjudication period would be separate from the decision whether to form the group, which could take up to one year, thus giving

group claims the same overall 3-year period afforded to individual claims. Individual claims would be subject to a longer adjudication timeframe because they may include case-specific research on the merits.

Timelines and the progress update after one year would give borrowers greater confidence that their defense to repayment claims are receiving prompt and serious review. The proposed timelines also make clear, however, that thorough review of a claim cannot be achieved in a few weeks. Finally, to hold itself accountable and give institutions some closure during the adjudication process, the Department would forego collection actions against an institution if the Department does not meet adjudication deadlines. The Department would forgo recoupment in this situation because the borrower would not have an approved borrower defense to repayment claim and thus there is no borrower defense liability to seek from the institution.

The Department recognizes that failing to decide a claim within the set period would increase costs for the Government. The Department's goal is that this provision would never result in any added costs because it will continue to engage in regular and thorough reviews of borrower defense claims.

The Department proposes to toll the adjudication timeline and notifications requirements for individual claims that are included in a group process so that a

borrower is not subject to two separate review timelines. The Department believes that group processes would generally be better for borrowers as they are likely to be supported by additional evidence, including potential submissions from third parties. If a group claim is denied, then the borrower's claim would be considered separately and the pause on the adjudication timelines and notification requirements would end.

Process to Adjudicate Borrower Defense Claims

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan except that in no event may a borrower recover from the Secretary more than the borrower repaid.

Current Regulations: The 1994 regulations establish that borrowers may assert a defense to repayment during proceedings which are available to the borrower when the Department initiates certain collection actions on a Direct Loan. The 2016 regulations in § 685.222(e), (f), (g), and (h) establish the general procedures to adjudicate a borrower defense claim based on whether the claim was an individual claim, group claim in an open school, or a group claim in a closed school.

The 2019 regulations at § 685.206(e)(9) provide the consideration of the order of objections and of evidence in

possession of the Secretary to adjudicate a borrower defense claim.

Proposed Regulations: Under proposed § 685.406(a) through (d), the Department would adjudicate the borrower defense claim in accordance with these subsections. If the claim is a group claim, under proposed § 685.406(b), the Department official considers evidence related to the claim, materials in the group application, individual claims that were part of the group, evidence within the Department's possession, and evidence or other information from the institution as well as any other relevant information. In adjudicating the group, the rebuttable presumption would be that everyone in the group was affected. Under proposed § 685.406(c), the Department official adjudicates an individual claim based on the information available to the official. The Department official considers materials in the individual application, evidence within the Department's possession, evidence or other information from the institution as well as any other relevant information. Finally, under proposed § 685.406(d), if the Department official requires additional information in order to adjudicate the claim, an institution must respond to a Department official's request within 90 days of the request and an individual must respond within a reasonable timeframe.

Reasons: During negotiated rulemaking, the Committee discussed the general process to adjudicate borrower defense claims. The Department proposes to codify the general process to adjudicate the borrower defense claim based on whether it is a group claim or an individual claim to make it clear that the Department would adjudicate the borrower defense claim. In both a group or individual claim, in general, the Department official considers evidence within the Department's custody and other relevant information in order to adjudicate the claim. This is a streamlined approach compared to the 2019 regulations, which included both an initial institutional response and an additional required round of borrower responses to whatever materials the institution sends the Department. See 34 CFR 685.206(e)(10). Because adjudication of a borrower defense claim is an administrative proceeding, and not a judicial proceeding that generally affords parties rights to cross-examination, the Department proposes that upon receipt of an application and an institutional response (if any), the Department should immediately begin adjudicating the borrower defense claim.

Should the Department official require information from the institution, the Department proposes to give the institution 90 days to respond. The Department believes this is an adequate timeframe for response while promoting expeditious adjudication of the borrower defense claim.

After a program review is conducted and, for example, the Department generally affords institutions 30 days to respond to a Department request for information prior to the Department's issuance of a Program Review Report.

Decision Letters

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan.

Current Regulations: The 1994 and 2016 regulations in § 685.222 establish that, after adjudication, the Department issues a written decision approving or denying the claim. The Department official's written decision is final as to both the claim and any relief granted.

The 2019 regulations at § 685.206(e)(11) require the Secretary to issue a written decision informing both the borrower and the institution of the decision and its basis, as well as the relief provided to the borrower, if any. Under § 685.206(e)(13), the Department official's decision is final.

Proposed Regulations: Under proposed § 685.406(e), the Department would issue a written decision on the outcome of an adjudication. If the Department official approves some or all of the borrower defense claim, the written decision would reflect the discharge amount and that the borrower's loans associated with the claim would be placed in, or

continue in, an interest-free forbearance until the Secretary discharges some portion or all of the loans. If the Department official denies the borrower defense claim, the written decision would include the reasons for the denial, the evidence relied upon, the loans that are due and payable to the Department or that would return to the loan's prior status, and the timeframe by which the Department's collection action would resume (90 days). The written decision also would describe the process for the borrower to request reconsideration of the decision. The written decision would be made available to an individual or member of a group and, to the extent practicable, the institution.

Reasons: During negotiated rulemaking, some negotiators recommended that the regulations require more specificity in communication to borrowers, citing court cases that expressed concern with the information provided in the Department's communications in the past. The Department agrees that decision letters should provide sufficient information to borrowers so they can understand the decision and make an informed decision about whether to pursue reconsideration of their claims. As set forth above, proposed § 685.406(e) outlines the information that would be provided in the Department's written decision letters, including the reasons for the decision, its effective date, and information about next steps, including

reconsideration where applicable. The Department believes giving borrowers this information would ensure that borrowers have the details to decide their next steps, including a request for reconsideration, while balancing the Department's need to keep borrowers informed and resolve claims in a timely manner. The Department also believes its proposed 90-day period before resuming collections provides borrowers adequate time to return to repayment or to request reconsideration as discussed in the *Reconsideration* section.

Borrower Cooperation & Transfer of Recovery Rights

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan and that in no event may a borrower recover from the Secretary an amount in excess of the amount the borrower repaid on their Direct Loan.

Current Regulations: The 1994 regulations do not address borrower cooperation and the transfer of a borrower's recovery rights to the Secretary. The 2016 regulations in section 685.222(j) establish that the borrower must reasonably cooperate with the Secretary in a borrower defense proceeding. Section 685.222(k) provide that borrowers transfer to the Secretary their rights to recover from a third-party.

The 2019 regulations at section 685.206(e)(14) establish that the Secretary may revoke any relief granted to a borrower who refuses to cooperate with the Secretary, and those regulations provide a non-exhaustive list of what cooperation could entail. Section 685.206(e)(15) provides that borrowers transfer to the Secretary the borrower's rights to recover from a third-party.

Proposed Regulations: Under proposed § 685.410, a borrower would be required to reasonably cooperate with the Secretary in any proceeding under subpart H. Under proposed § 685.411, the borrower would be deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the contract for educational services for which the loan was received, against the school, its principals, its affiliates, and their successors, its sureties, and any private fund.

Reasons: When a borrower files a borrower defense claim, the Department would require the borrower's cooperation to determine the facts of the claim and provide the institution with due process, as appropriate. Absent this cooperation, the Department could be unable to successfully resolve the borrower's request for relief. Rather than specifying what would constitute cooperation, as was done in the 2019 regulations, the Department believes a general

statement requiring reasonable borrower cooperation would be wholly sufficient. As discussed in the preamble to the 2019 regulations, the Department defined cooperation to include (but was not limited to) providing testimony regarding any representation made by the borrower to support a borrower defense claim and producing, within timeframes established by the Secretary, any documentation available to the borrower. The Department argued that the regulatory text would help to ensure that the Department receives the borrower's cooperation in any proceedings against the institution. See 83 FR 37263, July 31, 2018. The Department now disagrees that defining cooperation would assist the Secretary in recovering from the institution. Just as borrower defense claims are adjudicated on their own merits, the Department can also assess whether the borrower cooperates based on the circumstances of the case. Accordingly, the Department need not be prescriptive on what constitutes cooperation.

The HEA clearly articulates that in no event may a borrower recover from the Secretary an amount in excess that the borrower has repaid. For the Department to ensure compliance with this statutory provision, it is necessary that these proposed regulations contain a provision to prevent double recovery from the Federal Government. Although the 2016 and 2019 regulations allow the Secretary to reinstate a borrower's obligation to repay for amounts

that the borrower received relief from a claim made to a third-party (e.g.: a borrower successfully receives funds from a State tuition recovery fund), the Department is convinced that this provision is no longer necessary. In the borrower defense application, the Department asks the borrower to attest to any attempts made to recover from a third-party, and asking this question upfront adequately protects the Federal Government from a borrower seeking double recovery. In the Department's experience, after the borrower defense claim is approved and the case is considered closed, it is nearly impossible to determine if a borrower made a claim to a third-party. Therefore, the Department believes its proposal serves a twofold purpose: it requires borrower cooperation and preserves its right to recover from third parties to mitigate loss to the Federal taxpayer investment.

Borrower Defense to Repayment Post-Adjudication--Reconsideration Process

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan except that in no event may a borrower recover from the Secretary more than the borrower repaid.

Current Regulations: Some of the Department's borrower

defense regulations provide for a reconsideration process. The 1994 and 2016 regulations in § 685.222(e)(4) and (5) make reconsideration available for borrower defense claims denied wholly or in part, based on new evidence, and provide that the Secretary can reopen a borrower defense application at any time to consider evidence that was not considered in making the previous decision. The 2019 regulations in § 685.206(e)(13) provide that the Department's written decision is the final decision of the Department and is not subject to appeal within the Department. There is, thus, no reconsideration process under the 2019 regulation.

Proposed Regulations: Proposed § 685.407 sets forth the circumstances under which a borrower may seek reconsideration of a Department official's decision on their borrower defense claim. The Department official's written notice would be final, but if the borrower's claim is denied in full or in part, that individual borrower or, for a group claim, a State requestor, would be able to request reconsideration. Permissible bases for a reconsideration request would be limited to administrative or technical errors; the availability of new evidence; or a request by the borrower (for an individual claim) or a State requestor (for a group claim) for reconsideration under a State law standard.

While individuals would be able to request reconsideration of their claims, for group claims the Department proposes to limit requests for reconsideration to State requestors, which would include a State, a State attorney general, or a State regulatory agency. Individual members of the group would not be able to request reconsideration on behalf of the entire group or for any individual borrower.

An individual borrower who is part of a group that is denied in full or in part would not be able to seek reconsideration until they received a final decision from the Department official on a separate individual application. If the individual had not already done so before group formation, the individual could submit an individual borrower defense application in accordance with § 685.403 after a final decision from the Department official that resulted in a full or partial group denial.

Group reconsideration requests could be made for the same reasons as an individual request, but a request for reconsideration under State law would require additional documentation, including an analysis of the applicable State law standard and why it would lead to an approved borrower defense claim. Any reconsideration request, whether from an individual or on behalf of a group, must be made no later than 90 days from the date of the Department official's written decision.

To adjudicate a reconsideration request, the Department would designate a different Department official than the official who conducted the initial adjudication. When the reconsideration request is received, the borrower or group members would be placed in forbearance or stopped collections. The Department would have the option to request an additional response from the institution under the same procedures as described in new § 685.405. There would be no set timeline for the Department to issue a decision on a reconsideration request.

Finally, in new § 685.407(f)(1) the Secretary would be able to reopen at any time a borrower defense application that was partially or fully denied.

Reasons: The Department expects that borrowers or State requestors would include their best available evidence at the time that they file their original claims. Additional evidence may become available at a later time, however, especially from ongoing investigations by State attorneys general and other entities. The Department is also cognizant that if it made an error in its review of the claim, the borrower should have a method for asking that error to be addressed by the agency instead of needing to go to court to challenge the denial.

Allowing a reconsideration process is a change from what the Department concluded in the 2019 regulation, in which it said all decisions would be final. It took that

position partly out of concerns about resources to adjudicate claims and concerns about borrowers seeking repeated opportunities to have a claim be approved.

Upon further consideration and further experience adjudicating claims, the Department disagrees with the conclusions reached in the 2019 regulation. We believe the specific instances in which a borrower could seek reconsideration would limit the ability to ask for the same allegations to be reviewed repeatedly. Instead, they would be receiving a second look at their application when additional evidence suggested it, when they could demonstrate an error that the Department should correct, or when they wish to have a review under a different standard than the one originally used by the Department.

The Department acknowledges that allowing for a reconsideration process would be more work for the staff that reviews borrower defense applications, but it believes that the benefits from permitting this approach on net outweigh its exclusion. Without a reconsideration process the Department would risk having to address errors made in decisions through court proceedings rather than a second review. Litigation is more resource-consuming for the Department than reconsideration, and reconsideration is also more efficient and less expensive for borrowers. The Department also believes the ability to move all claims under a single upfront Federal standard would provide very

significant operational simplification and consistency in decision-making that would on net make the program easier to administer.

Allowing for a reconsideration process is consistent with other positions taken by the Department in the past. As explained in the 2016 final regulations, the Department believes it is important to allow a borrower to submit new evidence that he or she may have only recently acquired. The Department acknowledged that there should also be finality in the borrower defense process as well. See 81 FR at 75963. Providing a pathway for borrowers to have their borrower defense claim reconsidered, under the limited circumstances set forth in § 685.407, brings the borrower closer to finality in their borrower defense claim and such reconsideration process within the Department's borrower defense framework mitigates the need for complex litigation through the court system. In addition, as part of establishing a single consistent set of rules that apply regardless of when a borrower's loans were disbursed, the Department is proposing to allow all borrowers to request reconsideration based on State law to reflect the standard in the 1994 regulations. As noted earlier in this NPRM, one of the Department's goals is to provide a single upfront Federal standard for reviewing all claims pending and received after the effective date of this regulation's final rule. To accomplish that, the Department must ensure

that no borrower is presented with a narrower standard under the proposed rule than what they would have had under the prior regulation that would have previously applied to their claim. Including the State standard thus ensures that no one whose claim would have been originally subject to the 1994 regulation is worse off. The Department is proposing to make this option available to all borrowers, including not just those who would have been covered by the 1994 regulation. The Department is doing so because of concerns that varying reconsideration treatment by the disbursement date of the loan results in a process that is overly confusing for the borrower and is more administratively complex to administer. While providing the State law option to more borrowers adds some administrative burden, the Department believes that burden is more than offset by the efficiencies gained from the upfront review process.

The Department believes that limiting the reconsideration process to new evidence, administrative errors, or State law review would result in only looking at an application for the second time when there might be a meaningful difference that could change the outcome of the first review. While it takes additional Department resources to implement this reconsideration process, the Department believes that is more efficient than needing to

review an entirely new application or engaging with the borrower in the court system.

The Department believes that providing an opportunity for individual claimants or State requestors to request reconsideration would expedite final adjudication of a borrower defense claim. Non-Federal negotiators initially proposed that State law standards be included in the initial adjudication, as one element of the Federal standard. The Department believes such an upfront analysis would be unduly burdensome and delay the ability to provide relief to borrowers. Adjudication under a State law standard could yield the same outcome as under the Federal standard but would require additional time for the Department to analyze the State law in question. Reserving State law reviews for reconsideration after a full or partial denial ensures that they are conducted only when there is a possibility that the State law standard could yield a better result for the borrower than the Federal standard.

The Department considered and rejected the proposal to allow an individual borrower that is part of a group claim to request reconsideration of a claim under a State law standard on behalf of the group. The Department believes State partners, such as State attorneys general, would be the most knowledgeable about their respective State laws. State attorneys general are charged with enforcing the laws

of their states and in some states regulating pursuant to those laws. In these roles they are the foremost parties to interpret and enforce State statute and regulation. They would also be the ones who furnished the evidence and request that led to the initial approval of the group. These entities also are recognized to have the authority to represent the residents of their States in certain circumstances. Moreover, a State requestor's analysis of their own State law could be considered persuasive authority on that State's standard. The Department does not believe the same conditions apply to an individual. And while an individual could produce high-quality analyses of State laws, their analyses would not be entitled to the same persuasive status. Accordingly, an individual borrower who wants to seek reconsideration would have to do so on their own behalf when they have a decision rendered on their individual claim. The Department believes an individual application is the proper route for these borrowers because it is possible that an individual who is part of a group may have stronger evidence related just to themselves than what the Department has for the group of borrowers. This approach allows the Department to consider that individual evidence. The Department also believes that the work required of the borrower to provide their own individualized allegations in this situation will would yield more useful information to review.

The Department determined that giving borrowers 90 days to seek reconsideration--and keeping loan repayment and collection activity paused during that time--provides a sufficient balance for borrowers to make a thorough decision about whether to seek reconsideration without allowing their loans to be paused indefinitely. Pausing Department loan collection activity to allow time to seek reconsideration is similar to the Department's process in debt collection proceedings, such as administrative wage garnishment under § 488A of the HEA. There, collection activity does not commence if the borrower has requested a pre-offset hearing to review the existence or amount of the debt (analogous to a reconsideration request here). See 34 CFR 32.10. In this regulatory package the Department is also trying to ensure a consistent time period for borrowers to act if their initial applications for discharge on various programs or qualifying payment counts for Public Service Loan Forgiveness are denied, and the Department believes a consistent 90-day standard would result in consistent procedures for the Department.

Finally, in new § 685.407(f)(1) the Department proposes limiting when the Secretary may reopen a borrower defense application. We propose that the Secretary only be allowed to reopen a borrower defense application that was partially or fully denied. Although this should be a rarely used provision, limiting the Secretary's ability to

reopen cases only when there was a full or partial denial lessens the disadvantage to the borrower; for borrower defense claims that receive full approval, these borrowers can be assured that there would be finality to their cases. Thus, a borrower only stands to benefit from the Secretary reopening a borrower defense application that was fully or partially denied.

Amounts to be Discharged/Determination of Discharge

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan except that in no event may a borrower recover from the Secretary an amount in excess of the amount the borrower has repaid.

Current Regulations: Section 685.212 establishes the general conditions under which the Department discharges a borrower's obligation to repay a loan, or a portion of a loan, under various discharge provisions of the HEA, including borrower defense to repayment.

The 1994 and 2016 regulations in § 685.222(i) provide that the borrower may be granted full, partial, or no discharge. In general, to determine the amount of relief, the Department issued examples in Appendix A to part 685, subpart B, but also, when calculating discharge for a group, can consider information derived from a sample of borrowers from the group. Any discharge cannot exceed the

amount of the loan and is reduced by the amount of any refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation, compromise, or any other financial benefit received by, or on behalf of, the borrower that was related to the borrower defense. Nonpecuniary damages, such as inconvenience, aggravation, emotional distress, or punitive damages, are not part of the Department's calculation of harm nor the relief provided.

The 2019 regulations in § 685.206(e)(12) state that the Department determines the amount of relief, which is limited to the monetary loss the borrower incurred as a consequence of a misrepresentation. In determining the amount to be discharged, the Department considers the borrower's application, which includes information about any payments received by the borrower, such as funds from State judgments that the borrower is expected to put toward their loans, and the financial harm alleged by the borrower.

Proposed Regulations: The Department proposes applying a rebuttable presumption that the borrower or group of borrowers with an approved claim should receive a full discharge of the loans they received for attendance at the institution that is the subject of the claim, unless a preponderance of the evidence demonstrates that the

discharge should be a lower amount and one of three specific criteria is met.

The three criteria proposed for use by Department staff when recommending other than full discharge are:

1. Where the harm to the borrower resulted from an action that is easily quantifiable, such as failing to provide promised supplies or materials that have a fair market value of $200 or less.

2. When the basis for approval of the borrower defense claim is based entirely on actions that did not involve promises by the institution about educational outcomes or the quality of educational services delivered.

3. Where an institution provides false or inaccurate data unrelated to educational outcomes (for example, relating to the test scores or grade point averages of incoming students) to an organization that produces widely recognized rankings of institutions or programs, resulting in a ranking higher than what that institution or its program's true position should be.

The proposed regulations provide examples of the limited circumstances under which that presumption would be rebutted. These circumstances would include situations where the misconduct that resulted in an approved borrower defense claim relates to an easily quantifiable sum, such as the cost of a free supplies kit that was promised and not delivered; substantial misrepresentations, substantial

omissions, breaches of contract, or aggressive recruitment that do not relate to the education delivered by the institution or the outcomes of such education; or substantial misrepresentations related to widely recognized rankings of institutions or programs as a result of the submission of false data not relating to the outcomes of the education.

Under proposed § 685.408, for an approved claim not receiving a full discharge, the Department official would recommend to the Secretary a discharge amount for a borrower or group of borrowers. All borrowers within an approved group claim would receive the same recommended discharge, either in amount or as a percentage of their loans. In cases where the presumption of full relief is rebutted, the Department official would recommend the alternative amount, which may be an amount equal to the full harm suffered by borrowers if such sum is easily quantifiable, or 50 percent of the outstanding loan balance of the loans associated with the borrower defense claim if the amount of harm is not easily quantifiable. Although the Department official determines the amount of the discharge, the Secretary renders the final decision on the discharge based on the Department official's recommendation and the records available.

Reasons: The Department proposes that an approved borrower defense to repayment claim should result in relief equal to

the lesser of the full amount of harm to the borrower or the full amount of the Federal student loans covered by their claim, including amounts previously paid. We recognize that there may be circumstances in which the financial harm experienced by a borrower is less than the amount of a full loan discharge. The Department believes the circumstances in which a borrower has an approved claim but receives a partial discharge would be limited.

In moving to the presumption of full discharge except for specific circumstances, the Department is changing the position it took with respect to discharge amounts in the 2019 regulation. As discussed in the section concerning the standards for misrepresentation, the Department is concerned that the 2019 rule's requirement for a borrower to demonstrate individual harm and the standards associated with that proposal could have the unintended consequence of providing lesser amounts of relief for a borrower who succeeded despite their program. For instance, connecting relief amounts to periods of unemployment that appear to not be attributable to local or national labor market conditions, or considering the borrower's effort to find a job could result in no relief for a borrower who did manage to find employment despite no assistance from the institution, even as otherwise similar borrowers receive larger assistance. The Department is also concerned that the criteria for considering harm in the 2019 regulation

are overly subjective or confusing. The Department is not equipped to pass judgment on the quality of a borrower's search for employment, and the 2019 rule is insufficiently clear as to how the Department should factor underlying labor market conditions into the way it then calculates harm. The Department is concerned that such ambiguity could lead to inconsistent determinations of discharge amounts.

In removing the requirement for individualized harm determinations, the Department is also changing its position to allow it to pursue group borrower defense claims, as was explicitly authorized in the 2016 regulation and permissible under the 1994 one. For group claims, the Department believes that awarding the same percentage or dollar amount of relief to all similarly situated borrowers would be appropriate. Given that the concept underlying the group claim is that borrowers were subject to the same substantial misrepresentations, substantial omissions, breaches of contract, aggressive recruitment, or judgments or Department actions the Department is concerned that trying to then establish separate relief determinations for those borrowers would risk inconsistent determinations that would treat similarly situated borrowers differently.

When it comes to determining the amount of a discharge, the Department is cognizant that it can only make judgments about the value of an institution or

program, not its quality, and that the amount of any relief cannot exceed the full amount of the loan balance and any amounts previously paid. The Department is also concerned that when past regulations were less specific about how to determine the proper amount of a discharge the Department ended up using formulas that resulted in borrowers receiving lesser amounts of a discharge than they should have, including mathematical impossibilities such as requiring average earnings for a group of borrowers to be below $0.

The Department believes that the clearer framework proposed in these regulations would result in consistent decision-making and a clearer process for the Department to decide not only when a partial discharge may be appropriate, but also how to calculate such a discharge.

This framework would replace the methods for determining the discharge amount that existed under the prior three borrower defense regulations. However, the Department believes that the rebuttable presumption of full discharge and the clearer structure around partial discharges means that no borrower whose claim was pending or filed after the effective date of the regulations would be worse off than they would have been under the regulation that would previously have covered their claim based on their loans' disbursement date. Relatedly, the Department would ensure that institutions are not subject to a

recoupment effort from a claim that would not have been approved under the regulation that would otherwise have been applied to the claim based upon the loan's disbursement date. This consideration would also apply to the discharge amounts in that if the claim would have been approved under a prior regulation but for a lower amount than is approved under this regulation then the institution would not be subject to the higher recoupment amount.

The move to a rebuttable presumption of a full discharge is a change from the 2019 regulation, but not a change in practice from the relief provided on borrower defense approvals to date. As of May 2022, all approved borrower defense discharges have been for full discharges. There were some approved claims that were initially subjected to two different partial relief formulas issued by the previous administration, but both formulas were challenged in court. The previous Administration withdrew the first formula, and this Administration withdrew the second out of concern that it was not accurately using data and was resulting in insufficient relief for borrowers who were harmed.

The Department believes a rebuttable presumption of a full discharge would address the past problems around properly determining the amount of discharges for approved claims. It addresses the concerns the Department has about inconsistent decision-making for similarly situated

borrowers. It also acknowledges that the act of calculating a specific level of harm for a borrower is a challenging task that prior efforts by the Department to address have resulted in legal challenges. The proposed list of instances in which a partial discharge may be appropriate also captures what the Department anticipates the likeliest instances in which a partial discharge may provide the most appropriate amount of relief for a borrower even without this framework.

The proposed regulations include principles and examples of how to calculate a partial discharge amount. The Department anticipates that the examples would guide initial decisions as the Department reviews discharge amounts for approved claims.

In proposing a framework that addresses the challenges with determining harm and strives for consistency in decision-making, the Department identified three specific circumstances that it believes should merit consideration for a partial discharge. The Department identified these three circumstances based upon allegations it has seen in claims, as well as public reports of instances where colleges have engaged in high-profile misrepresentations. The first is where the harm to the borrower is easily quantifiable, such as failing to provide promised supplies or materials that have a fair market value of a clear dollar amount. The Department believes this situation

would make sense for a partial discharge because the harm is easily calculable and thus the concerns about inconsistency of decision-making and the use of flawed formulas would not apply.

The second circumstance is when approval of the borrower defense claim is based entirely on actions that did not involve promises by the institution about educational outcomes or the quality of educational services delivered. This would apply, for example, when an institution misrepresents the profile of its incoming class, but the classroom instruction and the outcomes of that instruction match what was otherwise anticipated and marketed. The Department proposes to highlight this type of action as a candidate for partial discharge because, while it is reasonable to expect a student to enroll based upon the false statements, those statements did not affect the value of the education that was delivered or the outcomes that students experienced.

The second partial discharge circumstance would not apply to statements made solely in the institution's marketing materials if they pertain to program outcomes. That is, materially false statements about the institution's rates of completion, passage rate on examinations necessary for licensure, or job placement would not rebut the presumption of full discharge because it is reasonable to believe a borrower or borrowers would

have relied on those false statements and would not have achieved the inflated outcomes presented. For the same reason, misrepresentations in marketing materials about the educational services delivered also would not rebut the presumption of full discharge. For instance, evidence that an institution promised its classes in a nursing program would all be taught by registered nurses when in fact none of the instructors were would lead to an approved borrower defense claim with the presumption of full discharge because students were enticed to enroll and take out a loan and the institution failed to provide the advertised instruction.

The third circumstance in which the presumption of a full discharge could be rebutted is where an institution provides false or inaccurate data unrelated to educational outcomes, such as inflated test scores or grade point averages of incoming students, to an organization that produces widely recognized rankings of institutions or programs, resulting in a ranking higher than what that institution or its program's true position should be. The Department is concerned about repeated instances in which institutions have submitted false data to major national rankings organizations, resulting in schools or programs given unfairly high rankings for several years. But the Department believes that the harm caused to the borrower by relying upon such a marginally inflated ranking does not

rise to the level of a full discharge. Many of the institutions or programs that have engaged in such behavior would have been highly ranked otherwise, still reject far more students than they accept, and have not been subject to allegations of low program quality or other misrepresentations that would support a claim for full discharge. Under these circumstances, partial relief could be appropriate.

Past borrower defense regulations have cited additional examples of partial relief that the Department does not include here because it does not believe they would result in an approved borrower defense claim. One example was where an institution claimed to have an award-winning professor, but that individual was on sabbatical while the borrower enrolled, or the individual had left the school and the marketing materials remained outdated. The Department does not contemplate any discharge for such a situation in the proposed regulations, because we do not believe it is reasonable to assume that the borrower would be guaranteed a space in the professor's class or relied on the particular misrepresentation, the presence of a specific professor, to their detriment when deciding to enroll and take out a student loan.

Instances where the Department official rebuts the presumption of a full discharge also would require a determination of the partial discharge amount a borrower or

group of borrowers should receive. This amount may be expressed in dollar or percentage terms, depending on the harm experienced by the borrower or group of borrowers. For example, a breach of contract with an easy-to-calculate effect on the borrower might be expressed as a set dollar amount for all borrowers, while a more complex instance could be expressed as a share of the loan amount. The Department also recognizes that there could be situations in which the level of harm is not clear. This could include instances where the Department official may need to make judgments about the value of educational services delivered that are too difficult to define and quantify. In situations where the Department is not able to calculate the value of the education, the Department proposes borrowers receive a discharge equal to 50 percent of the loan associated with the borrower defense claim. The Department chose this threshold because it evenly divides the uncertainty of quantifying the harm between the taxpayer and the borrower after the Department has determined that the presumption of a full discharge has been rebutted. A borrower would then have an option to ask for reconsideration of this amount and furnish different information that might support a higher discharge amount. The Department seeks feedback on its proposal for borrowers to receive a discharge equal to 50 percent of the loan associated with the borrower defense claim in situations

where the Department is unable to calculate the value of the education.

To clarify how partial and full discharges would be considered under the proposed regulations, the Department offers in this preamble the following examples:

1. A school represents in its marketing materials or in an enrollment contract that students will receive a supplies kit as part of their enrollment that has a value of $150. A student chooses that program instead of a comparably priced program that does not provide the supplies kit. The institution ends up charging the borrower for the supply kit instead of providing it for free. The Department does not find any other basis for a discharge.

Adjudication result: The borrower should have an approved borrower defense claim with a discharge amount of $150. The institution breached its contract with the student. However, the harm from the breach of contract is clearly calculable because it stemmed from the cost of a specific item that did not carry significant value.

2. An individual wishes to enroll in a highly selective graduate program. The school gives inflated data to a school ranking organization regarding the 25th and 75th percentile scores on the GRE of recent entrants and includes those inflated data in its own marketing materials. These inflated data raise the place of the

program in the ranking organization's published rankings. Degrees from the program continue to serve as an effective, well-regarded credential.

Adjudication outcome: The borrower should receive no discharge or a minimal discharge. The institution made a false statement that a borrower reasonably could have relied upon to choose that program instead of another one that is similarly ranked. However, it was made to an organization that publishes widely recognized rankings and primarily concerned false data not related to the outcomes of the education. The Department official would rebut the presumption of full discharge. The exact amount of the discharge would depend on a few factors. One would be the program’s inflated ranking versus what should have been its accurate ranking, which may be ascertained by looking at its ranking prior to the provision of inflated data. If the program still would have been among similarly ranked programs with accurate data with no other evidence that the education delivered is different than what was promised, then the Department official would likely recommend no discharge due to a lack of evidence that the reliance upon the misrepresentation was to the detriment of the borrower. They attended a highly ranked and highly selective program and programs in that category can move around in annual rankings anyway. If the inflated data significantly raised

the program’s rank then a small discharge may be appropriate.

3. An individual wishes to enroll in a highly selective graduate program. The school gives significantly inflated data to a school ranking organization regarding the rate at which its graduates obtain jobs. These inflated data raise the program’s rank in the organization's publications. The institution features both the inflated placement rate data and the inflated ranking data in a national ad campaign and in its marketing materials.

Adjudication outcome: The borrower should receive a full discharge. The institution misrepresented the employability of graduates in a program, which is a key factor under consideration for students, who often cite getting a job as one of the primary goals of an education. Even though the institution reported the falsified data to a national ranking organization, it also featured that data in marketing materials. As a result, if the claim is approved the Department official would be unlikely to rebut the presumption of a full discharge.

Related examples: The same analysis would apply to misrepresentations with significantly inflated data related to the rate at which students passed required examinations to obtain State licensure, the rate at which students

complete the program, earnings of graduates, or other indicators that speak to the outcomes of the education.

4. A school represents to prospective students, in widely disseminated materials, that their educational program will lead to employment in an occupation that requires State licensure. The program does not, in fact, meet minimum education requirements in any State to enable its graduates to sit for the exam necessary for them to obtain licensure.

Adjudication outcome: Borrowers should receive a full discharge. As a result of the school's misrepresentation, the borrowers cannot work in the occupation in which they reasonably expected to work when they enrolled. Accordingly, borrowers received limited or no value from this educational program.

Related examples: A similar analysis would apply if the institution had said it would provide required internships, clinicals, or externships that were not in fact provided to the students because this affects students' ability to work in the fields for which they are trained. Borrowers would have similar outcomes if a law school lacks accreditation by the American Bar Association (ABA) and fails to inform students that the lack of such accreditation means that they cannot sit for the bar exam in specific States or omits the fact that only a small fraction of graduates of the institution passes the bar exam in the limited number

of States in which a student may take that exam without graduating from an ABA accredited law school.

5. A school states to a prospective student that all of the faculty in its nursing program are nurses or physicians. The borrower enrolls in the program in reliance on that statement. In fact, none of the program's teachers, other than the director, is a nurse or physician. The teachers at the school are not qualified to teach medical assisting and the student is not qualified for medical assistant jobs based on the education received at the school.

Adjudication outcome: The borrower should receive a full discharge. None of the program's teachers have the promised qualifications. In contrast to reasonable students' expectations, based on information provided by the school, the typical borrower received no value from the program.

6. A school represents in its marketing materials that three of its undergraduate faculty members in a particular program have received the highest award in their field. A borrower choosing among two comparable, selective programs enrolls in that program in reliance on the representation about its faculty. However, although the program otherwise remains the same, the school had failed to update the marketing materials to reflect the fact that the award-winning faculty had left the school.

Adjudication outcome: The borrower's claim would not be approved. Although the institution made a misrepresentation to the borrower and should update its marketing materials, it is unreasonable to presume that a borrower would have relied upon this misrepresentation to enroll. The mere presence of award-winning faculty on a university's staff does not guarantee that the borrower would have been able to take classes from them. Many universities employ well-known faculty who have minimal teaching responsibilities. A student may have ultimately not chosen to major in the field in which the instructor teaches or the class might have had limited enrollment.

7. An individual interested in becoming a registered nurse meets with a school's admissions counselor, who explains that the school does not have a nursing program, but incorrectly states that completion of a medical assisting program is a prerequisite for any nursing program. Based on this information, the borrower enrolls in the school's medical assisting program rather than searching for another nursing program, believing that completing a medical assisting program is a necessary step toward becoming a nurse. After one year in the program, the borrower realizes that it is not necessary to become a medical assistant before entering a nursing program.

Appropriate relief: This borrower should receive a full discharge. Because it is not necessary to become a medical

assistant prior to entering a nursing program, the borrower has made no progress toward the career they sought, and in fact has received an education that cannot be used for its intended purpose.

In all of the above scenarios, the discharge recommendation reached by the Department official would be presented to the Secretary, who would choose whether to accept, reject, or modify the Department official's recommendation. The Department seeks feedback on these examples of the discharge recommendation reached by the Department official.

Borrower Defense to Repayment–Recovery from Institutions

Statute: Section 455(h) of the HEA authorizes the Secretary to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. Section 454(a)(3) of the HEA requires the institution to accept responsibility and financial liability stemming from its failure to perform the functions set forth in its program participation agreement--the document institutions must sign to participate in the Federal financial aid programs where they agree to abide by the rules and requirements governing the programs.

Current Regulations: Under § 685.206(e)(16), the 2019 regulation provides that Secretary uses the procedures under 34 CFR part 668 subpart G to collect the amount of a

discharged loan associated with an approved borrower defense claim from an institution for loans first disbursed on or after July 1, 2020. In 2017, the Department codified the process for the Secretary to initiate recovery proceedings through the Office of Hearings and Appeals (OHA), primarily through its regulations at § 668.87. See 82 FR 6253, January 17, 2017. Under this section, claims under either the 1994 or 2016 regulations are presented to a hearing official who renders a decision on both the approval of the claim(s) and the establishment of any resulting liability for the institution.

Proposed Regulations: The Department proposes to remove § 668.87 in its entirety. In its place, the Department proposes to include in proposed § 685.409 a general framework under which the Department would attempt to recover from institutions the amounts that the Secretary discharges for both individual and group borrower defense claims and to leverage the procedures already in place at part 668, subpart H, which govern how the Department pursues liabilities related to program reviews. The Department would have the option to forego recovery proceedings under these proposed regulations in situations such as where the cost of collecting would be more than the amount to recover or recovery would be outside of the six-year limitations period.

Newly proposed § 668.100 in subpart G to part 668 would make clear that, if any part of the proposed regulations is held invalid by a court, the remainder would still be in effect.

Reasons: The Department proposes to separate the process of reviewing and approving borrower defense applications from the recoupment process. As part of that change, the Department would handle the process of recoupment through the same existing procedures we currently use to assess program review liabilities. This means institutions would not have to go through a process they might be less familiar with to address liabilities from borrower defense.

The Department is concerned that the requirements in § 668.87 that connect the review and potential approval of group borrower defense applications directly to recoupment proceedings is out of keeping with the Department's practices for other similar discharge programs and could result in extensive delays in resolving group claims. Under § 668.87, the approval of a group claim and the establishment of the institutional liability stemming from it are connected through a single process that is conducted before a hearing official. The Department is concerned that such an approach conflates two different concerns--the interaction between the Department and the borrower and the interaction between the Department and the institution. For instance, the processes for discharges related to

closed schools or false certification have separate mechanisms for approving discharges for borrowers and then seeking any recoupment from an institution. This ensures that borrowers are able to receive the assistance they are guaranteed under the Higher Education Act while also preserving the due process rights of institutions, which can take months if not years to fully exhaust. The connected processes in § 668.87 have the added disadvantage of creating an entirely new and separate process for group claims that is different from any other process for assessing a liability than institutions currently face.

Instead of using the procedures in § 668.87, the Department proposes to recover from institutions the amounts discharged for group claims as outlined in the program review process[21] authorized under §§ 498 and 498A of the HEA. This includes the procedures for institutions to respond to the allegations to establish a liability against the institution. The institution could then contest the liability through the procedures laid out in that section. Consistent with those procedures, the Department would generate a Program Review Report (PRR) based upon the evidence in its possession, evidence from borrower defense applications, any institutional response, any other relevant information, and the amounts that the Secretary

[21] For an overview of the program review process, please see the 2017 Program Review Guide for Institutions: https://fsapartners.ed.gov/sites/default/files/attachments/programrevguide/2017ProgramReviewGuide.pdf.

discharged. This PRR would include a liability amount. The set of procedures for contesting liabilities through program reviews is long-established and many institutions will be familiar with this method. It includes ample opportunities for responding to the liability, as well as a process for contesting the liability through the Office of Hearings and Appeals, appealing to the Secretary, and then going to Federal district court. As a result, institutions will would not have to learn a new process.

The suggested approach better balances the interests of borrower defense claimants, the Department, taxpayers, and institutions than the current structure of § 668.87. Borrower defense claimants would receive faster answers on group applications by having the Department conduct its review process separate from recoupment. Taxpayers and the Department would still preserve a process for seeking recoupment for liabilities from an institution. And the institution would be subject to a familiar, long-established process that already affords significant due process rights before a liability can become final.

In establishing this process, the Department also recognizes that there may be circumstances where recovery is not feasible. Institutions would only face recoupment for conduct that would have been approved under the regulation that governed the conduct at the time it occurred in the amount that would have been granted under

that regulation. In other words, for loans first disbursed in 2018 that are part of an approved claim, the institution would only face a recoupment action if the claim would have been approved under the 2016 regulation. And, if the claim would have resulted in a partial discharge under the prior regulation but received a full discharge under these proposed rules, then the Department would only seek recoupment for the partial amount. If the claim would have been approved under the 1994, 2016, or 2019 regulations, however, the Department would seek recoupment under the applicable regulation.

The Department also proposes that it would have the option to not seek recoupment in circumstances where doing so would not make financial sense, such as where the cost of collecting on the claim would exceed the amount of the claim. The Department would also not seek to recoup on a claim that falls outside the six-year limitations period. Finally, the Department believes that each of the proposed provisions discussed in this NPRM serves one or more important, related, but distinct, purposes. Each of the requirements provides value to students, prospective students, and their families; to the public, taxpayers, and the Government; and to institutions separate from, and in addition to, the value provided by the other requirements. To best serve these purposes, we would include this administrative provision in the regulations to make clear

that the regulations are designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision should not affect the remainder of the provisions.

Time Limit for Recovery from the Institution

Statute: Section 454(a)(3) of the HEA provides that the institution accepts responsibility and financial liability stemming from the institution's failure to perform its functions pursuant to its program participation agreement.

Current Regulations: For loans first disbursed on or after July 1, 2020, § 685.206(e)(16) provides that Secretary may initiate a proceeding to collect the amount of a discharged loan associated with an approved borrower defense claim from an institution within 5 years of the final determination to approve the claim. This applies to loans disbursed on or after July 1, 2020.

Under § 685.222(e)(7), the 2016 regulation provides that the Secretary may initiate a proceeding to collect the amount of a discharge loan associated with an approved borrower defense claim within 6 years of when the borrower discovers or could have reasonably discovered a substantial misrepresentation or 6 years of when the institution breached its contract with the student, or at any point for a claim approved due to a judgment. The 6-year limit does not apply if at any point during that time the institution is notified of the claim by the borrower, a representative

of the borrower or the Department; a class action complaint; or written notice from a Federal or State agency with the ability to investigate the institution for issues that could relate to a borrower defense claim.

For loans first disbursed before July 1, 2017, the 1994 regulations in § 685.206(c) provide that the Secretary may initiate recovery proceedings that align with the record retention period, unless the institution did not receive notice of the claim during that period.

Proposed Regulations: Under proposed § 685.409(c), the Department would adopt a six-year limitations period to recover the amount of borrower discharge from the institution for loans disbursed on or after July 1, 2023. This period would start on the date the institution reported that the borrower graduated or withdrew or at any time if the act or omission was a judgment against an institution. The Department proposes the six-year limit would not apply if during that period the institution received notice of the claim from the Department; a class action lawsuit; or written notice from a Federal or State agency with the ability to investigate the institution for issues that could relate to a borrower defense claim. These time limits would apply for both individual and group claims. The Department official's notification to the institution of a borrower defense claim before the end of the limitations period would toll the 6-year limitations

period.

Reasons: The Department believes it is critical for it to use the authority granted to it by Congress in Sec. 454(a)(3) of the HEA to recoup the cost of approved borrower defense claims from institutions rather than having taxpayers bear all the expenses. To do so, the Department proposes to create a framework for recouping from institutions the cost of discharges associated with an approved borrower defense claim for loans disbursed on or after July 1, 2023, that is similar to what was included in the 2016 regulation, but with a simpler way of measuring the length of the time during which the Department could seek to recoup.

During negotiated rulemaking, some negotiators expressed concern about the lack of a limitations period for borrowers to file claims, which they believed could pose significant difficulties for institutions that may be financially liable for approved claims. The Department believes that the proposed notice of claims and limitations period on recoupment provides adequate protection for institutions while preserving financial remedies for the Department. The Department proposes to shift away from a time limit on recoupment tied from the date of the final determination as was used in the 2019 regulation to one from the date the institution reported that the borrower graduated or withdrew. The 2019 rule's approach worked

within its overall framework because there was an overall limit that required claims to be submitted within 3 years of a borrower's last date of attendance at the institution. Because the Department is proposing to remove that limitations period the Department does not believe a date tied to when the claim is approved would be appropriate since that could mean seeking to recoup from an institution for an approved claim that relates to behavior from many years earlier. The Department also considered the structure used in the 2016 regulation of basing the time period on when a borrower knew or could have known about a misrepresentation or when the institution breached the contract.

The Department, however, is concerned that it would be very difficult to properly establish such a date because it would require working with the borrower to ascertain the appropriate date or otherwise inferring one from instances such as public filing of lawsuits. Moreover, because the Department is not proposing a limitations period for the borrower, the question of when the borrower became aware of the misrepresentation or the breach of contract occurred become less relevant for the borrower. Accordingly, the Department believes that using a period tied to the last date of the borrower's attendance at the institution would be simpler to administer and for the institution to track and follow.

The Department believes having a defined limitations period for recoupment from institutions is important. By law, many Federal enforcement and collection actions are subject to a defined limitation period. 28 U.S.C. 2462, for example, provides a five-year limitation period for certain Federal enforcement, fine, and forfeiture actions. The 2019 regulations also incorporate a five-year limitations period against institutions. The Department reviewed various States' limitations periods for consumer protection claims. Some States have a limitations period for claims relating to consumer protection that is six years long. This includes States such as Maine (14 M.R.S. § 752), Minnesota (Minn. Stat. § 541.05), and New Jersey (N.J.S.A. 2A:14-1). Given the different uses of a five- or six-year limitations period, the Department seeks feedback on which period would be better to use for borrower defense recoupment proceedings.

While the limitations period generally restricts how long after a given date the Department may initiate a recoupment action, the Department believes that period should be suspended when the institution receives formal notice of the allegations related to the claim. Such notice would make the institution aware of the issue and the possibility of related action, essentially alleviating the concerns that a limitations period is meant to address. Receiving such formal notice would result in the

institution needing to maintain relevant records and thus addresses any concerns about institutions no longer retaining any relevant records. The Department proposes to define formal notice that could cause the limitations period to no longer apply as: being notified by the Department of borrower defense claims; a class action complaint asserting relief for a class that may include the borrower and that may form the basis of a borrower defense claim; or written notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower, for underlying facts that may form the basis of a borrower defense claim. Including class actions and written notice tied to investigations captures major instances in which an institution would be made aware that there is alleged conduct that could relate to a borrower defense claim. Moreover, both of those processes also require the institution to maintain records, which avoids the concerns about lacking sufficient information to respond to older allegations.

The Department also proposes that the limitations period should not apply to Department actions to recoup claims approved as a result of a judgment. As we reasoned in the 2016 NPRM, the availability of evidence for a borrower

defense that is based on a judgment in a court or administrative tribunal is not a concern, as the only evidence required is the judgment itself. In that NPRM, we proposed no limitations period. See 81 FR 39344. We therefore find it compelling to adopt a similar approach of no limitations period for judgments against an institution.

2. Pre-Dispute Arbitration Agreements--General Background:

In 2016, the Department amended the Direct Loan Program regulations in § 685.300 to condition an institution's participation in the Direct Loan Program on its PPA not to utilize pre-dispute mandatory arbitration agreements or class action waivers that (1) are related to the making of a Direct Loan or the provision of educational services for which the Direct Loan was provided, and (2) could form the basis of borrower defense claims. This limitation was consistent with the HEA, which allows institutions to participate in the Federal Direct Loan program and allow their students to borrow funds through that program, subject to certain terms and conditions. In 2019, the Department removed the prohibition of mandatory pre-dispute arbitration and class action waivers from the regulations and instead provided that institutions that required borrowers to sign a mandatory pre-dispute arbitration agreement or class action waiver as a condition of enrollment to make plain language disclosures about the use

of such agreements. The Department argued that disclosures about institutions' use of these agreements would allow students to make informed decisions about their enrollment (see 84 FR 49879).

Pre-dispute Arbitration Agreements and Class Action Waivers

Statute: Section 454 of the HEA authorizes the Secretary to impose conditions on institutions that wish to participate in the Direct Loan Program. Institutions that participate in the Direct Loan Program must enter into a PPA with the Department. 20 U.S.C. 1087d. Section 454(a)(6) of the HEA authorizes the Secretary to include in that PPA "provisions as the Secretary determines are necessary to protect the interest of the United States and to promote the purposes of" the Direct Loan Program.

Current Regulations: If institutions use a pre-dispute mandatory arbitration agreement or class action waiver, they are required to make disclosures and issue notices to borrowers about the terms and conditions of those agreements.

Specifically, in § 668.41(h) institutions are required to disclose information about these agreements in a plain language disclosure, available to enrolled and prospective students and to the public, on the institution's website where admissions and tuition and fees information are made available. Further, in § 685.304(a)(6)(xiii) through (x)(v) institutions must include in their required entrance

counseling information on the institution's internal dispute resolution process and who the borrower may contact regarding a dispute related to educational services for which the Direct Loan was made. Institutions are required to review with the student borrower the pre-dispute arbitration or class action waiver agreement and when it will apply, how to enter into the process and who to contact with questions.

Proposed Regulations: The Department proposes to prohibit the use of mandatory arbitration or class action waivers as discussed below. Under the proposed rules at § 685.300(d), as part of the PPA, each institution would have to agree, as a condition of participating in the Direct Loan Program, that it will not require students to use an internal dispute resolution process before the student pursues a borrower defense claim. As proposed, this provision would apply to all PPAs executed after the rule is effective.

In addition, in proposed § 685.300(e), under the PPA, institutions would be prohibited from relying on a mandatory pre-dispute arbitration agreement, or any other mandatory pre-dispute agreement with a student who obtained or benefitted from a Direct Loan, in any aspect of a class action related to a borrower defense claim, until the presiding court rules that the case cannot proceed as a class action. The proposed regulations include a non-exhaustive list of what would constitute reliance on a

mandatory pre-dispute arbitration agreement with respect to a class action, including seeking dismissal, deferral, or stay of a class action; excluding a person or persons from joining a class action; avoiding discovery; and/or filing an arbitration claim. Finally, the Department proposes to require that certain provisions regarding class action bans be included in any agreement with a student who receives a Direct Loan to attend the school or who for whom a Direct PLUS Loan was obtained.

Proposed § 685.300(f) would provide that, as part of the PPA, the institution would agree that it will not enter into a mandatory pre-dispute arbitration agreement to arbitrate a borrower defense claim or rely in any way on a pre-dispute arbitration agreement with respect to any aspect of a borrower defense claim. The proposed regulations include a non-exhaustive list of what would constitute reliance on a pre-dispute arbitration agreement, including seeking dismissal, deferral, or stay of a judicial action; avoiding discovery; and/or filing an arbitration claim. Finally, the Department proposes to require that certain provisions relating to notices and the terms of the pre-dispute arbitration agreements be included in any agreement with a student who receives a Direct Loan to attend the school or for whom a Direct PLUS Loan was obtained.

Under the proposed rules at § 685.300(g) and (h), institutions would be required to submit certain arbitral records and judicial records connected with any borrower defense claim filed against the school to the Secretary by certain deadlines. The Department would maintain a centralized database of these records that would be accessible to the public.

Finally, the proposed rules at § 685.300(i) provide a general definitions section. This includes a revised definition of "borrower defense claim" that maintains congruence with definitions elsewhere in the title IV regulations. The Department achieves this by cross-referencing the definition of "borrower defense claims" as defined in the 1994, 2016, 2019, and new subpart D to part 685.

Reasons: These proposed regulations would add limitations pertaining to arbitration and class action waivers. Section 454(a)(6) of the HEA authorizes the Secretary to include in the PPA "provisions as the Secretary determines are necessary to protect the interest of the United States and to promote the purposes of" the Direct Loan Program. From compliance reviews, reports from the public, and a review of institutions' enrollment agreements, the Department has seen instances when institutions have compelled borrowers to arbitrate a borrower defense claim, required an internal dispute process prior to filing a

borrower defense claim, and prohibited a class of affected borrowers from filing borrower defense claims. These restrictive provisions in students' enrollment agreements stymie a borrower's ability to fully reap the rights and benefits of the Direct Loan Program by hindering their rights to pursue a borrower defense claim or unduly delaying when a borrower defense claim was filed or could be filed. As discussed in the 2016 NPRM (see 81 FR 39381), for these Direct Loans to be repayable, the loans must be enforceable obligations of borrowers. Acts and omissions that give rise for a borrower to assert a defense to repayment frustrate the purposes of the Direct Loan Program--financing students' postsecondary expenses and obtaining repayment. Mandatory pre-dispute arbitration agreements and class action waivers further impede borrowers' ability to file borrower defense claims and receive appropriate relief and discharges. Absent these proposed regulations, borrowers in distress would likely default, institutions would be insulated from recovery actions, and the risk and liabilities would be transferred to the Federal taxpayer. For these reasons, these proposed regulations would protect the interests of the United States for borrower defense claims asserted on Direct Loans, while ensuring the successful financing of postsecondary education by providing loans repayable by current recipients of this Federal public benefit.

In the preamble of the NPRM published on June 16, 2016, we described the concerns regarding mandatory arbitration and class action waiver requirements. 81 FR at 39380-86. The preamble to the June 16, 2016, NPRM described how Corinthian Colleges used the mandatory arbitration and class action waiver provisions in its student enrollment agreements to shift the cost of its misrepresentations from the company to the Federal taxpayers. 81 FR at 39382-83. Moreover, the NPRM noted that there was a lack of transparency both to students and the public regarding the outcome of arbitrations, the results of which are generally not public. See generally 81 FR at 39381-85. The 2019 regulations took a different approach and concluded that the general Federal policy in favor of arbitration outweighed the particular issues of mandatory arbitration and class action waivers in the context of the Department's Federal student financial aid programs.

The Department has taken another look at mandatory arbitration and class action waiver requirements as they relate to the Federal Direct Loan Program. The Department reviewed both the 2016 NPRM and the 2019 final rule. The Department has determined that the lack of information for students cited in the 2016 NPRM remains a concern and makes it extremely difficult for current and prospective students to judge the potential burdens and risks they are assuming

when they choose to attend an institution that includes mandatory arbitration and class action waivers in its enrollment agreement.

The 2019 regulations removed the restrictions on the use of mandatory arbitration agreements and class action waivers, based on the general Federal policy in favor of arbitration and a view that arbitration is generally less costly for the parties and results in more timely resolutions. The Department specifically cited the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and Congress' disapproval of regulations issued by the Consumer Financial Protection Bureau that would have limited mandatory arbitration and class action waivers. See 84 FR at 49839-40.

Both the 2016 and 2019 regulations note that the Federal Arbitration Act (FAA) reflects the Federal policy favoring arbitration. In issuing the 2016 regulations, the Department specifically acknowledged that the agency lacks "the authority, and does not propose, to displace or diminish the effect of the FAA." 81 FR at 76023. The Department also specifically noted that the 2016 rule "does not invalidate any arbitration agreement, whether already in existence or obtained in the future." *Id.* Instead, the 2016 regulations conditioned an institution's future participation in the Federal Direct Loan Program on its agreement not to impose mandatory arbitration and class

action waiver requirements relating to borrower defense claims on borrowers of Federal Direct Loans. As noted by the District Court in *California Ass'n of Private Postsecondary Sch. v. DeVos*, 436 F. Supp. 3d 333, 344 (D.D.C. 2020), *vacated as moot,* No. 20-5080, (D.C. Cir. Oct. 14, 2020), "if a school wants to participate in a federal program and to benefit from the many billions of dollars that the United States distributes in Direct Loans every year, it must agree to abide by the conditions that the Secretary reasonably determines are necessary to protect the public and the integrity of the program."[22] In that case, the court concluded that the Department's 2016 regulations were consistent with the Secretary's authority under the HEA and did not conflict with the FAA.

The 2019 regulations permit institutions to include pre-dispute arbitration agreements or class action waivers in enrollment agreements with their students or in other documents that must be signed by the student as a condition of enrollment. The student often has little or no say in the selection of the arbitrator, the choice of venue, or the ability to appeal, among other factors.

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[22] We note that regulations issued by the U.S. Department of Health and Human Services in 2019, which barred health care facilities participating in the Medicare and Medicaid programs from requiring residents to agree to binding arbitration as a condition for admission, were similarly upheld based on the agency's authority to condition participation in those programs. *Northport Health Servs. of Arkansas v. U.S. Dep't of Health and Human Servs.*, 14 F.4th 856, 866-69 (8th Cir. 2021).

As the court cases above demonstrate, the decision reflected in the 2019 regulations to permit institutions to include these required provisions was based on an incorrect understanding of the interplay between the HEA and the FAA and the mistaken conclusion that the FAA undercut the policy reflected in the 2016 regulations. The 2019 regulations also failed to adequately balance the costs and benefits of arbitration, focusing too heavily on the conclusion that arbitration provides speedier results and failing to take into account the protection of the interests of the United States, whose funds are at stake for borrower defense claims asserted on Federal Direct Loans.

As discussed in the preamble of both the 2016 and 2019 regulations, there have been a variety of studies regarding the relative costs and benefits of arbitration versus litigation, with mixed conclusions. 81 FR 31982 (2016 NPRM); 84 FR at 49841-49844 (2019 Final Rule). Moreover, no study the Department is aware of has addressed arbitration in the context of higher education and student loans. Therefore, in proposing regulations regarding arbitration and class actions in the borrower defense context, the Department is relying on its experience in the student loan area. As discussed in depth in the preamble to the 2016 NPRM, 81 FR at 39382-83, the Department's experience with Corinthian Colleges and other institutions

demonstrates that, had class actions been permitted, borrowers may have been able to directly pursue relief from the institution rather than relying on recovery from the Federal taxpayer through borrower defense discharges of their student loans. The impediment to class actions and the institutions' ability to force students into arbitration removed a significant deterrent threat. When students have the option to pursue class action relief, they have the chance to recover compensation for the damages they may have suffered, including the costs related to their loans.

Moreover, we note that, to prevent double recovery, and as discussed more fully in the *Borrower Cooperation & Transfer of Recovery Rights* section of this NPRM, Sec. 455(h) of the HEA provides that in no event may a borrower recover from the Secretary relief in excess of the amount such borrower has repaid on their Direct Loan.

The Department also is concerned that the use of arbitration clauses or class action waivers in enrollment agreements would stifle students' ability to bring complaints to the attention of oversight bodies, leaving taxpayers to assume the financial risk if those borrowers fail to repay their loans. As discussed in the 2016 NPRM, 81 FR at 39380, agreements that bar relief by class action lawsuits remove the financial risk to an institution because the institution is insulated from the acts or

omissions that gave rise to the borrower defense claim for which the taxpayers would assume the losses associated with the discharge. Moreover, class action waivers could impede borrowers from obtaining compensatory relief for themselves and further prevent borrowers from obtaining injunctive relief to compel an institution, in a timely manner, to desist from the conduct that caused them injury and could continue to cause other borrowers, injury in the future. Class action waivers effectively allow an institution to perpetuate misconduct with much less risk of adverse financial consequences than if the institution could be held accountable in a class action lawsuit. 81 FR at 39382.

As discussed in the 2016 NPRM, Corinthian Colleges included explicit class action waiver provisions in enrollment agreements, and used those, with mandatory pre-dispute arbitration clauses, to resist class actions by students. Suits brought against Corinthian Colleges were dismissed, and taxpayers were left to assume the financial losses resulting from the institution's misconduct. 81 FR at 39383.

The Department reiterates its 2016 position that regulating institutions' use of these agreements is necessary to "protect the interests of the United States and to promote the purposes" of the Direct Loan Program under § 454(a)(6) of the HEA, 20 U.S.C. 1087d(a)(6). 81 FR at 76022. By using these agreements, institutions could

evade accountability, curtail borrowers' rights to bring a borrower defense claim to the Department, and leave the Federal taxpayer on the hook for the institution's misconduct.

Another issue that impedes the Department's oversight of institutions' use of these mandatory arbitration agreements is that arbitral records are often shielded from public view. Borrowers and prospective students are unable to access records reflecting the outcomes of arbitration proceedings and their potential impact on the borrower's enrollment at the institution, as these records are not required to be made available publicly. Prospective students may not be able to make informed choices about their decision to attend a postsecondary institution or obtain a Direct Loan without public knowledge of these arbitration and judicial records. The opacity of these arbitral records under current regulations also weakens the Department's ability to exercise oversight over institutions and to "protect the interests of the United States," by hampering the Department's ability to identify patterns of abuse and wrongdoings and take appropriate corrective action. Moreover, allowing arbitration but requiring notice to the Department when such arbitration was initiated undermines the deterrent effect that these proposed regulations would have: to prevent and discourage

institutions' wrongdoing upfront, rather than waiting until an institution engages in wrongdoing.

We note that the prohibition on institutions' use of mandatory arbitration and class action waiver provisions regarding borrower defense claims in their enrollment agreements was in effect between July 1, 2017, and July 1, 2020. At no time during that period or during the negotiated rulemaking hearings or committee meetings that preceded this NPRM did institutions identify any significant problems or issues from removing such provisions from their student agreements or otherwise complying with the regulations. On the other hand, since issuance of the 2019 regulations, the Department has heard from borrowers, advocates representing students, State attorneys general, and the public about problems stemming from these mandatory pre-dispute arbitration agreements and class action waivers and the lack of transparency regarding arbitral records. Collectively, these constituency groups highlighted the difficulties these agreements or class action waivers present in bringing a lawsuit based on the type of institutional conduct that would give rise to a borrower defense claim, as well as concerns that institutions may try to use internal dispute processes to dissuade the filing of a borrower defense claim.

In light of the constituency groups' concerns that institutions foreclosed on borrowers' right to bring a

lawsuit and created challenges to filing a borrower defense claim, the Department revived the issues surrounding pre-dispute arbitration agreements and class action waivers. During the negotiated rulemaking sessions, the Department proposed to prohibit institutions that participate in the Direct Loan program from obtaining, through the use of contractual provisions or other agreements, a pre-dispute agreement for arbitration to resolve claims brought by a borrower against the institution that could form the basis of a borrower defense claim. The Department proposed to restore prohibitions on institutions obtaining from a borrower, either in an arbitration agreement or in another form, a waiver of their right to initiate or participate in a class action lawsuit regarding such claims, and from requiring students to engage in internal dispute processes before contacting accrediting or government agencies with authority over the institution regarding such claims. Institutions would be required to notify the Department and to disclose to students the institution's use of arbitration on acts or omissions related to the making of a Direct Loan or the provision of educational services for which the Direct Loan was provided, and to provide certain arbitral records and judicial records connected with any borrower defense claim filed against the school to the Department, which would be shared with the public.

All but one non-Federal negotiator supported the Department's reinstatement of the requirements in the 2016 regulations; the one dissenting non-Federal negotiator opposed the reinstatement of the restrictions on pre-dispute arbitration agreements and class action waivers. Some of the negotiators suggested that the Department should expand the limitation by defining a borrower defense claim for this purpose as any unlawful act or omission by the institution. Other negotiators urged the Department to extend the prohibition on mandatory pre-dispute arbitration to include private loans. Some negotiators also suggested that the regulations should include a specific enforcement provision that would require the Secretary to enforce the provisions of the PPA. Other negotiators suggested that the disclosure and notice requirements should ensure the language in the disclosures meet students at their level, as these students often get lost in the "legalese" of the documents they are required to sign as a condition of enrollment.

One negotiator disagreed with the Department's proposal. This negotiator generally agreed that transparency relating to arbitration and class action waivers is important but argued that alternative dispute resolution processes such as arbitration are less costly for students and more efficient in resolving complaints. This negotiator noted that the Department already has an

FSA Feedback System to address Federal student aid complaints and, for institutions that participate in Department of Veterans Affairs (VA) educational programs, the VA has a complaint resolution system that provides aggrieved servicemember-students a path for lodging complaints affecting VA programs. The negotiator who disagreed with the Department's proposal also expressed concern over cybersecurity and student privacy regarding reporting and disclosure of arbitral and judicial records related to borrower defense claims. The Department discusses these provisions below.

After hearing from the negotiators and carefully reviewing the current regulations, the Department proposes a prohibition against the use of pre-dispute arbitration agreements and class action waivers for the reasons discussed above.

General--Applicability to Direct Loans

During negotiated rulemaking, the Department proposed limiting the prohibition against pre-dispute arbitration agreements to agreements related to the making of a Direct Loan or provision of educational services for which the Direct Loan was intended. Some negotiators requested an expansion of the prohibition to include other actions taken by agents of the institution, including online program managers (OPM). These negotiators reasoned that an OPM should also be subject to the prohibition against pre-

dispute arbitration agreements. One negotiator argued that the Department's authority under 20 U.S.C. 1094(a)(27) to regulate preferred lender arrangements would allow the Department to extend the reach of the prohibition.

Consistent with the Department's position since 1995, see 60 FR at 37769, the Department's authority with respect to the terms and conditions of the institution's PPA with the Secretary only pertains to the making of a Direct Loan or the provision of educational services for which the Direct Loan was intended. OPMs may be covered under these regulations only to the extent they are providing services that are part of the borrower's educational program for which the Direct Loan was intended.

Pre-Dispute Arbitration Agreements--Agreements Currently in Force

The Department acknowledges that many existing loan agreements include mandatory arbitration provisions or class action waivers or may be executed prior to the effective date of the final regulations. In that circumstance, similar to the Department's approach in developing the 2016 regulations, 81 FR at 39386, the proposed regulations would prohibit a participating institution from attempting to exercise such agreements and would require a participating institution to either amend the agreements or notify the students who executed those agreements that the institution will not attempt to

exercise those agreements in a manner proscribed by the regulations. Note that in September 2018, a Federal court invalidated the Department's actions to delay implementation of the 2016 regulations, including the provisions on the prohibition of the pre-dispute arbitration agreements and class action waivers, and those rules went into effect in October 2018. The Court held that the rule did not have retroactive effect. *California Ass'n of Private Postsecondary Schs. V. DeVos,* 344 F. Supp. 3d 158, 173 (D.D.C. 2018).

It is important to note that these regulations would not invalidate those past contracts. These regulations would simply condition the institution's future participation in the Direct Loan program on the institution not enforcing of certain provisions in those contracts going forward. As discussed in the 2016 regulations (see 81 FR 76024, November 1, 2016):

> Regulations commonly change the future consequences of permissible acts that occurred prior to adoption of the regulations, and such regulations are not retroactive, much less impermissibly retroactive, if they affect only future conduct, and impose no fine or other liability on a school for lawful conduct that occurred prior to the adoption of the regulations. The regulations do not make an institution prospectively ineligible because it has already

entered into contracts with arbitration provisions. The regulations impose no fine or liability on a school that has already obtained such agreements. The regulations address only future conduct by the institution, and only as that conduct is related to the institution's participation in the Federal Direct Loan Program.

The PPAs that institutions enter into with the Secretary provide notice to institutions that they must comply with all statutory provisions of or applicable to title IV of the HEA, and all applicable regulatory provisions, including new regulations that go into effect during the institution's participation. See 34 CFR 668.14(b)(1). And as discussed in 2016, the HEA gives the Secretary authority to modify the terms of the PPA as needed to protect Federal interests and promote the objectives of the Direct Loan program. See 81 FR 76023.

Pre-Dispute Arbitration Agreements--Public Disclosure of Agreements and Judicial Proceedings

Some negotiators expressed privacy concerns for individuals, or the institution, if the regulations required public disclosure of arbitration agreements and judicial proceedings related to borrower defense claims. They argued that these records contain confidential information. These negotiators also raised the potential

of a cybersecurity incident if these records are made publicly available.

The Department notes that institutions are already required to furnish other sensitive information to the Department, some of which is made public, including Tier 1 and Tier 2 arrangements under the cash management regulations at part 668, subpart K; and Clery Act campus safety and security reports, among others. Under the proposed regulations and to protect privacy, the Department expects institutions to submit arbitral and judicial records with personally identifiable information redacted. The Department would subsequently disclose these redacted records publicly. Separate and apart from this proposed provision, the Department maintains its general authority to request information from institutions, including original, unredacted versions of arbitral or judicial records that relate to Direct Loans or the educational program for which a Direct Loan was intended.

The Department remains committed to protecting students' information to the extent permissible under applicable privacy laws, such as the Family Educational Rights and Privacy Act (FERPA), while ensuring compliance with requirements under the Freedom of Information Act (FOIA).

Pre-Dispute Arbitration Agreements--Definitions

The Department proposes to align the definition of "borrower defense claim" for purposes of the prohibition on mandatory arbitration and class action waivers with the definition in the applicable borrower defense regulations. The Department believes that referencing the applicable borrower defense regulations themselves would make the meaning of "borrower defense claims" clear for each set of regulations.

In *Young v. Grand Canyon Univ.*, 980 F.3d 814 (11th Cir. 2020), the court considered a mandatory arbitration agreement that forced a borrower to arbitrate his borrower defense claims rather than file a lawsuit. The institution moved to compel arbitration pursuant to the agreement, which the student signed as part of his application for admission. The district court granted the institution's motion to compel, holding that the borrower's claims for misrepresentation and breach of contract were not "borrower defense claims" as defined in the Department's regulations prohibiting mandatory pre-dispute arbitration agreements.[23] The Court of Appeals for the 11th Circuit reversed, concluding that the plain language of the pre-dispute arbitration regulations contemplated such claims, and thus that the borrower could not be compelled to arbitrate them. The court noted, however, that the definition of "borrower

[23] *Carr et al. v. Grand Canyon Univ., Inc. et al.*, Case No. 1:19-cv-01707-TCB (N.D. Ga. Aug. 19, 2019).

defense claim" for purposes of the pre-dispute arbitration prohibition could have been written more clearly.

A negotiator urged the Department to add a definition of "provision of educational services" in the regulations addressing mandatory pre-dispute arbitration agreements. However, the Department believes that this concept is sufficiently defined in the borrower defense regulations, under the existing regulations in § 685.20€)(1)(iv) and in proposed § 685.401(a).

Pre-Dispute Arbitration Agreements–Technical Conforming Changes

Section 668.41(h) provides that institutions that require pre-dispute arbitration agreements and/or class action waivers as a condition of enrollment must make certain plain language disclosures to enrolled students, prospective students, and the public about the use of such agreements. The plain language disclosure must state that the institution cannot compel a student to use an internal dispute process and cannot require the student to waive their right to file a borrower defense claim with the Department. The disclosure also must confirm that arbitration tolls any limitation period for filing such claims. The format of the plain language disclosure must be in at least 12-point font and must be on the institution's website or in the college catalog. Institutions are prohibited from relying solely on an

intranet site to provide such disclosures and notices to prospective students or the public. Finally, § 668.41(h)(2) defines "class action", "class action waiver", and "pre-dispute arbitration agreement" for purposes of this section.

For loans first disbursed on or after July 1, 2020, current § 685.304(a)(6) requires certain additional written disclosures if an institution requires a student to sign a pre-dispute arbitration agreement or a class action waiver as a condition of enrollment. Specifically, if an institution requires either form to be signed, § 685.304(a)(6)(xiii) requires the institution to provide a written description of its dispute resolution process and who the student may contact at the school if the student has a dispute relating to Direct Loans or the educational services for which the loans were provided. With respect to pre-dispute arbitration agreements, § 685.304(a)(6)(xiv) requires the institution to provide a written description of how and when any pre-dispute arbitration agreement applies, how such arbitration agreement functions, and whom the student may contact with questions. Finally, for class action waivers, § 685.304(a)(6)(xv) requires the institution to provide a written description of the applicability of class action waivers, alternatives to class action waivers, and whom the student may contact with questions.

The Department proposes to remove § 668.41(h) because they would be unnecessary given other proposed changes. The proposed regulations at § 685.300 would contain provisions requiring institutions to make specific disclosures about their use of mandatory pre-dispute arbitration agreements and class action waivers.

The Department also proposes to remove § 685.304(a)(6)(xiii) through (xv). The proposed regulations at § 685.300 would state the conditions under which disclosures would be required and provide deadlines for such disclosures.

The Department proposes deleting the identified provisions because these issues would be addressed by the proposed regulations and render the requirements in § 668.41(h) unnecessary. Because § 668.41(h) would be unnecessary, the cross references to that provision in § 685.304 would reflect these technical changes.

3. Interest Capitalization (§§ 685.202, 685.209)

Background: Interest capitalization occurs when any accrued, unpaid interest becomes part of the principal balance of a borrower's loan. Capitalization is triggered by certain events, as provided by either the statute or by regulation. For student loans, interest capitalization is most often triggered after a period of deferment or forbearance. Once interest is capitalized and becomes part of the loan principal, the new principal balance begins to

accrue interest at the rate applicable to the loan, which increases the overall cost of the loan. Thus, interest capitalization effectively causes a borrower to pay interest on principal and accrued interest.

This issue was subject to negotiated rulemaking and consensus was reached on the proposal to remove interest capitalization on Direct Loans where it is not required by the HEA. As proposed, interest capitalization on Direct Loans would be retained only where it is specifically required by the HEA. Because there would be fewer situations in which interest is capitalized, this proposal would result in a loss in revenue and therefore would increase costs for the Government and consequently U.S. taxpayers. However, the proposal is expected to result in lower total payments over time for borrowers, thereby increasing the likelihood that borrowers would repay their loans in full. Given this benefit, the Department believes that the benefits for borrowers exceed these costs and justify the change.

Statute: Section 428H(e)(2) of the HEA, which applies to the Direct Loan Program under the parallel terms and conditions provisions in § 455(a)(1) of the HEA, provides that interest may be capitalized: when a loan enters repayment, at the expiration of the grace period (in the case of a loan that qualifies for a grace period), at the

expiration of a period of deferment or forbearance, or when the borrower defaults.

Section 455(f)(1) requires capitalization at the end of a deferment period for Direct Unsubsidized Loans, Direct PLUS Loans, and Direct Unsubsidized Consolidation Loans.

Section 493C(b)(3)(B) requires capitalization when a borrower who is repaying under the income-based repayment (IBR) plan stops repaying under that plan or is determined to no longer have a partial financial hardship.

Current Regulations: Under § 685.202(b)(2), the Secretary may capitalize interest on a Direct Loan when a borrower enters repayment. Section 685.202(b)(3) provides that for an unsubsidized Direct Loan and for all Direct Loans during periods of forbearance, the Secretary capitalizes the unpaid interest that has accrued on the loan upon the expiration of the deferment or forbearance. Section 685.202(b)(4) provides that the Secretary annually capitalizes unpaid interest on a Direct Loan during any period of negative amortization under the alternative repayment plan described in § 685.201(l) or under the income-contingent repayment (ICR) plan described in § 685.209(b). Section 685.202(b)(5) provides that the Secretary may capitalize unpaid interest on a Direct Loan when a borrower defaults on the loan.

Section 685.209(a)(2)(iv) provides that interest is capitalized on a Direct Loan when a borrower who is

repaying under the Pay As You Earn (PAYE) repayment plan is determined to no longer have a partial financial hardship or chooses to leave the PAYE plan. Under § 689.209(a)(5)(iii)(B), unpaid interest is also capitalized when a borrower repaying under the PAYE plan fails to annually recertify their income.

Under § 685.209(c)(2)(iv), any unpaid interest is capitalized at the time a borrower leaves the Revised Pay As You Earn plan.

Finally, § 685.221(b)(4) and § 685.221(e)(3)(ii) incorporate the requirements from § 493C(b)(3)(B) of the HEA that interest is capitalized at the time a borrower chooses to leave the IBR plan or begins making payments that are not based on income, which includes when a borrower repaying under the IBR plan no longer has a partial financial hardship or fails to recertify income.

Proposed Regulations: The Department proposes to remove the provisions in §§ 685.202 and 685.209 on interest capitalization of Direct Loans where it is not required by the HEA, including when capitalization is permitted (but not required) under the HEA. We propose to eliminate the regulatory provisions stating that unpaid interest is capitalized or may be capitalized when a borrower enters repayment; upon the expiration of a period of forbearance; annually during periods of negative amortization under the alternative repayment plan or the ICR plan; when a borrower

defaults; when a borrower who is repaying under the PAYE plan fails to recertify income, or chooses to leave the plan; and when a borrower who is repaying under the REPAYE plan leaves the plan.

Specifically, we propose to remove—

- § 685.202(b)(2), which provides that for a Direct Unsubsidized Loan, a Direct Unsubsidized Consolidation Loan that qualifies for a grace period under the regulations that were in effect for consolidation applications received before July 1, 2006, a Direct PLUS Loan, or for a Direct Subsidized Loan for which the first disbursement is made on or after July 1, 2012, and before July 1, 2014, the Secretary may capitalize the unpaid interest that accrues on the loan when the borrower enters repayment.

- The provision in § 685.202(b)(3) that provides that the Secretary capitalizes interest that accrues on Direct Loans during periods of forbearance.

- Section 685.202(b)(4), which provides that, subject to some exceptions, the Secretary annually capitalizes unpaid interest when a borrower is paying under the alternative repayment plan or the income-contingent repayment plan described in § 685.209(b) and the borrower's scheduled payments do not cover the interest that has accrued on the loan.

- Section 685.202(b)(5), which states that the Secretary may capitalize unpaid interest when a borrower defaults on a loan.
- Section 685.209(a)(2)(iv)(A)(*2*), providing that accrued interest is capitalized at the time a borrower chooses to leave the PAYE repayment plan.
- Section 685.209(a)(2)(iv)(B), which provides that the amount of accrued interest capitalized when a borrower is determined to no longer have a partial financial hardship is limited to 10 percent of the original principal balance at the time the borrower entered repayment under the PAYE repayment plan and after the amount of accrued interest reaches that limit, interest continues to accrue, but is not capitalized while the borrower remains on the PAYE repayment plan.
- Section 685.209(c)(2)(iv), providing that any unpaid accrued interest is capitalized at the time a borrower leaves the REPAYE plan.

The Department is not proposing changes to the regulations related to interest capitalization where capitalization is required by the statute. This includes when a borrower exits a period of deferment on an unsubsidized loan or when a borrower who is repaying loans under the IBR plan is determined to no longer have a partial financial hardship, including if they fail to annually recertify income.

Reasons: The Department is concerned that frequent interest capitalization increases what a Direct Loan borrower owes and may extend the time it takes for some borrowers to repay their loans. This may result in delinquency and or default for borrowers who cannot manage payments on higher loan balances. Recent studies have shown that growing loan balances lead to both financial and psychological challenges to successful repayment by borrowers. Borrowers reported being overwhelmed with their increasing loan balances, with many expressing frustration and diminished motivation to make payments toward balances that continue to grow.[24] The Department is concerned that such diminished motivation may result in higher rates of delinquency and or default, which has significant negative consequences for borrowers, including negative credit reporting and the possibility of garnished wages or loss of tax refunds. The Department believes that the negative effects on borrowers of interest capitalization outweigh the added costs that come from ending this practice where allowed. Furthermore, there may be many circumstances where borrowers are not aware that capitalization may occur or do not understand the impact that interest capitalization has on their loan balance. The act of rolling unpaid interest into a borrower's principal balance

[24] https://www.pewtrusts.org/en/research-and-analysis/articles/2020/04/08/policymakers-should-consider-impact-of-growing-student-loan-balances-on-borrowers-and-taxpayers.

can be a frustrating experience for borrowers who are confused as to what triggered the capitalization or surprised by the higher amount they owe because of capitalization. Borrowers also frequently express frustration and surprise with interest capitalization, at least in part because this is not an occurrence they are likely to have experienced with other financial products. Given that borrowers already express significant confusion from the overall complexity of student loan repayment and the various options available to them, the Department does not believe alternative approaches to eliminating interest capitalization, such as improved education, would successfully address the problem. As mentioned in the background section for this provision, the Department recognizes the cost impact of this proposal from lost revenue but believes the benefits for borrowers exceed these costs and justify the change. Therefore, the Department proposes to eliminate interest capitalization for Direct Loans in instances where it has the authority to do so.

The Department also proposes to eliminate instances where the regulations currently permit but do not require interest capitalization. This change provides greater clarity for borrowers since it may not be clear when the Department does or does not capitalize interest. This

change also eliminates concerns that such permissive instances could be applied inconsistently.

The Committee reached consensus on this issue. The proposal to eliminate interest capitalization where not statutorily required was enthusiastically received by all the committee members and received unanimous support. Many committee members applauded the Department for its efforts to remove interest capitalization in the situations described above.

Some committee members requested that the Department provide this benefit to borrowers who consolidate their other Federal student loans into a Federal Direct Consolidation Loan. The Department could not agree to that request because a consolidation loan does not result in capitalization; rather, it is a new loan with a new principal balance made up of the principal and interest that the borrower owed on each of the underlying loans.

Some negotiators asked the Department to extend this approach to FFEL loans. However, the Department noted that it does not have the authority to prohibit a FFEL lender from capitalizing interest.

One committee member requested that the Department provide more information to help the committee members understand how interest capitalization impacts certain groups of borrowers and requested that the Department apply this benefit retroactively. The Department replied that

the regulatory changes to eliminate interest capitalization would be prospective, consistent with our standard rulemaking procedures.

4. Closed School Discharge (§§ 674.33(g), 682.402(d), and 685.214)

Statute: Sections 437(c)(1) and 464(g) of the HEA provide for closed school loan discharges for borrowers in the Perkins Loan and FFEL Programs who are unable to complete a program of study because their school closed. The closed school discharge provisions also apply to Direct Loans, under the parallel terms, conditions, and benefits provision in section 455(a) of the HEA.

Current Regulations: Sections 674.33(g), 682.402(d), and 685.214 describe the qualifications and procedures in the Perkins, FFEL, and Direct Loan Programs for a borrower to receive a closed school loan discharge. Pursuant to §§ 674.33(g)(4) and 685.214(c)(1), a Perkins or Direct Loan borrower must submit a written request and sworn statement to apply for a closed school discharge.

If a loan holder in the Perkins, FFEL or Direct Loan Program or a FFEL guaranty agency determines that a borrower may qualify for a closed school discharge, the loan holder provides the borrower with a discharge application and an explanation of the qualifications and procedures for obtaining a discharge. The loan holder or guaranty agency promptly suspends any efforts to collect

from the borrower on any affected loan. Under §§ 674.33(g)(8)(v), 682.402(d)(6)(ii)(H), 682.402(d)(7)(ii), 685.214(f)(4) and 685.214(g)(4), if a borrower fails to submit an application for a closed school discharge within 60 days of the loan holder or guaranty agency providing the application to the borrower, the loan holder or guaranty agency resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended.

Sections 674.33(g)(4)(i)(B), 682.402(d)(1)(i), and 685.214(c)(1)(i)(B) provide that to qualify for a closed school discharge, a borrower must have been enrolled in the school at the time the school closed or must have withdrawn from the school not more than 120 days before the school closed. These regulations also provide that the Secretary may extend the 120-day timeframe if exceptional circumstances justify an extension.

Under §§ 674.33(g)(4)(i)(C) and 685.214(c)(1)(i)(C), a Perkins or Direct Loan borrower may qualify for a closed school discharge if the borrower did not complete, and is not in the process of completing, the program of study through a teach-out at another school or by transferring academic credits earned at the closed school to another school. This also applies to FFEL borrowers under former § 682.402(d)(3)(ii)(C), which was inadvertently removed from the Code of Federal Regulations as of July 1, 2019.

Under §§ 674.33(g)(1)(ii)(A), 682.402(d)(1)(ii)(A), and 685.214(a)(2)(i), a school's closure date is the date the school ceases to provide educational instruction in all of its programs, as determined by the Department.

Under §§ 674.33(g)(3)(i)(B), 682.402(d)(8) and 685.214(c)(3)(i), the Secretary (and a guaranty agency, in the case of a FFEL Program loan) may discharge a loan without an application for an eligible borrower based on information in the Secretary's or guaranty agency's possession. The Secretary (and a guaranty agency in the case of a FFEL loan) discharges a Perkins or FFEL borrower's loan if the borrower did not subsequently re-enroll in a title IV school within three years of the school's closure, for schools that closed on or after November 1, 2013, pursuant to §§ 674.33(g)(3)(ii) and 682.402(d)(8)(ii). The Secretary discharges a Direct Loan if the borrower did not re-enroll within three years of the school's closure for schools that closed on or after November 1, 2013 and before July 1, 2020, pursuant to § 685.214(c)(3)(ii).

Current regulations in part 674, subpart B of the Perkins regulations and part 682, subpart D of the FFEL regulations do not address severability. Current regulations in part 685, subpart B and subpart C of the Direct Loan regulations address severability.

Proposed regulations: The Department proposes to revise § 685.214 to remove the separate closed school discharge application requirements for Direct Loans disbursed on or after July 1, 2020, and Direct Loans disbursed before July 1, 2020, that appear in current § 685.214(c), (d)(1), (f) and (g).

Proposed §§ 674.33(g)(4) and 685.214(d)(1) would provide that the borrower must submit a completed closed school discharge application to the Secretary and that the factual assertions in the application must be true and made by the borrower under penalty of perjury.

Proposed §§ 674.33(g)(8)(v), 682.402(d)(6)(ii)(H) and 685.214(g)(4) would extend the time period that a borrower has to submit a closed school discharge application before the forbearance period expires to 90 days of the Secretary or other loan holder providing the discharge application to the borrower. Under proposed § 685.214(g)(4), if the Secretary resumes collection on a Direct Loan after the 90 days the Secretary would not capitalize unpaid interest that accrued on the loan during the period of suspension of collection activity that exists in current § 685.214(f)(4) and (g)(4).

Proposed §§ 674.33(g)(1)(ii)(A), 682.402(d)(1)(ii)(A), and 685.214(a)(2)(i) would specify that, for purposes of a closed school discharge, a school's closure date is the earlier of the date that the school ceases to provide

educational instruction in most programs, as determined by the Secretary, or a date chosen by the Secretary that reflects when the school had ceased to provide educational instruction for most of its students.

Proposed §§ 674.33(g)(1)(ii)(D), 682.402(d)(1)(ii)(D), and 685.214(a)(2)(iii) would define "program" for purposes of determining the school's closure date as the credential defined by the level and Classification of Instructional Program (CIP) code in which a student is enrolled. Under the proposed definition, the Secretary may define a borrower's program as multiple levels or CIP codes if:

- The enrollment occurred at the same institution in closely proximate periods;
- The school granted a credential in a program while the student was enrolled in a different program; or
- The programs must be taken in a set order or were presented as necessary for borrowers to complete to succeed in the relevant field of employment.

Proposed §§ 674.33(g)(3)(i)(B), 682.402(d)(8)(i)(B) and 685.214(c)(1) would provide that the Secretary--and a guaranty agency in the case of a FFEL Program loan--may discharge a loan without an application for an eligible borrower based on information in the Secretary or guaranty agency's possession if the borrower did not complete an institutional teach-out plan implemented by the school or a teach-out agreement at another school, approved by the

school's accrediting agency and, if applicable, the school's State authorizing agency.

Proposed §§ 674.33(g)(3)(ii), 682.402(d)(8)(ii) and 685.214(c)(1) would remove the current requirement that a borrower may only qualify for a closed school discharge without an application if the borrower does not re-enroll in an eligible title IV school within three years of the school's closure date.

Proposed § 682.402(d)(3) would restore provisions to the FFEL regulations that were inadvertently removed as of July 1, 2019.

Proposed §§ 674.33(g)(4)(i)(C), 682.402(d)(3)(iii) and 685.214(d)(1)(i)(C) would retain the current requirement that a borrower state on the closed school discharge application that the borrower did not complete an eligible institutional teach-out plan performed by the school or a teach-out agreement at another school and remove the requirement that the borrower state that they did not complete a comparable program of study at another school.

Under proposed §§ 674.33(g)(3)(ii), 682.402(d)(8)(ii) and 685.214(c)(2), if a borrower accepts but does not complete an institutional teach-out plan implemented by the school or a teach-out agreement at another school, approved by the school's accrediting agency and, if applicable, the school's State authorizing agency, the Secretary would

discharge the loan within one year of the borrower's last date of attendance in the teach-out program.

Proposed §§ 674.33(g)(4)(i)(B), 682.402(d)(1)(i) and 685.214(d)(1)(i)(A) would provide that a borrower who withdrew from the school not more than 180 days before the school closed may qualify for discharge, an increase in time from the 120-day period under current regulations for Perkins and FFEL loans. The Secretary would be able to extend the 180-day period if exceptional circumstances justify an extension.

Proposed §§ 674.33(g)(9), 682.402(d)(9) and 685.214(h) would contain an expanded, but nonexhaustive, list of exceptional circumstances that would justify the Secretary extending the new 180-day timeframe. The expanded list of exceptional circumstances would include, but not be limited to:

- Revocation or withdrawal by an accrediting agency of the school's institutional accreditation;
- Placement of the school on probation by its accrediting agency or the issuance of a show-cause order by the institution's accrediting agency, or placement on an accreditation status, by its accrediting agency for failing to meet one or more of the agency's standards;
- Revocation or withdrawal by the State authorization or licensing authority to operate or to award academic credentials in the State;

- Termination by the Department of the school's participation in a title IV, HEA program;
- A finding by a State or Federal government agency that the school violated State or Federal laws related to education or services to students;
- A State or Federal court judgment that a school violated State or Federal laws related to education or services to students;
- The teach-out of the student’s educational program exceeds the 180-day look back period for a closed school discharge;
- The school responsible for the teach-out of the student’s educational program fails to perform the material terms of the teach-out plan or agreement, such that the student does not have a reasonable opportunity to complete his or her program of study;
- The school discontinued a significant share of its academic programs;
- The school permanently closed all or most of its in-person locations while maintaining online programs; or
- The Department placed the school on the heightened cash monitoring payment method as defined in § 668.162(d)(2).

Conforming changes reflecting the revisions discussed above would be made to §§ 682.402(d)(6)(ii) and 682.402(d)(7) of the FFEL regulations.

Proposed § 682.424 would make it clear that, if any part of the proposed regulations is held invalid by a court, the remainder would still be in effect.

Reasons: Under the current regulations, to qualify for a closed school discharge, a borrower must have been enrolled at the institution on the date of its closure or have withdrawn no more than 120 days prior to its closure for loans made before July 1, 2020, or 180 days prior to the school's closure for loans made on or after July 1, 2020. The borrower may not have graduated from the school or transferred their credits to complete the same or a comparable program at another school to qualify for the discharge. Through this rulemaking, the Department proposes to address the disparity in eligibility criteria for receipt of a closed school discharge based on the disbursement date of the loan, as well as to address other issues that we believe impede borrowers from obtaining closed school discharges. We propose to modify the current regulations in several ways to increase access to closed school discharges for borrowers who have experienced the disruption of being enrolled in a school that closes, and who are burdened by student loan debt for an educational program that they were unable to complete through no fault of their own.

Automatic closed school discharges, which are granted by the Department based on information in its possession,

are available to certain borrowers under different conditions. The Department is proposing to make automatic closed school discharges available to all Direct Loan, FFEL and Perkins Loan borrowers under the same criteria. In addition, the proposed regulations would reduce the time frame for a borrower to qualify for an automatic closed school discharge from three years to one year after the school has closed. The U.S. General Accountability Office (GAO) found that over 70 percent of borrowers who received automatic closed school discharges under the three-year provision were in default on the loan.[25] The GAO has also noted that, without an automatic discharge option, only a small percentage of eligible borrowers ever obtain relief through a closed school discharge. Providing for automatic closed school discharges for all qualified Direct Loan, FFEL loan and Perkins Loan borrowers and automatically discharging loans more quickly (e.g., within one year instead of the current three years) would make it far less likely that borrowers who are qualified for discharges but who fail to apply would default on their loan before receiving relief through an automatic discharge. The Department weighed the risks to borrowers of defaulting on

[25] Government Accountability Office. (2021). "College Closures: Many Impacted Borrowers Struggled Financially Despite Being Eligible for Loan Discharges." Testimony before the Subcommittee on Higher Education and Workforce Investment, Committee on Education and Labor, House of Representatives. (GAO Publication No. 21-105373). Washington, DC: U.S. Government Printing Office.

a loan for which they are eligible for a discharge against the possibility that some students may opt to re-enroll and transfer their credits after one year. However, the Department believes that students are best protected by establishing a one-year period for automatic discharges. In addition to protecting borrowers against default, a one-year period still provides borrowers time to decide whether they want to continue their studies through an approved teach-out plan. A borrower may need some time after a school closes to sort out their educational options. Providing an automatic discharge one year after closure should give borrowers enough time to make thoughtful educational decisions but not be so long that there is a risk that those who are struggling would have their loans default.

The non-Federal negotiators were generally supportive of the Department's proposal. Several non-Federal negotiators were concerned about the Department's initial proposal that would not have extended the possibility of automatic discharges for borrowers who attended schools that closed before 2014. The Department initially proposed this limitation on automatic closed school discharges because the Department's enrollment information for those years is not sufficient to determine if a borrower re-enrolled in a comparable program. Non-Federal negotiators argued that the borrowers who attended schools that closed

before 2014 are the borrowers who are least likely to be aware that they may qualify for closed school discharges.

Several non-Federal negotiators also proposed eliminating the comparable program requirement that prevents a borrower who has enrolled in a comparable program from qualifying for a closed school discharge in its entirety. Without this limitation on eligibility for a closed school discharge, the lack of Departmental data showing whether borrowers re-enrolled in comparable programs for those years would be a moot point. In the view of these negotiators, the existing requirement disincentivizes re-enrollment. As noted by the negotiators, the best outcome for a borrower who attended a school that closed would be for the borrower to re-enroll elsewhere and complete their education. However, if a borrower is faced with the decision to either re-enroll or to obtain a loan discharge, the borrower is likely to opt for the discharge.

One non-Federal negotiator expressed a concern that the proposed automatic discharges would result in fewer students completing teach-out plans or transferring their credits to other schools. This negotiator felt that the Department's proposal could result in the Department discharging student loans for thousands of borrowers who withdrew from their institution for personal reasons and were not impacted by the school closure or by any potential

degradation of educational quality prior to the school closing.

Other non-Federal negotiators noted that institutions that close have, in many cases, been spiraling downward, and that school closure does not occur in a vacuum. In the case of sudden closures, there are often a string of events that occurred before the school's accreditation is terminated or the school has its front doors locked with no warning. For an institution that has been steadily declining prior to closure, the credits earned at the school may not be transferrable.

In contrast to this view, one of the non-Federal negotiators made the point that each school closure is unique, and that while there are many examples of schools that have not handled closure well, some schools do effectuate an orderly, planned closure. This negotiator stated that school closure is not necessarily a sign that the quality of instruction at the school has deteriorated and that there can be unique transactions such as mergers, consolidations, or acquisitions that end with an institution officially closing, but prior to the closure the school was still in good standing. According to the negotiator, the transaction that resulted in the school closure may have been intended to result in a stronger institution, and schools that close under these circumstances are likely to have established effective

teach-out programs or to have ensured that their credits are transferrable to another institution.

Several non-Federal negotiators disagreed with this line of reasoning. They argued that, regardless of whether the school closure is precipitous or carefully planned, a student attending a school that closes is harmed. Even for a student who can transfer credits to another school, the experience of going through a school closure can still be devastating. The student may have given up a job to attend the school or may have spent months or years in a program that the student will not be able to finish. Students may have taken out private or institutional loans to further their education at the school. These types of loans are not covered under the closed school discharge provisions, which only apply to Federal title IV loans.

During the first negotiating session and in explaining our initial proposal, the Department emphasized that our goal with these proposed regulations is to create more ways for a borrower to qualify for an automatic discharge. Under the proposed rules, re-enrolling would not preclude a borrower from obtaining a closed school discharge. However, the Department did not collect and does not have reliable data on students' programs prior to 2014; therefore, the borrower could not qualify for an automatic discharge prior to 2014. Such borrowers could still apply for a closed school discharge by providing an attestation

that they did not enroll in a comparable program. Initially, the Department's proposed regulations would have defined "comparable program" as a program with the same credential level and in the same field of study, and which accepted most of the credits transferred from the closed school. The Department pointed out that this would be a less stringent standard than the standard in the 2016 rule pertaining to automatic closed school discharges, which provided that a borrower who enrolled elsewhere would not qualify for an automatic discharge.

Under current practice, a borrower applying for a closed school discharge must certify under penalty of perjury whether the borrower is enrolled in or has completed a comparable program at another school. If the borrower has enrolled in or completed a comparable program, the borrower must certify whether the new school accepted transfer credits from the closed school or did not require the borrower to complete core credits after evaluating the borrower's competency. If transfer credits were accepted or the borrower was not required to complete core credits, the borrower is not eligible for a closed school discharge. Since re-enrollment information at that level of detail would not normally be in the Department's routine databases, in the case of an automatic closed school discharge, if the Department has information indicating that the borrower has re-enrolled in a comparable program,

the Department does not grant an automatic discharge. However, the borrower may still apply directly for a closed school discharge, and, by providing the certifications discussed above and meeting the additional eligibility criteria, qualify for a closed school discharge.

The Department's initial proposal would have provided a more generous set of eligibility criteria for granting automatic closed school discharges.

The Department emphasized that we would retain a wait-out period because we believe that it is important to allow time between the school closure and the automatic discharge to give a borrower an opportunity to decide whether to re-enroll in another program. For many borrowers, particularly those close to completing their credential, obtaining the degree or certificate they were pursuing will be their preferred option following a school closure. However, we believe that the current three-year period is too long. If the timeframe is longer than one year, it is possible that the loan will go into default before the automatic closed school discharge would be granted, as evidenced by the high number of automatically discharged loans in default status as found by GAO. Specifically, GAO reported that more than half of borrowers who eventually received an automatic discharge on their loans following a closure first defaulted on their loans; and more than half

of those borrowers did so within 18 months of their school closing.

A non-Federal negotiator proposed removing the re-enrollment limitation entirely but retaining the one-year timeframe. This proposal was supported by many members of the negotiating committee. The Department agreed to consider this proposal.

The Department also noted that, under the proposed regulations, the clock on the automatic discharge timeframe would be paused while the borrower is in a teach-out program and would re-start after they leave the teach-out without graduating the program. The non-Federal negotiators were generally supportive of this proposal.

The Department noted the disparity in the timeframe for a borrower to have withdrawn from the school to qualify for a closed school discharge which, depending on the loan disbursement date, could be 120 or 180 days prior to the school closing. The Department proposed making the timeframe consistent at 180 days for all borrowers. As outlined in the 2018 NPRM (83 FR at 37268), when we last amended the closed school regulations, we determined that 180 days is a reasonable timeframe after considering summer breaks and the potential for a student to have withdrawn one semester prior to a school's precipitous closure, which could be as many as 180 days earlier. The proposed changes

also ensure equity for all borrowers regardless of loan disbursement date.

The non-Federal negotiators supported this proposal, although some expressed concern that schools might manipulate the date of closure, rendering borrowers ineligible for a closed school discharge. They asked whether there are specific triggering events that the Department uses to determine whether a school is considered closed for purposes of a closed school discharge. The Department indicated that there are and provided the negotiators with a chart that is used to make these determinations.

Determining the date of an institutional closure to include circumstances where an institution has ceased instruction in most programs or for most students allows the Department to address situations where an institution may effectively cease operating without formally closing to limit discharges for borrowers. This provision would not automatically apply if, for example, a small institution remains open but ends a program or two but would capture a circumstance where an institution continues only one small program while otherwise ceasing all other enrollment. This would limit the ability of an institution to manipulate the closed school discharge process.

The Department noted that the existing regulations give the Secretary the authority to extend the discharge

timeframe (whether 120 or 180 days) under exceptional circumstances. The existing regulations provide illustrative examples of exceptional circumstances, and the Department proposed adding additional illustrative examples to that list. The proposed six additional examples illustrate circumstances that the Department believes justify an extension of the look-back timeframe. While the current regulations include revocation or withdrawal of accreditation by the institutional accrediting agency, the Department proposes that other actions —- such as an accrediting agency putting the institution on probation or issuing a show cause order--could indicate that the institution is at risk of losing its accreditation, thereby placing the borrower in an untenable situation should a resulting closure occur outside the look-back timeframe. Similarly, after receiving comments and feedback from legal aid representatives and State attorneys general, the Department proposes to add administrative findings and court judgments that a school violated State or Federal law related to education or services to students as additional examples that would warrant an extension of the look-back timeframe. Finally, based on its experience, the Department proposes three additional examples that could indicate that the school is in danger of closing and placing its borrowers at risk: when a school discontinues a significant share of its academic programs; when a school

permanently closes all or most of its in-person locations while maintaining online programs; and when the school has been placed on heightened cash monitoring as defined under § 668.162(d)(2). Each of these circumstances indicates that the institution may be at risk of closing, and we propose to include these examples as situations that warrant an extension for the borrower.

Non-Federal negotiators expressed concerns relating to stackable credentials and the issuance of retroactive credentials as methods schools use to prevent borrowers from qualifying for closed school discharges. The Department agreed that closing schools issuing retroactive credentials to borrowers to prevent them from qualifying for closed school discharges is a concern. Non-Federal negotiators also discussed the problem of schools forcing borrowers into an associate degree program before a bachelor's degree program, even when the student is only interested in obtaining the bachelor’s degree. Negotiators argued that, in some cases, borrowers are unknowingly placed in associate degree programs but are led to believe that they are working toward a bachelor’s degree. In these cases, if a school closes, the loans used to obtain the associate degree are not eligible for discharge. Only the loans used to obtain the subsequent bachelor’s degree may qualify.

To address these concerns, the Department proposed expanding the definition of "program" to give the Department the discretion to determine whether an institution has placed a student in a different program or awarded the student a different degree to make the student ineligible for a closed school discharge. The revised definition would cover enrollments that occurred at the same institution in close proximate periods, or if a school granted a credential for one program while the student was enrolled in a different program. While there are many circumstances in which dual enrollment or reverse credentialing can benefit students, the Department is concerned about past instances where some institutions have required students to start in programs other than the ones the students wanted to pursue, broken up programs into multiple pieces when a student needs to complete all of them to succeed in the relevant field of employment, or retroactively awarded credentials in a way that then reduces the amount of closed school discharges because a borrower cannot receive a discharge related to a program from which they graduated.

The Department is proposing to eliminate the current regulations relating to a borrower re-enrolling in a comparable program. However, we are not proposing to remove the limitation regarding a borrower completing the program through a teach-out agreement. A borrower would

only qualify for a closed school discharge if the borrower did not complete an institutional teach-out plan performed by the school or through a teach-out agreement with another school approved by the school's accrediting agency and, if applicable, the school's state authorizing agency.

The Department believes removing the re-enrollment criteria would better reflect the legislative intent of the HEA and avoids the significant challenges that exist in implementing the requirement. Under § 437(c) of the HEA, a borrower may receive a closed school discharge if they are unable to complete the program in which they are enrolled. The HEA does not mention the possibility that enrollment in a comparable program would limit the borrower’s eligibility for a discharge. The intent of the comparable program requirement in the regulations is to encourage borrowers to get a degree or certificate. However, this may result in too many situations where a borrower loses the ability to receive a discharge even though the program they are enrolled in is not a true extension of the program they were in at the institution that closed. Similarly, there is no definition of what constitutes a comparable program, creating a risk that a borrower will incorrectly believe a program to be comparable when it is objectively not comparable. The Department proposes to address this issue by only barring discharges to situations in which the borrower accepts and completes an approved teach-out

program. The purpose of a teach-out program is to provide students a smooth path to completion of their program while minimizing the common problems that occur during transfer. Approved teach-out plans include agreements between the two institutions around credit transfer and programs and ensure the new program provides similar content. Teach-out programs with these features may be more clearly viewed as an extension of the student's original program. Schools that are engaged in a planned closure or a planned closure of a program are in a better position to arrange a formal teach-out than schools that close precipitously. A school that closes precipitously, unless it already has a teach-out plan in place, may not be able to provide a teach-out for its students.

Though participating in a teach-out program may be the most expeditious way for a borrower to complete their original program, the Department proposes that students who start a teach-out program be eligible for an automatic discharge if they do not complete it. This proposal would minimize the high-stakes nature of a borrower's decision of whether to continue in a teach-out program and would encourage more students to attempt to continue their education. It also acknowledges that, despite a student's effort to continue the prior program, there may be meaningful differences between the schools and programs that make completion nonviable. These differences can

include the teach-out option being too far away for the borrower or that the teach-out program is taught online when the borrower was previously attending an in-person program. The Department also believes that it is inappropriate to limit a borrower's eligibility for a discharge solely on the basis that they have been offered a teach-out program. Under such a policy, an institution could limit its possible closed school discharge liability simply by offering teach-out options in inconvenient locations that are not feasible for borrowers.

As noted above, during the negotiated rulemaking, the Department shared subregulatory guidance in the form of a table that indicates when certain conditions constitute a closed school. The non-Federal negotiators requested that the subregulatory guidance be publicly available to provide institutions with a clearer understanding of when a school is considered closed, beyond the regulatory language. The negotiators recommended putting the guidance in the FSA Handbook or including it as part of the preamble to this NPRM.

The Department agreed to make the document available in a more public forum but noted that the document needed some technical updating and revisions. The updated and revised version of the information will be made available in Volume 2 of the Federal Student Aid Handbook, which will

be made available on the Department’s website at https://fsapartners.ed.gov/knowledge-center/fsa-handbook.

One non-Federal negotiator had significant concerns about the proposed language. This negotiator objected to the proposal to define a closed school to include a school that has ceased to provide educational instruction for most of its students. The non-Federal negotiator added that this would mean a student attending a school that has not closed would be eligible for closed school discharge. The non-Federal negotiator noted that institutions add and discontinue program offerings routinely in response to student demand and changes in the labor market and argued that programmatic innovation should be encouraged so that institutions continuously improve offerings to help students succeed in the workforce. The non-Federal negotiator felt that the Department's proposal could be particularly damaging to small institutions that want to switch up program offerings and only offer three or four programs in total. Under the proposed regulations, instead of starting new programs and discontinuing old programs, some colleges may keep old programs afloat simply to avoid a closed school discharge liability. In this negotiator’s view, the proposed definition of a closed school departs from the plain meaning of that term in the HEA. The negotiator contended that to obtain relief under the statute, the school must have closed.

This non-Federal negotiator also noted that the proposed regulations would represent a significant shift away from the concept that a borrower who enrolls in a comparable program would not qualify for a closed school discharge. The Department's new proposal would provide loan discharges to all borrowers who attend a school that closed except those who completed their programs through a teach-out agreement. In the negotiator’s view, this would create a perverse incentive for borrowers not to enroll in a teach-out program because it would be more financially rational for a borrower to transfer credits to another school than to participate in a teach-out. The negotiator believed that teach-out arrangements are generally positive for students and expressed disappointment that the Department would propose a policy that would disincentivize enrollment in a teach-out program. If a borrower is close to completing their program when the school closes and can transfer all of their credits, they may only need to take one or two classes at the new school. However, they can still be eligible for full student loan relief under the proposal. The negotiator stated that this creates a windfall for students, which would primarily be paid by taxpayers. Lastly, the negotiator objected to the Department’s intention to make these changes to the closed school discharge regulations apply retroactively to all title IV borrowers.

The Department responded that the objections raised by the non-Federal negotiator represented general differences of opinion over the direction of the proposed regulations. The Department emphasized that the proposed revisions to the regulations are intended to ensure that borrowers who have experienced school closures have easier access to closed school discharges and to address a multitude of potential closed school situations that could adversely affect borrowers. In particular, the proposed regulations seek to ensure that borrowers are not left worse off if they accept a teach-out agreement following a closure and that teach-out opportunity does not meet the student's needs or live up to the promise of the program they originally signed up for--a situation that has been a reality for many students affected by precipitous school closures in the past. We do not believe that offering choices to students disincentivizes the use of a teach out and agree that we want to provide pathways for students to complete their academic program. Moreover, the Department believes that the proposal in these regulations would be more likely to encourage a borrower to accept a teach out because doing so would not eliminate their ability to receive a discharge just by trying the program at the new institution. The choice of whether to take a teach out is thus lower stakes for a borrower than it is under current circumstances.

The Department did not believe that there was a feasible way to bridge the differences between the proposed regulatory language and the non-Federal negotiator's objections. The non-Federal negotiator agreed. Therefore, the Committee was not able to reach consensus on these proposed regulations.

With regard to severability, we believe that each of the proposed provisions discussed in this NPRM serves one or more important, related, but distinct, purposes. Each of the requirements provides value to students, prospective students, and their families; to the public, taxpayers, and the Government; and to institutions separate from, and in addition to, the value provided by the other requirements. To best serve these purposes, we would include this administrative provision in the regulations to make clear that the regulations are designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision should not affect the remainder of the provisions.

5. Total and Permanent Disability Discharge (§§ 674.61, 682.402, and 685.213)

This issue was subject to negotiated rulemaking and consensus was reached on the proposal.

Statute: Sections 437(a)(1) and 464(c)(1)(F) of the HEA provide for a discharge of a borrower's Perkins or FFEL program loan if the borrower becomes totally and

permanently disabled as determined in accordance with the Secretary's regulations, or if the borrower is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or has lasted, or can be expected to last, for a continuous period of not less than 60 months. The TPD discharge provisions also apply to Direct Loans under § 455(a) of the HEA.

Current Regulations: Under §§ 674.61(b)(2)(iv), 682.402(c)(2)(iv), and 685.213(b)(2), a TPD discharge may be certified by a doctor of medicine (MD) or a doctor of osteopathy (DO). In addition, under certain circumstances, a borrower may qualify for a TPD discharge based on an SSA notice of award indicating that the borrower qualifies for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits. The SSA has different time frames for conducting follow-up disability reviews depending on the nature and severity of the individual's disability. If the borrower's next scheduled SSA disability review will be within five to seven years, the borrower would fulfill the requirements in the HEA for a total and permanent disability discharge.

Sections 674.61(b)(6)(I), 682.402(c)(6), and 685.213(b)(7)(i) state that a borrower's Perkins, FFEL, or Direct Loan program loan may be reinstated after the borrower has received a TPD discharge if the borrower:

- Has annual employment earnings that exceed 100 percent of the poverty guideline for a family of two;
- Receives a new TEACH Grant or title IV loan;
- Fails to ensure that the full amount of any disbursement of a title IV loan or TEACH Grant received prior to the discharge date that is made is returned; or
- Receives a notice from SSA indicating that the borrower is no longer disabled or that the borrower's continuing disability review will no longer be within the five- to seven-year period.

If a loan is reinstated, §§ 674.61(b)(6)(iii), 682.402(c)(6)(iii), and 685.213(b)(7)(iii) specify that the notice of reinstatement sent to the borrower explain that the first payment due date following reinstatement would be no earlier than 60 days.

Current regulations in part 674, subpart D (Perkins) and part 682, subpart D (FFEL) do not address severability.

Proposed Regulations: Under proposed §§ 674.61(b)(2)(iv), 682.402(c)(2)(iv), and 685.213(b)(2), a TPD discharge application may be certified by an NP, a PA licensed by a State, or a licensed certified psychologist at the independent practice level, in addition to an MD or DO. The type of SSA documentation that may qualify a borrower for a TPD discharge would be expanded to include an SSA Benefit Planning Query or other SSA documentation deemed acceptable by the Secretary. In addition to SSA

documentation indicating that a borrower qualifies for SSDI or SSI benefits with a next scheduled disability review in five years to seven years, a borrower would qualify for a TPD discharge based on SSA documentation indicating that the borrower—

- Qualifies for SSDI or SSI benefits with a next scheduled disability review within three years, and the borrower's eligibility for disability benefits in the three-year review category has been renewed at least once;
- Has a disability onset date for SSDI or SSI of at least five years prior to the application for a disability discharge or has been receiving SSDI or SSI benefits for at least five years prior to the application for TPD;
- Qualifies for the SSA compassionate allowance program; or
- Is currently receiving SSA retirement benefits and met any of the above requirements prior to qualifying for SSA retirement benefits.

Conforming changes identifying the additional medical professionals who would be authorized to certify a TPD discharge application, and the additional SSA documentation that would be acceptable for a TPD discharge would be made throughout §§ 674.61(b), 682.402(c), and 685.213(b) of the Perkins, FFEL, and Direct Loan regulations.

Proposed §§ 674.61(b)(6)(i), 682.402(c)(6), and 685.213(b)(7)(i) would eliminate the existing reinstatement

requirements, except for the provision which provides that a borrower's loan is reinstated if the borrower receives a new TEACH Grant or a new title IV loan within three years of the date the TPD discharge was granted.

For a loan that is reinstated, proposed §§ 674.61(b)(6)(iii), 682.402(c)(6)(iii), and 685.213(b)(7)(iii) would revise the regulations governing the notification of reinstatement to provide that the notice will explain to the borrower that the first payment due date following reinstatement will be no earlier than 90 days after the date of the notification of reinstatement, instead of no earlier than 60 days.

The provisions in §§ 674.61(b)(7), 682.402(c)(7), and 685.213(b)(8) that describe a borrower's responsibilities after receiving a total and permanent disability discharge would be removed.

Proposed § 685.213(d) would provide that the Secretary will grant a TPD discharge without an application if the Secretary obtains the appropriate documentation from the Department of Veterans Affairs (VA) or SSA.

Proposed §§ 674.65 and 682.424 would make it clear that, if any part of the proposed regulations is held invalid by a court, the remainder would still be in effect.

Reasons: Prior to the negotiations that resulted in this NPRM, the Department took important steps to improve the TPD discharge process for eligible borrowers. On November

26, 2019, the Department published in the *Federal Register* an interim final rule (IFR) amending and updating the regulations pertaining to TPD discharges for veterans. The IFR removed administrative burdens that may have prevented at least 20,000 totally and permanently disabled veterans from obtaining discharges of their student loans by automating the process for granting TPD discharges based on a data match with the VA. On August 23, 2021, we published a final rule in the *Federal Register* that adopted and amended the regulations established in the IFR. The final rule:

- Expanded the automatic TPD discharge process to borrowers who are eligible for SSDI and/or SSI benefits and whose next scheduled disability review is no earlier than five to seven years;
- Clarified that borrowers determined to be eligible for a TPD discharge based on data that the Secretary obtains from VA or the SSA are not required to submit a TPD application to have their Federal student loans discharged;
- Described the process used by the Secretary to automatically discharge Federal student loans for a borrower who is determined to be eligible for a TPD discharge based on data obtained from either VA or the SSA;
- Specified the contents of the notice the Secretary sends to borrowers who are determined to be eligible for a

TPD discharge based on data that the Secretary obtains from VA or from the SSA; and

- Provided for the return of payments to the person who made payments on the loan on or after the effective date of the determination by VA or SSA for borrowers who receive the automatic TPD discharge.

In addition to these regulatory changes, the Department also announced in March 2021 that we would relax the TPD monitoring period requirements during the national emergency due to the pandemic and reinstate TPD discharges for any borrower who had not responded to requests for earnings information.

With this rulemaking, the Department proposes to build on the reforms to the TPD discharge process described above.

During the negotiated rulemaking sessions, the Department proposed eliminating the TPD income monitoring period altogether. The Department has found that, rather than acting as a guardrail, requiring borrowers who are totally and permanently disabled to submit annual income information has caused significant numbers of loans discharged due to TPD to be reinstated simply because the borrower did not respond to a paperwork request and not because they had earnings above the threshold for reinstatement. The Department noted that around half of the loans discharged due to total and permanent disability

are reinstated because of a failure by the borrower to respond to the request for earnings information.

The non-Federal negotiators agreed with this proposal as part of reaching consensus on the overall total and permanent disability regulatory text. However, since the Department was not proposing to eliminate the reinstatement requirements regarding borrowers who obtain additional title IV loans after receiving a TPD discharge, they recommended that the three-year monitoring period be reduced to one year. The Department considered this proposal, but ultimately determined that retaining the three-year monitoring period for this purpose is appropriate. Because we are taking steps with these regulations to make it easier for borrowers to receive TPD discharges, the Department has not been presented with a reason to change our current position on having a three-year limitation on borrowers taking out additional title IV loans.

Under current regulations, a borrower may qualify for a TPD discharge based on an SSA determination that a borrower is in SSA's Medical Improvement Not Expected (MINE) disability status. The MINE status is the only current SSA disability status that the Department uses for TPD discharges based on SSA disability determinations.

The Department noted that there are other SSA disability categories that may meet the Department's

criteria for a TPD discharge. These statuses include qualifying for SSA's Compassionate Allowance Program, which is a status where the borrower has one of a predefined set of serious conditions that is highly likely to result in the borrower qualifying for disability benefits. Another status is Medical Improvement Possible (MIP). MIP requires a disability review within three years, so a borrower whose MIP status was renewed at least once would meet the HEA requirement that a borrower's medical impairment last, or be expected to last, at least five years.

Individuals in the MIP category are required to undergo a medical review within three years of SSA's initial determination that they are qualified for SSA disability benefits. Therefore, a borrower who is in the MIP category and whose approval for disability benefits is subsequently renewed would be in that disability status for six years and would meet the HEA definition of a medical condition that has lasted or is expected to last at least five years. To address this situation, the Department is proposing to allow borrowers whose MIP status has been renewed at least once to qualify for a TPD discharge based on SSA documentation.

Finally, the Department noted that when an individual in the MINE or MIP category reaches retirement age, the individual becomes eligible for SSA retirement benefits. These individuals would now receive SSA retirement benefits

rather than disability benefits and would no longer appear in the Department's data match as eligible for SSA disability benefits.

The non-Federal negotiators agreed with allowing borrowers in these additional SSA disability categories to qualify for TPD discharges and recommended that individuals who may not be in the MINE or MIP categories but have a disability onset date for SSDI or SSI purposes of at least five years prior to applying for a TPD discharge qualify for the discharge.

One negotiator supportive of these proposals asked why the proposed regulatory language continued to provide for a TPD application process for borrowers who qualify for a TPD discharge based on the data match with SSA. The Department responded that applications for TPD discharge are also based on a physician's certification. Borrowers would still need to submit an application that is reviewed by the Department. In addition, borrowers who qualify based on SSA documentation may want to apply for the discharge prior to being reflected in an SSA data match or may want to apply at a later time after initially turning down an automatic TPD discharge. Finally, retaining the application process allows borrowers who may be inadvertently missed in the SSA data match to apply directly to the Department for the discharge. This could include borrowers who have reached retirement age after

previously being in an eligible SSA category but who are no longer identified in the Department's data matches.

In addition to expanding the types of SSA categories that would qualify a borrower for a TPD discharge, the Department also proposed expanding the type of SSA documentation that a borrower may provide when applying for the discharge. Currently the only SSA documentation submitted by a borrower that is acceptable under the regulations is the SSA Notice of Award. However, the Department has also commonly accepted an SSA Benefit Planning Query (BPQY) which contains similar information to the Notice of Award. A BPQY is also easier for a borrower to obtain than an SSA Notice of Award. This technical change would conform with current practice.

The non-Federal negotiators agreed with this proposal but were concerned that the proposed regulation may limit the Department's flexibility to accept other types of SSA documentation. The non-Federal negotiators mentioned other types of documentation that might serve the same purpose, such as 1099 tax forms that indicate that an individual has received SSA disability benefits for at least five years and printouts from the MINE social security website. Non-Federal negotiators recommended that the proposed regulations allow the Department to retain flexibility to accept other types of documentation not specifically referenced in the regulatory language. To address this

concern the Department adjusted the proposed language to indicate the other types of documentation it could accept was a non-exhaustive list.

The Department also proposed expanding the list of the types of healthcare professionals authorized to certify a TPD discharge application. We proposed expanding the list of eligible certifiers to include both NPs and PAs who are licensed to practice in the United States. As noted by one negotiator, a shortage of physicians is a major problem in poor and rural areas. Allowing NPs and PAs to certify TPD applications would be an enormous benefit for borrowers who seek care from these providers — particularly for those who do not have access to doctors.

The Department raised the concern that, while at the time of the negotiations we had identified a source verifying licensure of NPs, we had still not identified a source for verifying licensure status of PAs. Another concern related to allowing PAs to certify TPD applications was raised by a non-Federal negotiator, who noted that a PA's scope of practice is often defined by a collaboration agreement with the physician, and that such agreements are often required by insurance companies to cover procedures carried out by PAs. This negotiator recommended that the proposed regulation include a qualifier noting that a PA can certify a TPD discharge application if it is within the PA's scope of practice. The Department did not adopt this

proposal. The types of agreements often required by insurance companies defining a PAs scope of practice would not routinely address the PA's authority to certify TPD applications. One non-Federal negotiator, supportive of the proposal, also raised the issue of borrowers living abroad, who may have difficulty getting certifications from healthcare practitioners licensed to practice "in a State." This negotiator recommended building in some flexibility regarding the State licensure requirement for health care professionals certifying TPD applications for borrowers living outside the United States.

The Department did not agree with this recommendation. The State licensure requirement provides assurances that individuals certifying TPD are qualified to make disability determinations. It would not be feasible for the Department to verify comparable licensing standards in foreign countries.

Finally, the Department proposed adding language to the regulations that would provide greater protection around the certification of the TPD discharge applications. We proposed adding language stating that the Department would analyze physician's certification forms to verify any patterns that suggest potential cause for concern. This could include large numbers of forms certified by a single individual, for example. In such cases, the regulatory language would authorize the Department to refer concerning

practices to the Office of Inspector General (OIG), and to decline to accept health care practitioners' certifications in such cases. We noted that this would provide added protection for taxpayers, considering that we are also proposing to eliminate the income monitoring period and give more options for the current physician's certification.

In general, the non-Federal negotiators did not support this proposal. They were concerned about the term "patterns of concern," which some felt was ambiguous. Another concern was that opening the certifying authority to NPs and PAs would have the potential of an individual certifying a high volume of TPD applications simply because that individual could not assist patients in this way before the regulatory change. The negotiators noted that this could be a problem especially in rural communities, where PAs and NPs serve many patients due to the lack of doctors in these areas.

The negotiators expressed concern that the proposed regulation would create a chilling effect, and that some health care professionals would be less likely to feel comfortable certifying TPD applications if the Department retained this proposed language in the final regulations.

The Department responded that every few years there are some significant criminal prosecutions involving physicians who falsified TPD discharge applications. The

proposed regulatory language was intended to address those situations and was designed to put people on notice that we are going to analyze the information that we receive through the TPD discharge process, and we will take action to protect the Federal fiscal interest when warranted. The Department noted that we already have the authority to do this, regardless of whether the language is included in the regulations. However, we were proposing to include the language as a way of providing notice that we intend to conduct this level of oversight to the TPD discharge process. Ultimately, the Department agreed to remove the language from the proposed regulations since the language is not needed for the Department to refer such cases to OIG.

The Department made further changes to the proposed regulatory language in response to the concerns raised by the non-Federal negotiators. We propose to accept SSA disability determinations showing a disability onset date of at least five years prior to the date of application for TPD or an indication that the borrower has been receiving SSDI or SSI benefits for at least five years prior to the application for TPD. We propose expanding the SSA documentation requirements to include "other documentation deemed acceptable by the Secretary," in response to the recommendation that the proposed regulations allow the Department to accept documentation not specified in the

regulations. This would provide the Department with flexibility to accept documentation that we may not have been aware of at the time the regulation is finalized, but that when presented by a borrower indicates that they meet the criteria for discharge.

The non-Federal negotiators supported the proposed TPD regulations, as revised based on their recommendations, and reached consensus on this issue.

With regard to severability, we believe that each of the proposed provisions discussed in this NPRM serves one or more important, related, but distinct, purposes. Each of the requirements provides value to students, prospective students, and their families; to the public, taxpayers, and the Government; and to institutions separate from, and in addition to, the value provided by the other requirements. To best serve these purposes, we propose including an administrative provision in the regulations to make clear that the regulations are designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision should not affect the remainder of the provisions.

6. False Certification Discharge (§§ 682.402(e), 685.215(c) and 685.215(d)

Statute: Section 484(d) of the HEA contains the requirements that an individual who does not have a high school diploma or a recognized equivalent of a high school

diploma must meet to qualify for title IV, HEA aid. Section 437(c) of the HEA provides for the discharge of a borrower's liability to repay a FFEL Program Loan if the student's eligibility to borrow was falsely certified by the school. The false certification discharge provisions also apply to Direct Loans, under § 455(a) of the HEA.

Current Regulations: Sections 682.402(e), 685.215(c) and 685.215(d) describe the qualifications and procedures for receiving a false certification discharge in the FFEL and Direct Loan programs.

Section 682.402(e)(1)(i)(A) provides that a FFEL borrower may qualify for a false certification discharge if the school certified the eligibility of a borrower who was admitted based on the "ability to benefit" (ATB) from its training, but the borrower did not meet the eligibility requirements in part 668 and in § 484(d) of the HEA. Section 682.402(e)(13) describes a variety of different ATB standards that have been applicable to different enrollment periods.

Section 685.215(a)(1) provides that a Direct Loan borrower who does not meet the applicable alternative to high school graduation eligibility criteria qualifies for the discharge if the borrower reported not having a high school diploma or equivalent to the school.

Sections 682.402(e)(1)(i)(B) and 685.215(a)(1)(iii) provide that a borrower qualifies for a false certification

discharge if the school signed the borrower's name on the loan application or promissory note without the authorization of the borrower.

Sections 682.402(e)(1)(i)(C) and 685.215(a)(1)(v) state that a borrower qualifies for a false certification discharge if the school certified the borrower's eligibility for a FFEL or Direct Loan as a result of the crime of identity theft.

Section 685.215(a)(1)(iv) provides that a Direct Loan borrower may qualify for a false certification discharge if the school certified the eligibility of a student who would not meet the requirements for employment in the occupation for which the training program supported by the loan was intended due to a physical or mental condition, age, criminal record, or other requirement accepted by the Secretary that was imposed by State law.

Current FFEL regulations in part 682, subpart D, do not address severability.

Proposed Regulations: Proposed §§ 682.402(e)(6) and 685.215(d) would amend the procedures for applying for a false certification discharge. The proposed regulations would remove the provisions in § 685.215(a)(1), (c), (d) and (e) that established separate false certification discharge procedures and eligibility requirements for loans disbursed before July 1, 2020, and loans disbursed on or after July 1, 2020.

Under proposed §§ 682.402(e)(6)(iii) and 685.215(d)(3), if a FFEL or Direct Loan borrower submits an application for discharge that a FFEL program loan holder or the Secretary determines is incomplete, the loan holder or Secretary would notify the borrower of that determination and allow the borrower 30 days to amend the application and provide supplemental information. If the borrower does not amend the application within 30 days of receiving the notification, the borrower’s application would be closed as incomplete, and the loan holder or Secretary would resume collection on the loan and grant forbearance to the borrower for the period in which collection activity was suspended.

Under proposed § 682.402(e)(6)(iv) and (v), if a FFEL borrower submits a complete application to the loan holder, the holder would file a claim with the guaranty agency no later than 60 days after the holder receives the borrower's complete application. The guaranty agency would determine whether the available evidence supports the claim for discharge. Proposed § 682.402(e)(6)(vii) would require a guaranty agency to issue a decision that explains the reasons for any adverse determination on a false certification discharge application, describes the evidence on which the decision was made, and provides the borrower, upon request, copies of the evidence. The guaranty agency would consider any response or additional information from

the borrower and notify the borrower as to whether the determination is changed. Proposed § 682.402(e)(6)(ix) would provide the borrower with the option to request that the Secretary review the guaranty agency's decision.

Proposed §§ 682.402(e)(6)(x) and 685.215(d)(7) would provide that a borrower whose discharge request is denied is not precluded from re-applying for a false certification discharge if the borrower has additional supporting evidence. We do not propose to impose a deadline by which a borrower who seeks to re-apply must do so.

We propose to eliminate the reference to "ability to benefit" in current § 602.402(e)(1)(i)(A). Instead, § 682.402(e)(1)(ii)(A) would specify that a FFEL borrower qualifies for a false certification discharge if the borrower reported not having a high school diploma or its equivalent and did not satisfy the alternative to graduation from high school requirements under section 484(d) of the HEA and § 668.32(e).

The earlier ATB standards were all based in statute. Since there have been many changes to the statutory requirements over the years, and could be more changes in future years, we are proposing to remove the regulatory language and simply cross-reference the relevant HEA section. The detailed descriptions of ability to benefit eligibility criteria applicable to different cohorts of borrowers in § 682.402(e)(13) of the FFEL regulations would

be removed. This is a conforming change to a change that we made to the Direct Loan regulations several years ago.

Under proposed § 682.402(e)(1)(ii)(B), if a school certified the eligibility of a FFEL borrower who is not a high school graduate (and who does not meet the applicable alternative to high school graduate requirements) the borrower would qualify for a false certification discharge if the school:

- Falsified the borrower's high school graduation status;
- Falsified the borrower's high school diploma; or
- Referred the borrower to a third party to obtain a falsified high school diploma.

Proposed § 685.215(a)(1)(i) and (ii) would remove the language in the Direct Loan regulations that limited the provisions described above to Direct Loans made before July 1, 2020, add a cross-reference to the alternative to graduation from high school requirements in § 668.32(e), and provide that a borrower would qualify for the discharge if the borrower did not meet the alternative to high school graduation requirements that were in effect when the loan was originated.

Proposed § 682.402(e)(3)(ii) would describe the requirements a FFEL borrower must meet to qualify for a discharge due to a false certification of high school graduation status. Proposed § 685.215(c)(1)(i) and (ii)

would specify that a Direct Loan borrower would qualify for the discharge if the borrower did not meet high school graduation requirements at the time the loan was originated, rather than at the time the loan was disbursed.

Proposed § 682.402(e)(1)(ii)(C) would specify that a FFEL borrower qualifies for a false certification discharge if the borrower failed to meet the applicable State requirements for employment due to a physical or mental condition, age, criminal record, or other reason accepted by the Secretary that would prevent the borrower from obtaining employment in the occupation for which the training program supported by the loan was intended in the student's State of residence at the time the loan was certified. Proposed § 682.402(e)(3)(iii) would state the requirements a FFEL borrower must meet to obtain a discharge based on a disqualifying condition.

Proposed § 685.215(a)(1)(iv) would specify that a Direct Loan borrower qualifies for a discharge due to a disqualifying condition if the borrower did not meet the applicable State requirements at the time the loan was originated.

Proposed § 685.215(a)(3) would describe what it means for a loan to be "originated" for purposes of a false certification discharge of a Direct Loan.

Proposed §§ 682.402(e)(3)(iv), 682.402(e)(3)(v), 685.215(c)(3), and 685.215(c)(4) would remove the

requirements that a borrower applying for a false certification discharge based on an unauthorized signature or unauthorized payment provide signature samples.

Proposed §§ 682.402(e)(3)(vi) and 685.215(c)(5) would replace the documentation requirements for a false certification discharge due to identity theft, including the signature sample requirements, and replace them with a nonexhaustive list of documentation a borrower may provide to apply for the discharge. The list includes:

- A judicial determination of identity theft relating to the individual;
- A FTC identity theft affidavit;
- A police report alleging identity theft relating to the individual;
- Documentation of a dispute of the validity of the loan due to identity theft filed with at least three major consumer reporting agencies; and
- Other evidence acceptable to the Secretary.

Proposed § 682.402(e)(15) would change the provisions for granting a false certification discharge without an application in the FFEL Program to include cases in which the Department or the guaranty agency has information in its possession showing that the school has falsified the Satisfactory Academic Progress (SAP) of its students.

Proposed §§ 682.402(e)(16) and 685.215(c)(10) would provide that a State Attorney General or non-profit legal

services representative may submit an application for a group false certification discharge to the Secretary.

The proposed FFEL program regulations would include conforming changes to § 682.402(e)(7) through § 682.402(e)(14) reflecting the changes discussed above.

Proposed § 682.424 would make it clear that, if any part of the proposed regulations is held invalid by a court, the remainder would still be in effect.

Reasons: As noted above, FFEL and Direct Loan borrowers may currently qualify for false certification discharges if the borrower's eligibility to borrow was falsely certified by the school or was falsely certified due to the crime of identity theft. A borrower may currently qualify for false certification discharge if:

- The borrower did not have a high school diploma or its recognized equivalent and did not meet the applicable alternative eligibility criteria;
- The borrower had a status, including either a physical or mental condition, age, criminal record, or other circumstance, that disqualified them from meeting the legal requirements for employment in the occupation for which the training program supported by the loan was intended;
- The school signed the borrower's name on the loan application or promissory note without authorization; or
- The borrower was a victim of identity theft.

The current false certification regulations have two separate sets of eligibility criteria depending on when the loans were first disbursed, either before July 1, 2020, or after July 1, 2020. The regulations effective on or after July 1, 2020, make it more difficult for borrowers to obtain false certification discharges than the regulations that were in place prior to July 1, 2020. The proposed regulations are more in keeping with the statutory intent of the false certification discharge by providing easier access to the discharge for eligible borrowers. The Department believes that maintaining the stricter standards effective July 1, 2020, for one cohort of borrowers while providing more equitable standards for another cohort of borrowers would be unfair and arbitrary. Unless there is a programmatic reason for different cohorts of borrowers seeking the same Federal benefit to apply under different requirements, we believe the requirements should be consistent. Therefore, we are proposing consistent false certification discharge standards for all cohorts of borrowers. In addition to the equity issues, it is challenging for the Department to process false certification discharge applications under two sets of eligibility criteria. With these proposed regulations, the Department seeks to standardize the eligibility criteria for a false certification discharge, regardless of when a borrower's FFEL or Direct Loan was made. In addition, we

are proposing to revise some of the current provisions in the false certification regulations that we believe are overly burdensome for borrowers. By proposing standards that cover all false certification discharge claims, regardless of when the loan was first disbursed, and by reducing the administrative burden created by some of the existing regulatory requirements, we hope to provide more clarity to borrowers and to make it easier for borrowers who qualify for a false certification discharge to receive that relief. For this purpose, a loan is considered originated when the school has certified the loan and the loan is created within the FSA system. The actual disbursement of the loan could take place months thereafter. This proposal would help to ensure that students meet the title IV eligibility requirements by discouraging institution from authorizing loan disbursements to ineligible students.

The non-Federal negotiators were supportive of this proposal. One negotiator noted that using the disbursement date rather than the origination date allows the school to falsify the eligibility of a borrower and then, during the months that may elapse between origination date and disbursement date, try to cure it by allowing the borrower to complete six credit hours of their program. This negotiator requested that the Department include in the regulatory language a definition of "origination." The

negotiator was concerned that the determination of the origination date for purposes of a false certification should be close to the time a student signs the promissory note.

Another non-Federal negotiator noted that a student may lie to an institution and to the Department about the student's high school graduation status to access the Federal student aid programs. When a student is lying and the lie was not coached or coerced by an institution, the negotiator asked for assurances that the Department would not hold institutions accountable for false certification liability concerning high school completion.

Other non-Federal negotiators stated that mistakes can be made both by institutions and students and noted that there is a distinction between an honest mistake and intentional fraud on the part of either party. These negotiators asserted that unless there is evidence that the institution has intentionally misled or deceived the student, the school should not be liable.

The Department responded that if a participant in the student financial aid programs is found to have lied on a form or committed fraud, the Department pursues that liability through appropriate steps that can include assessing liabilities against the school or seeking restitution from the student under the False Claims Act.

The Department emphasized that the purpose of these proposed regulations is to address situations under which a student would qualify for a false certification discharge. For the Department to hold a school liable for the discharge, the Department would have to go through an administrative process to establish the liability and then prove that liability before a hearing official. We would need sufficient evidence to demonstrate that the school is responsible for the discharged amount. The school is not automatically liable for the discharged amount.

The Department pointed out that the proposed regulations would rescind the provision that any borrower who attested to having a high school diploma or equivalent does not qualify for false certification discharge. This would ensure that borrowers can seek a discharge through the false certification regulations if they were coerced or deceived by their school and had reported not having a valid high school diploma or equivalent. The non-Federal negotiators were generally supportive of this proposal.

Non-Federal negotiators also expressed concern that schools would falsely certify satisfactory academic progress for enrolled students who are not meeting minimal requirements to continue in an educational program. The Department agreed that the proposal to allow the Department to grant false certification discharges without an application due to falsification of satisfactory academic

progress would provide clarity to borrowers and institutions and ensure that all borrowers are treated under the same standards.

One non-Federal negotiator recommended expanding the disqualifying status false certification conditions to include de facto prohibitions to employment as well as legal prohibitions. The negotiator provided examples of such type of prohibitions, including the inability of students to obtain employment because the school lacked the type of programmatic accreditation needed for the occupation or because the student does not speak English. The Department considered this proposal but determined that including prohibitions that are not established by State law would not be feasible. De facto prohibitions, which may simply be standard practices of a particular industry, as opposed to clearly defined rules that would render a borrower unemployable in that industry, could not reasonably be considered grounds for a false certification discharge. The Department also noted that claims by a school that it had certain programmatic accreditation that it did not would be more appropriately adjudicated as a borrower defense discharge.

The Department's current regulations require borrowers to submit an application within 60 days of their loan being placed into forbearance. The proposed regulations would allow borrowers whose initial application is incomplete 30

days to submit supplemental information. This would expand the time frame by which borrowers can send information to support their false certification application. If the borrower does not amend their application within 30 days, the claim would be closed as incomplete, and collection would resume on the loan. The borrower would still have the option to reapply. These reforms would make it easier for a borrower to obtain and provide the information to support their false certification discharge application. The Department sees no downside in making it easier for borrowers to demonstrate eligibility for a benefit to which they are statutorily entitled. We are proposing to limit this time period for submitting additional information to 30 days because it would not be in the interests of the borrower for the loan to stay in forbearance indefinitely, and the total of 90 days should be sufficient time for a borrower to collect and submit the evidence needed to support the discharge claim.

The non-Federal negotiators generally supported the Department's proposal to remove the requirement that borrowers submit signature samples to qualify for certain categories of false certification discharge. However, they were concerned that, in certain claims, a signature would be helpful and by removing the requirement to submit them, borrowers may not realize that they may still have the option to submit signature samples. Negotiators asked if

there was a mechanism for the Department to inform a borrower that signature samples would be helpful in reviewing the borrower's claim.

The Department responded that in cases where there may be other evidence that could support the borrower's claim, the Department does now, and will continue to, inform borrowers that, if they have additional information, such as a signature sample, it would be helpful to provide it.

In discussing the proposed revisions to the identity theft provisions, the Department pointed out that we are proposing to replace the current requirement that a borrower must provide a judicial determination of identity theft as the sole acceptable evidence with a list of possible alternative forms of evidence, such as an FTC identity theft affidavit, or a police report, or a dispute of a loan with all three credit bureaus. We explained that we decided to include multiple types of evidence for a borrower to prove identity theft since a single type of evidence may not be sufficient, and, in most cases, a judicial determination of identity theft would be difficult and time consuming for a borrower to obtain.

The negotiators supported these proposed revisions. One negotiator noted that the FTC identity theft affidavit is lengthy, and that requiring the use of additional evidence to demonstrate identify theft creates multiple hurdles for borrowers. The negotiator cautioned against

requiring multiple sources of evidence to prove identify theft and requested that the Department ensure that there is some flexibility in the kinds of evidence that can be presented to the Department to make a claim of false certification due to identity theft.

The Department noted that allowing the use of additional evidence of identity theft was not intended to make it more difficult for borrowers to qualify for a discharge under these provisions but is intended to broaden the current categories of acceptable documentation for identity theft false certification claims while protecting against insufficient claims. The Department also noted that the proposed regulations also would include "other evidence accepted by the Secretary" to allow for flexibility for the borrower in requesting a discharge. We propose this provision to allow the Secretary to accept evidence that the Department may not be aware of at the time these regulations are promulgated, but that make a strong case that the borrower qualifies for the discharge.

As noted above, a non-Federal negotiator asserted that if a school falsely certified its own institutional or programmatic eligibility to participate in the title IV programs, it should constitute a false certification of a borrower under the statute. The Department, however, believes this proposal is not consistent with the statute. The statute refers to a school falsely certifying the

eligibility of a borrower and not to the school falsely certifying its own eligibility. In our view, the latter might be a basis for borrower defense discharge, not a false certification or borrower eligibility issue.

Some negotiators raised concerns about the determination of when a loan is considered originated for purposes of a false certification discharge, particularly in reference to the mention of the Common Origination and Disbursement (COD) system in the proposed regulation. Negotiators were concerned that future successor systems to COD are not mentioned. The Department clarified that reference to a successor system to COD is not necessary since loan origination is not tied to a specific Department of Education system.

A non-Federal negotiator proposed adding a group discharge provision to the regulations. This negotiator felt that, although the Department has existing authority to grant group discharges and has done so in the past, amending the regulations to identify the instances in which the Department would provide for group discharges would be beneficial to borrowers. The negotiator believed that it would be particularly useful for borrowers who attended the same school and who attest to similar violations for which there is common evidence that would allow for an accurate discharge for a group of borrowers. The non-Federal negotiator contended that a regulatory provision that

requires the Department to accept group discharge applications is a necessity. The negotiator noted that many borrowers do not know of their right to file for a false certification discharge and so the group process is particularly important. The negotiator also asserted that the Department has not responded to group applications in the past. Without regulatory language that explicitly provides for group discharge, the negotiator stated that it is difficult for advocates and borrowers to obtain relief through a group discharge process.

The negotiator also argued that it is much more difficult for an advocate to seek to compel unlawfully withheld action or unreasonably delayed conduct without statutory or regulatory language specifically requiring the Department to act on a group discharge application.

After considering these arguments, the Department agreed with the negotiator and added language to the proposed regulations providing for group applications for false certification discharges. The proposed new language would provide that a State attorney general or nonprofit legal services representative may submit an application for a group discharge to the Secretary.

The Department also clarified that, in the FFEL Program, guaranty agencies (GAs) would not be expected to accept group applications. Group applications for FFEL borrowers would be submitted to the Department and, if the

Department approved the application, the Department would notify the appropriate GAs to discharge the loan, as the Department currently does under 34 CFR 682.402(e)(11)(iii) for false certification discharge applications for which a borrower requests a review of a false certification discharge application by the Secretary.

With this final issue resolved, the Committee reached consensus on the proposed false certification discharge regulations.

With regard to severability, we believe that each of the proposed provisions discussed in this NPRM serves one or more important, related, but distinct, purposes. Each of the requirements provides value to students, prospective students, and their families; to the public, taxpayers, and the Government; and to institutions separate from, and in addition to, the value provided by the other requirements. To best serve these purposes, we would include this administrative provision in the regulations to make clear that the regulations are designed to operate independently of each other and to convey the Department's intent that the potential invalidity of one provision should not affect the remainder of the provisions.

7. Public Service Loan Forgiveness (PSLF)

Qualifying Employer and Definitions for PSLF (§685.219(b))

Background: The Department has received significant public input regarding the requirement that a borrower be employed

full-time with a qualifying public service employer to qualify for PSLF. The Department believes that additional definitions in the regulations, including defining the term "full-time" in a manner that takes into consideration the traditional work schedule for non-tenured faculty at institutions, and adds flexibility in determining full-time employment, would clarify eligibility for the PSLF program. The Department reviews and responds to numerous borrower inquiries regarding the issues with the Department's determination of qualifying employers, qualifying payments, and overall requirements for PSLF. The Department uses this information to formalize changes in the PSLF program that would assist borrowers in achieving loan forgiveness, clarify steps for our servicers, and provide more transparency in the PSLF processes.

Statute: Section 455(m) of the HEA provides for forgiveness of the remaining balance due on an eligible non-defaulted Federal Direct Loan (Federal Direct Stafford Loan, Federal Direct PLUS Loan,[26] Federal Direct Unsubsidized Stafford Loan, or Federal Direct Consolidation Loan) after the borrower has made 120 monthly payments on the eligible Federal Direct Loan while the borrower is employed full-time in a public service job. The 120

[26] Parents who take out Federal Direct PLUS Loans to pay the costs of attendance for their dependent children are not eligible to repay the parent PLUS loans under any of the income-driven repayment plans. However, if a parent PLUS loan is consolidated into a Direct Consolidation Loan, the consolidation loan may be paid under the income-contingent repayment plan and would then qualify for PSLF.

monthly payments must be made under at least one of the following qualifying repayment plans: the income-based repayment plan; the standard repayment plan based on a 10-year repayment period; the income contingent repayment plan; or, except for the alternative repayment plan, any other repayment plan if the monthly payment amount is not less than what would have been paid under the standard 10-year repayment plan. The 120 payments do not have to be made consecutively.

Section 455(m)(3)(B) of the HEA defines a "public service job" as a full-time job in:

- Emergency management;
- Government (excluding serving as a member of Congress);
- Military service;
- Public safety;
- Law enforcement;
- Public health (including nurses, nurse practitioners, nurses in a clinical setting, and full-time professionals engaged in health care practitioner occupations and health care support occupations), as such terms are defined by the Bureau of Labor Statistics;
- Public education;
- Social work in a public child or family service agency;

- Public interest law services (including public defense or legal advocacy on behalf of low-income communities at a nonprofit organization);
- Early childhood education (including licensed or regulated childcare, Head Start, and State funded prekindergarten);
- Public service for individuals with disabilities;
- Public service for the elderly;
- Public library sciences; or
- School-based library sciences and other school-based services.

A public service job may also include:

- A full-time job at an organization that is described in section 501(c)(3) of Title 26 and exempt from taxation under section 501(a) of such title;
- Teaching as a full-time faculty member at a Tribal College or University as defined in section 316(b); or
- Teaching as a full-time faculty member in high-needs subject areas or areas of shortage (including nurse faculty, foreign language faculty, and part-time faculty at community colleges), as determined by the Secretary.

The statute does not include separate definitions of any of the listed public service jobs, nor does it include definitions of other terms or specify what constitutes full-time employment.

Current Regulations: Current § 685.219(b) contains definitions of key terms, including the definitions of "full-time" and "public service organization." The current regulations incorporate the concept of qualifying employment into the defined term "public service organization." Under the current regulations, qualifying employers generally include Federal, State, local, and Tribal Government agencies; nonprofit organizations that are described in section 501 (c)(3) of the Internal Revenue Code and exempt from taxation under § 501(a) of the Internal Revenue Code; and other organizations that provide certain specific public services listed in § 455(m)(3)(B) of the HEA, other than a business organized for profit, a labor union, or a partisan political organization.

Proposed Regulations: The Department proposes adding new definitions and modifying some existing definitions in § 685.219(b) to clarify what are "qualifying employers" and "full-time" work under PSLF.

Specifically, the Department proposes to add the following 11 definitions:

- "civilian services to the Military,"
- "early childhood education program,"
- "non-tenure track employment,"
- "public health,"
- "non-governmental public service,"
- "public service for individuals with disabilities,"
- "public service for the elderly,"
- "public education service,"
- "public library services,"
- "school library services," and
- "qualifying repayment plan."

As with existing regulations, these new definitions would relate to qualifying services only relevant for organizations that provide certain specific public services listed in § 455(m)(3)(B) of the HEA, other than a business organized for profit, a labor union, or a partisan political organization.

The Department further proposes to expand or clarify the current five definitions: "employee or employed," "full-time," "military service," "other school-based service," and "qualifying employer." With regard to "civilian services to military" in particular, the Department proposes to clarify that this definition speaks to providing services to or on behalf of members, veterans, or the families or survivors of members or veterans of the

U.S. Armed Forces. Military service, while technically government employment, is generally considered and referred to as military service or non-civilian Federal employment rather than just government employment for the purposes of qualifying for PSLF.

The Department proposes to define "full-time" as: (1) working in qualifying employment in one or more jobs at least an average of 30 hours per week for the time period certified; (2) working at least 30 hours per week throughout a contractual or employment period of at least 8 months in a 12-month period, such as in the situation of elementary and secondary school teachers, in which case the borrower is deemed to have worked full-time; or (3) working the equivalent of 30 hours per week as determined by multiplying each credit or contact hour taught per week by at least 3.35 in non-tenure track employment at an institution of higher education.

The Department proposes to define "non-governmental public service" as services provided directly by employees of a nonprofit organization where the organization has devoted a majority of its full-time equivalent employees to work in at least one of the following areas: emergency management, civilian service to military personnel and military families, public safety, law enforcement, public interest law services, early childhood education, public service for individuals with disabilities and/or the

elderly, public health, public education, public library services, school library, or other school-based services.

The Department proposes to define “public service for individuals with disabilities” as services performed for or to assist individuals with disabilities (as defined in the Americans with Disabilities Act (42 U.S.C. 12102)) that are provided to a person because of the person's status as an individual with a disability.

The Department proposes to define “public service for the elderly” as services that are provided to individuals who are aged 62 years or older and that are provided to a person because of the person's status as an individual of that age.

The Department proposes to define “public education service” as the provision of educational enrichment and/or support to students in a public school or a school-like setting, including teaching.

The Department proposes to define “public library service” as the operation of public libraries or services that support their operation.

The Department proposes to define “school library services” as the operations of school libraries or services that support their operation.

The Department proposes to remove the current definition of “public service organization” and replace it with a definition of the term “qualifying employer.” The

proposed definition includes (1) A United States-based Federal, State, local, or Tribal Government organization, agency, or entity, including the U.S. Armed Forces or the National Guard; (2) a public child or family service agency; (3) a non-profit organization under section 501(c)(3) of the Internal Revenue Code of 1986 that is exempt from taxation under section 501(a) of the Internal Revenue Code; (4) a Tribal college or university; or (5) a nonprofit organization that provides a non-governmental public service, attested to by the employer on a form approved by the Department, and that is not a business organized for profit, a labor union, or a partisan political organization.

Reasons: The proposed definitions would provide greater certainty, simplicity, and clarity to borrowers and employers and ensure that the Department is fulfilling the statutory intent of encouraging borrowers to work in public service.

Since the creation of the PSLF program almost 15 years ago, the Department has interpreted public service to mean employment with a government organization, a nonprofit organization under section 501(c)(3) of the Internal Revenue Code that is exempt from taxation under section 501(a) of the Internal Revenue Code, or another type of nonprofit organization that provides services in areas specified by Congress so long as it is not a labor union or

a partisan political organization. During the negotiations, some non-Federal negotiators cited the exclusion of for-profit organizations as qualifying employers that provide services in specified areas as a primary reason for not agreeing with the Department's proposed regulations. In considering any changes to the eligible employers, the Department must craft proposals that are operationally viable to ensure that the Department is able to process PSLF benefits in a timely manner. In particular, the Department currently could not implement any changes that require it to: (i) perform an in-depth and individualized review of the eligibility for any significant number of additional employers and particularly for for-profit employers, which have far less required transparency than nonprofit organizations and thus require more extensive investigation; or (ii) assess individual borrowers' job descriptions to determine whether some, but not all, positions within an employer qualify for PSLF. Based upon those operational considerations, the Department seeks feedback on two possible changes where the Department is assessing operational and legal feasibility and policy alignment. The first is around the concerns raised by some non-Federal negotiators about some doctors in California and Texas who work full-time at private, non-profit hospitals but who are ineligible for PSLF because State law prohibits them from being hired by the hospital itself.

This is a change that would not expand the universe of qualifying employers but rather adjust for whom a qualifying employer may sign a PSLF form. ED invites comment on whether borrowers who provide services to a qualifying employer but are ineligible to provide those services as an employee due to State law should be able to participate in the program through the qualifying employer. The second is around whether for-profit early childhood education employers, as defined in §103(8) of the Higher Education Act (20 U.S.C. 1003) and for which the majority of full-time equivalent employees provide a qualifying service such as education for young children, should be qualifying employers for purposes of PSLF. Among other potential reasons, this might be operationally feasible because early childhood education is a category of employment that already has a specific definition in the HEA which references licensure and regulation and the universe of eligible employers might be simpler to identify. In responding to comments on operational issues as well as the two possible items above, the Department is particularly interested in the following questions: (1) What criteria and sources of information can the Department use to identify eligible for-profit early childhood education employers in a consistent and simple manner that does not require an individualized review of employer or borrower specific activities? As mentioned above, an

expansion of eligible employers without simple and clear criteria that minimizes the judgment required by the Department would be impossible to administer. The Department is interested in potential solutions for addressing these operational limitations. For example, are there sources that could identify IRS employer identification numbers for licensed and regulated early childhood education programs, as defined in §103(8) of the Higher Education Act (20 U.S.C. 1003)? Could those same sources identify whether the employer meets other requirements in this regulation, such as having a majority of an employer's full-time equivalent employees provide a qualifying service in the form of early childhood education for young children?

(2) Should the Department use the eligibility for, or receipt of, certain Federal funding as a requirement for a for-profit early childhood education employer to be a qualifying employer for the purposes of PSLF? Are there sources of information identifying employer identification numbers of Federally funded early childhood education programs, consistent with the definition of early childhood education noted above?

(3) Could the Department limit PSLF eligibility to only for-profit early childhood education employers for which another Federal agency such as the U.S. Department of Health and Human Services has provided employer

identification numbers and information that would help the Department easily assess eligibility?

(4) Is it consistent with the purposes and goals of the PSLF program to include for-profit early childhood education as qualifying employment? For instance, to what extent would the inclusion of for-profit licensed and regulated early childhood education providers as eligible employers improve recruitment and retention of the early childhood workforce, increase early educator degree and credential attainment, and improve access to quality early childhood education for children and families?

(5) Are there other considerations for including for-profit early childhood education as a type of qualifying employer for PSLF? For example, this could include Congress' specific mention of licensed and regulated childcare programs in §103(8) of the Higher Education Act (20 U.S.C. 1003), or the PSLF legislative history.

The Department's proposed definition of "qualifying employer" reflects the statutory requirements and the goals of public service. We believe that the additional definitions would help to clarify the meaning of public service toward that end and align the regulations with the statutory intent of the PSLF Program.

Through these proposed regulations, the Department would also modify the regulations in response to public comments we received during the public hearings and

negotiation sessions. Specifically, the Department would modify the definition of "full-time" to include any employee who works a minimum average of 30 hours of work per week during the period being certified.[27] Currently, in most cases, if the borrower has a single employer, "full-time" is defined as the greater of 30 hours per week or the number of hours the employer considers full-time or a minimum of 30 hours throughout a contractual employment period of at least 8 months in a 12-month period, such as elementary and secondary school teachers. The Department's proposed definition also would include a conversion calculation to use in determining whether someone in non-tenure track employment at institutions is employed full-time. The determination of how many hours these borrowers worked for PSLF purposes would be calculated by multiplying each credit or contact hour the employee has by at least 3.35. The calculation aligns with the conversion rates used in California and Oregon to certify that an adjunct instructor is eligible for PSLF.[28] This ratio would require an adjunct to teach at least nine credit hours a term to be considered full-time. That figure is three-quarters of the hours needed for a student to be considered full-time for Federal financial aid purposes (12). That is the same

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[27] https://www.irs.gov/affordable-care-act/employers/identifying-full-time-employees

[28] https://leginfo.legislature.ca.gov/faces/home.xhtml

relationship between the number of weekly hours required to be considered full-time for PSLF (30), which is three-quarters of the standard 40-hour workweek. Originally, the Department proposed multiplying each credit hour by 2.5. The negotiators felt this number was too low because the Department did not consider contact hours as hours worked and did not accurately reflect of the hours that non-tenured staff work when teaching courses. The Department agreed that multiplying each credit or contact hour by 3.35 would more accurately reflect the hours worked by non-tenured staff and the negotiators agreed. The proposed regulations would also add a definition to clarify the meaning of "non-tenure track employment" based on current practice. Providing greater clarity in the regulations would help employers who may be unsure how to properly certify PSLF applications for these individuals.

As suggested by the negotiators, the Department has also proposed definitions of "public health" and "non-governmental public service," including public service for individuals with disabilities and the elderly, to provide clarity for borrowers.

Some negotiators suggested that the Department should determine a borrower's eligibility for PSLF by evaluating the borrower's job description instead of determining eligibility based on the activities of their employer. The Department notes that making individual determinations

about PSLF eligibility based upon a borrower's specific job would be administratively infeasible. The Department does not have the capacity to review individual job descriptions. Further, obtaining the necessary documentation to make borrower-by-borrower decisions would add a significant burden to anyone participating in the program.

One Committee member suggested that the Department use the Standard Occupational Classification (SOC) System codes which classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. As discussed during the negotiations, the Department did not have a viable way to operationalize a process to review individual job descriptions to determine borrower eligibility and still does not. Moreover, the statute does not require such individual review. The statute refers to broad eligibility for certain types of services traditionally embedded in the government or nonprofit sectors. The Department is concerned that determining eligibility based on job description rather than employer would lead to borrowers working for the same employer having different eligibility statuses, creating significant confusion and disparities within an organization. Such a process would also require employers to make potentially new determinations about what SOC code a borrower's occupation should fall into for the sole purpose of PSLF.

The Department also proposes to continue using the employer approach because it would be more equitable for all employees of an organization. If the Department relied on individual job descriptions, it is likely that many support staff who provide services to the organization rather than to its clients would not qualify even though their services are vital to keeping the organization itself in operation. The Department would not have adequate processes to monitor the complexities around reviewing these applications to ensure borrowers would not lose benefits if they changed jobs while working for the same employer. Moreover, the Department would not have the ability to review the accuracy or appropriateness of every job description.

The Department is proposing one clarifying change from its continued approach of using the services provided by the organization to determination eligibility for PSLF. In the past, the Department considered an organization to be a qualifying employer for the purposes of PSLF if its primary purpose was to provide a qualifying service. The idea behind this concept was that an entire organization should not be designated as a qualifying employer if only a couple of its employees are providing a qualifying service because that demonstrates that the qualifying service is not in fact a core part of the organization's work. However, the Department has found that determining an organization's primary purpose can be confusing and hard to apply.

Therefore, the Department proposes to use a more quantitative standard for determining that an employer is providing a public service--that the majority of an organization's full-time equivalent employees must be providing a qualifying service for the organization to be a qualifying employer for PSLF.

The Department heard concerns from several negotiators and public commenters during the negotiated rulemaking process that there are borrowers who are working with qualifying government and nonprofit organizations but who are not eligible for PSLF because they are employed either directly through a contract with the qualifying employer or as the employee of an organization that has a contract with the qualifying employer. For instance, the Department heard from borrowers who work as contractors to provide support to K-12 students on a full-time basis but who are not eligible for PSLF because they are not employees of a qualifying employer. We also heard negotiators discuss public defenders in rural areas who work on a contract basis and also do not qualify for PSLF. The Department also heard about nonprofit hospitals where doctors work as contractors even while nurses or other medical professionals work as full-time employees. The Department is considering whether it should adjust eligibility to account for these types of situations. For example, a provision would note that, only for the purposes of PSLF,

the eligible borrowers would include a borrower who works as a contractor at a qualifying employer if that qualifying employer is willing to certify the periods worked by that individual.

The Department seeks comments on whether to revise the program in this way or to address these issues in another manner. The Department also seeks feedback on whether qualifying employers would be willing to sign PSLF forms on behalf of their contractors; how to ensure consistency within and among employers about signing PSLF forms for contractors so there are not disparities based upon a borrower's pay, level of education, or job function; and what additional guidance employers would need to implement this change. The Department is also interested in feedback about whether there could be ways to distinguish which types of contractors should be eligible, such as restricting eligibility to a contractor whose job site is co-located with a qualifying employer--either virtually, in-person, or with individuals served by the qualifying employer, such as students--versus one who works completely separately from the qualifying employer.

8. Improving the PSLF Processes (§§ 685.219 and 682.414(b))

Statute: Section 455(m) provides that the Secretary shall cancel the balance of interest and principal due on any eligible Federal Direct Loan for borrowers who are not in

default, have repaid their loans under a qualifying repayment plan, and have made 120 payments while employed in a public service job and at the time of forgiveness. The statute does not define the PSLF application process.

Current Regulations: Section 685.219 establishes the conditions under which a borrower may qualify for PSLF and lists the specific eligibility criteria that a borrower must meet to receive PSLF. The regulations specify that the borrower must make each of the required 120 monthly payments within 15 days of the scheduled due date for the full scheduled installment amount for that payment to qualify toward PSLF. Under § 685.219(e), after a borrower makes 120 qualifying payments on a loan, the borrower may request forgiveness of the remaining balance by submitting a request on a form approved by the Department. The payments do not have to be made consecutively. If the Department determines the eligibility criteria is not met, the Department resumes repayment obligations the loan.

Proposed Regulations: The Department proposes to revise § 685.219(c)(1)(iii) so that borrowers have more ways to have payments count toward forgiveness. This includes counting payments that are equal to the full scheduled payment, even if the payment is made in multiple installments or outside the 15-day period in current regulations so long as the loan is not in default. The Department also would revise in § 685.219(c)(2) so that a borrower who makes a lump sum

or monthly payments equal to or greater than the full scheduled amount made in advance of the borrower's scheduled payment due date may also receive credit toward forgiveness on those additional payment amounts. These lump sum payments can be counted for a period of months not to exceed the date of the borrower's next annual repayment plan recertification date under the qualifying repayment plan. For example, a borrower who makes a $50 monthly payment on an income-driven repayment plan could pay that $50 a month or make a one-time payment of $600 during that year and receive credit for a year of payments.

Current regulations do not allow any periods of deferment or forbearance to count toward PSLF. In § 685.219(c)(2)(v), the Department proposes to allow each month in which a borrower is in one of the following deferment or forbearance periods to count as a month of payment for PSLF purposes if the borrower certifies qualifying employment for the period of time covered by the deferment or forbearance:

- Cancer treatment deferment under § 455(f)(3) of the Act;
- Economic hardship deferment under § 685.204(g), including a Peace Corps service deferment;
- Military service deferment under § 685.204(h);
- Post-active-duty student deferment under § 685.204(i);

- AmeriCorps forbearance under § 685.205(a)(4);
- National Guard Duty forbearance under § 685.205(a)(7);
- U.S. Department of Defense Student Loan Repayment Program forbearance under § 685.205(a)(9); and
- Administrative forbearance and mandatory administrative forbearance under § 685.205(b)(8) or § 685.205(b)(9).

In § 685.219(c)(3), the Department proposes to count toward the required 120 monthly qualifying payments, those qualifying payments made by a borrower on an eligible Direct Loan that the borrower later consolidates into a Direct Consolidation Loan.

Proposed § 685.219(e), which broadly reflects the Department's current practice, explains the process by which a borrower documents qualifying employment and requests forgiveness after making 120 qualifying payments on the eligible loans for which forgiveness is requested. In proposed new § 685.219(f), the Department would authorize forgiveness on eligible loans without an application from the borrower when the Department has sufficient information to determine the borrower's eligibility without an application. For example, the Department has announced its intentions to enter into data matching agreements with the U.S. Office of Personnel Management so that it can identify Federal employees who

are eligible for PSLF. Once those matches are active, the Department could possibly award sufficient PSLF credit for forgiveness without the borrower taking any action. The same could be true with other data matches under consideration. All other borrowers would be required to provide the necessary information on a form approved by the Department along with the employer's certification.

If a borrower is unable to obtain the employer's certification, the Department would attempt to determine if the borrower was working for a qualifying employer at the time the qualifying payment was made based on the documentation provided by the borrower or otherwise available to the Department. If the Department determines the borrower meets the requirements for loan forgiveness, the Department would notify the borrower of this determination and the remaining balance of principal and accrued interest on the eligible loans would be forgiven. For borrowers who do not meet the requirements for forgiveness, the Department would notify the borrower of the decision, resume loan repayment obligations, and grant forbearance of payment on both principal and interest for the period in which collection activity was suspended. No interest would be capitalized per changes proposed in other sections of this NPRM.

The Department also proposes new regulations to create a reconsideration process under proposed § 685.219(g) for

borrowers whose applications for forgiveness were denied or who disagree with the Department's determination of the number of qualifying payments or months of qualifying employment that have been earned by the borrower, which formalizes the current non-regulatory process. Borrowers whose applications have been denied would have 90 days to request reconsideration on a form approved by the Department. The Department proposes that borrowers whose forgiveness applications were denied before the effective date of the final regulations would have 180 days from the effective date of the regulations to request reconsideration.

In new § 685.219(g)(6), the Department would also propose to count time toward forgiveness for a borrower who postponed monthly payments under a deferment or forbearance that would not lead to a qualifying payment under the proposed regulations. The Department proposes that a borrower would have to meet certain criteria to have a month counted as a qualifying payment for this purpose. First, the borrower would have to have been employed full-time at a qualifying employer as defined under § 685.219 during the forbearance or deferment period. Second, the borrower would have to make a payment equal to or greater than the amount they would have paid at that time on a qualifying repayment plan. For example, a borrower with a monthly payment of $100 under the standard 10-year plan who

spent a year on a forbearance while employed at a qualifying employer could make an additional payment of $600 and receive credit for six of those months.

In § 682.414(b)(4), the Department would propose to require FFEL Program lenders to report detailed information related to a borrower's deferments, forbearances, repayment plans, delinquency, and contact information on any FFEL loan to the Department by an established deadline.

Reasons: In August 2020, the Department updated the description of a qualifying payment by allowing the payment to count as a qualifying payment if it was made in full within 15 days of the payment due date.[29] On October 6, 2021, the Department announced a limited PSLF waiver during which borrowers may receive credit for payments that previously did not qualify for PSLF or TEPSLF.[30] These administrative steps demonstrated improvements to the PSLF process for borrowers. In addition, in October 2021, the Department waived certain PSLF rules, such as the requirement to make a qualifying payment within a specified time, under a specific repayment plan, and on a loan from a particular program for a limited time due to the COVID-19

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[29] https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2020-10-28/changes-public-service-loan-forgiveness-pslf-program-and-new-single-pslf.

[30] Press Release, U.S. Department of Education, "U.S. Department of Education Announces Transformational Changes to the Public Service Loan Forgiveness Program, Will Put Over 550,000 Public Service Workers Closer to Loan Forgiveness," October 6, 2021, https://www.ed.gov/news/press-releases/us-department-education-announces-transformational-changes-public-service-loan-forgiveness-program-will-put-over-550000-public-service-workers-closer-loan-forgiveness.

pandemic.[31] Through the proposed rules described in this NPRM, the Department seeks to continue to improve upon the program and convert certain of the temporary changes into permanent regulatory changes under a continuing basis.

Specifically, the Department proposes to amend the regulations governing PSLF to treat months in which a borrower is in certain deferment and forbearance periods as months of qualifying payments. The proposed changes would also streamline and clarify the application process for PSLF, provide increased flexibility to borrowers, remove application barriers where practicable, and allow the Department to communicate with borrowers from the FFEL Program instead of (or in addition to) lenders, and provide overall improvements to the process. While consensus was not reached on the proposed regulations for PSLF, the negotiating committee generally agreed with the Department's proposals regarding expanded qualifying payment periods; eliminating the 15-day payment date requirement; clarifying requirements related to lump sum payments; allowing months spent in certain forbearances and deferments to count as months in repayment; allowing prior payments on Direct Loans to count toward the 120 payments required for forgiveness if the borrower repays the loan on which the payments were made through a Direct Consolidation Loan; automating the application process where practicable;

[31] Ibid.

requiring FFEL Program lenders to report additional details to the Department related to the loans; and formalizing a reconsideration process where borrowers seeking PSLF may request a review and redetermination of the decision on whether the borrower had a qualifying employer, qualifying payments, or on the denial of an application for forgiveness.

Many of the negotiators did not agree with the Department's proposed regulatory language that would provide a path for borrowers to receive credit for past periods of deferment or forbearance while the borrower was working for a qualifying employer. The negotiators requested instead that the Department automate the PSLF process. These negotiators also wanted the Department to allow payments made on FFEL Program loans that are repaid through a Direct Consolidation Loan to count toward PSLF forgiveness. Under the current interpretation of the law, the 120 monthly payments have to be made on the loan for which the borrower requests forgiveness. So, a borrower who consolidates a Direct Loan and later applies for forgiveness of the Consolidation Loan does not receive credit for payments made on the loan before it was consolidated. However, the negotiators advanced a different interpretation of the HEA, suggesting that counting payments made on loans later consolidated into the Direct Loan Program and regardless of whether the loan

consolidated was a Direct Loan would also be a permissible interpretation of the HEA.

Negotiators also wanted to include additional forbearances and deferments and proposed to provide a forbearance to borrowers seeking PSLF until the effective date of the regulations and to count the months in this forbearance as qualifying payments.

The Department proposes to include certain specific forbearance and deferment periods as qualifying periods for PSLF because of concerns based on past practices that borrowers, who are likely to have a $0 payment on an income-driven repayment plan which would make them eligible to receive PSLF credit, could instead be offered one of these deferments or forbearances. A borrower who chose to pause their payments through one of these deferments or forbearances would be giving up the opportunity to receive credit toward PSLF. For example, deferments tied to military service, Peace Corps or post-active duty or forbearances related to AmeriCorps, National Guard Duty, or U.S. Department of Defense student loan repayment are instances in which a borrower is engaging in employment that would qualify for PSLF. Allowing these deferments and forbearances to count toward PSLF prevents the borrower from losing months or years of progress toward forgiveness by making the wrong choice or getting inaccurate advice. We also seek feedback on whether, if possible to

operationalize, the Department should include comparable deferments for Direct Loan borrowers with FFEL Program loans described in 34 CFR 685.204(j). The Department is aware that this problem has affected a substantial number of borrowers. For instance, in October 2021, the Department announced a limited PSLF waiver that allows borrowers to count other repayment plans, and deferments or forbearances used while working for a qualifying employer, toward forgiveness. As a result of that time-limited waiver, approximately 127,000 borrowers have been approved for $7.3 billion in forgiveness as of mid-May 2022. More than 1 million additional borrowers also receive an average of 12 months credit toward forgiveness. These data indicate that even better servicing and clearer information for borrowers would likely be unable to address the scale of the challenge.[32] The Department also proposes to provide credit toward PSLF for periods in which a borrower is on an economic hardship or cancer deferment. Borrowers on an economic hardship deferment would have a $0 payment on an income-driven repayment plan, which already counts toward forgiveness. Borrowers on a cancer treatment deferment should not have to choose between pausing their loan payments while receiving life-saving medical treatment or receiving credit toward PSLF. The Department also proposes to allow months spent in administrative or certain

[32] https://studentaid.gov/announcements-events/pslf-limited-waiver

mandatory administrative forbearances to count as a qualifying payment where the borrower does not control whether their loans are paused. While borrowers would not receive credit for qualifying months when a servicer pauses a borrower's payments while it reviews PSLF paperwork or other circumstances, the Department proposes that a borrower be able to receive credit for these months by making any required payment under the hold harmless period. The Department believes that this measure will would ensure borrowers do not lose forgiveness credit during prolonged time spent in a forbearance due to paperwork processing.

The negotiators requested that additional deferment and forbearance periods be counted as time toward forgiveness. The Department has not included the other deferment periods, such as the period of an unemployment deferment, in the proposed regulations because borrowers utilizing that deferment would not meet the employment requirements for PSLF. The Department also did not include the rehabilitation training deferment in the proposed regulations because eligibility for this deferment requires that the borrower be in a program that prevents them from being employed for more than 30 hours a week, which is an employment requirement for PSLF. The Department believes that granting credit toward PSLF for those periods would create a conflict because under the deferment, the borrower

would not be engaging in the 30 hours a week of work required to qualify for PSLF.

The Department recognizes that many borrowers may have paused their payments through deferments or forbearances that we are not proposing to credit toward PSLF. The Department announced in April 2022 improvements to past challenges with the use of deferments and forbearances that will help many of these individuals. Specifically, the Department will be awarding credit toward PSLF for borrowers who spent more than 3 years cumulatively in a forbearance or 12 consecutive months in a forbearance, and for months spent in any deferment prior to 2013 besides an in-school deferment. These changes will only result in PSLF credit for periods after the program's creation in October 2007, and borrowers must have qualifying employment during those months. The Department believes that these changes will address many of the most concerning instances of forbearance, but for other periods as well as in the future the Department proposes to offer a hold harmless period. This would provide those borrowers who were working for a qualifying employer during the periods of forbearance or deferment an opportunity to get PSLF credit for those months by making payments equal to what the borrowers would have owed during that time. A borrower would receive credit toward forgiveness without the need to make an additional payment for any month in which the

borrower would have had a $0 payment on an income-driven repayment plan but obtained a forbearance instead. The Department believes, that with these proposed regulations, borrowers would have an opportunity to regain progress toward forgiveness that would otherwise be lost without putting them through a burdensome process of proving they were steered, misled, or otherwise taken advantage of.

The Department has manually reviewed PLSF applications to determine qualifying payments and/or qualifying employment on an informal basis. The Department believes that by formalizing and codifying a reconsideration process, borrowers would be able to officially request the Department take another look at their qualifying payment and/or qualifying employer eligibility through a process determined by the Secretary. The Department believes that 90 days from the denial notice is more than adequate time for a borrower to submit a reconsideration request. This reconsideration period also aligns with what the Department is proposing for the borrower defense to repayment reconsideration process.

The Department could not agree to the negotiators' request that payments on FFEL loans or other Federal student loans not made under Part D of the HEA count for PSLF purposes. Section 455(m)(1)(A) of the HEA specifically provides that the 120 monthly payments must have been made on an eligible Federal Direct Loan.

The Department already requires FFEL Program lenders to contact FFEL Program borrowers and provide information about PSLF. The Department proposes to require FFEL lenders to report additional information under 682.414 so that borrowers (particularly those with loans from multiple programs) are receiving accurate, timely, and helpful messages directly from the Department about the repayment and forgiveness of their Federal student loans to ensure that all Federal loan borrowers are informed on PSLF information and information about other digital tools offered by the Department.

The Department believes that these proposed regulations would improve the Department's ability to administer forgiveness to borrowers who qualify for PSLF, increase the number of qualifying borrowers who receive forgiveness, and increase the number of borrowers who receive forgiveness by aligning with the number of months of qualifying employment. The corresponding increase in discharges would represent a greater cost to the taxpayer, but the Department believes that the benefits received by borrowers by obtaining discharges under the PSLF statute justify the costs.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether this regulatory

action is “significant” and, therefore, subject to the requirements of the Executive Order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an “economically significant” rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles stated in the Executive Order.

The Department estimates the quantified annualized economic and net budget impacts to be $85.1 billion in increased transfers among borrowers, institutions, and the Federal Government, including annualized transfers of $9.1 at 3 percent discounting and $10.0 billion at 7 percent discounting, and annual quantified costs of $5.3 million

related to paperwork burden. Therefore, this proposed action is "economically significant" and subject to review by OMB under section 3(f) of Executive Order 12866. Notwithstanding this determination, based on our assessment of the potential costs and benefits (quantitative and qualitative), we have tentatively determined that the benefits of this proposed regulatory action would justify the costs.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental,

public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these proposed regulations as these policies are better in light of the facts and to comply with executive orders. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these regulations are consistent with the principles in Executive Order 13563.

We have also determined that this regulatory action would not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

As required by OMB Circular A-4, we compare the final regulations to the current regulations. In this regulatory impact analysis, we discuss the need for regulatory action, potential costs and benefits, net budget impacts, and the regulatory alternatives we considered.

1. Need for Regulatory Action

The Department has identified a significant need for regulatory action to address regulatory burdens, alleviate administrative burden, and ensure Federal student loan borrowers are more easily able to access the loan discharges to which they are entitled under the Higher Education Act of 1965, as amended (HEA). Accordingly, these proposed regulations would alleviate some of the burden on students, institutions, and the Department, as discussed further in the Costs and Benefits section of this RIA.

In recent years, outstanding Federal student loan debt has increased considerably and, for too many borrowers, that burden has been costly. More than 1 million borrowers defaulted on a Federal student loan each year in the periods prior to the nationwide pause of student loan interest and repayment first implemented by the Department

and then extended by Congress in the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Millions of others fell behind on their payments and risked default. For those who have defaulted, consequences can be significant, with many borrowers having their tax refunds or other expected financial resources garnished or offset, their credit histories marred, and their financial futures put on hold. To alleviate some of this burden, the administration enacted the American Rescue Plan Act of 2021 where all student loan forgiveness and discharges of any loan type is Federal tax-free through December 31, 2025.

We continually examine our regulations to improve the Federal student loan programs and it was the primary goal of this negotiated rulemaking. This NPRM specifically addresses regulatory changes to discharges that will help borrowers to reduce or eliminate debt for which they should not be responsible to pay. The Department will also propose regulatory changes to income driven repayment plans in a future NPRM that would greatly benefit borrowers.

The Department seeks to reduce the burden for students and borrowers to access the benefits to which they are entitled through several provisions in these proposed regulations. This includes streamlining the borrower defense regulations and establishing a process for group consideration of claims from borrowers with common claims or affected by the same unacceptable institutional act or

omission; easing the process of accessing false certification discharges; clarifying the rules borrowers must comply with for the PSLF program; reducing the burden caused by interest capitalization; ensuring totally and permanently disabled borrowers have the ability to access and maintain a discharge more easily; and allowing borrowers to automatically access a closed school loan discharge. Throughout these proposed regulations, we accommodate and, where possible, require, that these benefits are provided automatically, so that borrowers are not required to submit unnecessary paperwork to benefit from provisions included in the HEA. We also preserve borrowers' ability to pursue their grievances in court by prohibiting pre-dispute arbitration clauses or class action waivers in institutions' enrollment agreements.

These efforts to reduce burden for students and institutions would also indirectly reduce the burden on the Department by, for example, limiting the need for adjudication of individual claims for borrower defense in some cases, simplifying the criteria that need to be checked to determine if payments count toward PSLF, and limiting the need for the Department to process paperwork by providing discharges on a more automatic basis for borrowers whose schools close or when a borrower has a total and permanent disability.

These proposed regulations would affect each of the three major Federal student loan programs. This includes the Direct Loan program, which is the sole source of Federal student loans issued by the Department of Education today, as well as loans from the Federal Family Education Loan Program, which stopped issuing new loans in 2010 and the Perkins Loan Program, which stopped issuing new loans in 2017. Changes to TPD, closed school discharges, and false certification discharges would affect all three programs. Changes to interest capitalization, borrower defense, arbitration, and Public Service Loan Forgiveness would only affect Direct Loans.

Interest Capitalization:

Virtually all struggling borrowers likely saw their balances increase due to interest capitalization. Interest capitalization may have occurred due to time in forbearances or deferments. Furthermore, interest capitalization following in-school grace periods affects all borrowers with unsubsidized loans. Eliminating interest capitalization stops compounding the costs and makes loans more affordable for borrowers. While eliminating interest capitalization doesn't remove borrowers' debt burden, it would help to increase affordability for students whose balances might continue to grow. That's particularly true for the low-income or struggling borrowers who tend to use deferments and

forbearances more heavily, and thus see more capitalizing events throughout their repayment periods.

Pre-dispute Arbitration:

Often, schools that have taken advantage of students have forced those students to shield their complaints by requiring students to participate in private arbitration proceedings, where the terms are set by the institution, rather than allowing them their day in court. These pre-dispute arbitration agreements require students to agree to the terms before a conflict ever arises and often dictate whether the student can appeal the decision. Though pre-dispute agreements are not inherently predatory in practice, they can be applied in predatory ways toward borrowers such as undermining borrowers' rights to avail themselves of certain loan discharges, depriving borrowers of the protections in the HEA. We have seen arbitration applied across different industries including consumer protection and employment, and in the realm of education, pre-dispute arbitration agreements are often linked to propriety education enrollment agreements.[33] As a result, successive cohorts of students may have experienced the same predatory behavior. Additionally, while the Department is aware of arguments that arbitration lowers the costs of dispute resolution for borrowers relative to

[33] Habash, T. and Shireman, R., (April 28, 2016). *How College Enrollment Contracts Limit Students' Rights, The Century Foundation*. Retrieved from https://tcf.org/content/report/howcollege-enrollment-contracts-limit-students-rights/.

litigation, a study of consumer finance cases analyzed by the Consumer Financial Protection Bureau found that most resulted in no determination on the merits of the allegation by the arbitrator, and those that did (and where counsel was retained) resulted in attorney's fees awarded at a similar rate to both consumers and companies.[34]

The Department observed several issues and problems around pre-dispute arbitration and class action waivers. First, institutions may use arbitration clauses in enrollment agreements to effectively discourage students from pursuing complaints. This enables an institution to avoid financial risk associated with its wrongdoing and shift the risk to the taxpayers and federal government through subsequent borrower defense discharges. Additionally, borrowers cannot have their day in court because some enrollment agreements prevent their ability to participate in lawsuits, including class action litigation. This further insulates institutions from the potential financial risk of their wrongdoing and the lack of transparency surrounding institutions' arbitration requirements and limits on class actions.

Closed School Discharge:

Borrowers have also faced the negative financial impacts of institutions closing, often without adequate

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[34] Consumer Financial Protection Bureau. (2015.) "Arbitration Study: Report to Congress." https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

warning, interrupting borrowers' ability to continue and complete their desired educational programs. Many of these borrowers were left with debt but no degree, sometimes facing new barriers to education such as geographic location, nontransferable credits, and inability to complete their degree. This has negatively affected borrowers' ability to make their payments, creating a need for improved processes for closed school discharges.

Several aspects of the closed school discharge process have limited the ability of borrowers to receive closed school discharges. Final regulations published in the *Federal Register* on November 1, 2016, provided for automatic closed school discharges to borrowers who were eligible for a closed school discharge but did not apply for one, and who did not enroll elsewhere within three years of the institution's closure. Final regulations published on Sept. 23, 2019, eliminated this provision. The proposed ruleset would reinstate a form of the 2016 provision.

Closed school discharges for borrowers who withdrew from a school prior to the school closing are also not consistent across years in the discharge window available to borrowers. Additionally, under § 685.214(c)(1)(i)(B), the Secretary may extend the closed school discharge window under "exceptional circumstances." The non-exhaustive list of exceptional circumstances provided in the regulations

does not include many events that may occur on the path to closure and could reasonably be associated as a cause of that closure. In addition, the September 23, 2019, regulations removed some of the exceptional circumstances that were included in the prior regulations, such as "a finding by a State or Federal government agency that the school violated State or Federal law," and that remain highly relevant factors in some college closures. This proposed regulation aims to remedy these issues.

Total and Permanent Disability Discharge:

Another area in which the current regulations create gaps for borrowers is related to total and permanent disability discharge. For borrowers who are unable to meaningfully work, their student loan debt became exceedingly burdensome, leaving many in dire financial circumstances, despite being eligible for discharges of their Federal student loans under the HEA. Some eligible borrowers are not fully aware of existing relief pathways, but for those who are aware of TPD discharges, they face a complex and onerous procedure to ensure borrowers continue to meet the statutory test of not being able to engage in gainful employment to acquire and maintain discharges.

The Department has identified several aspects of the TPD discharge process that could be improved through regulation. First, the Department currently runs a 3-year post-discharge income monitoring period, for which the

documentation requirements are burdensome for affected borrowers. Since 2013, loans for more than half of the 1 million borrowers who received a TPD discharge were reinstated because the borrower did not respond to requests for income documentation, although an analysis conducted by the Department with Internal Revenue Service (IRS) data suggests that 92 percent of these borrowers did not exceed the earnings threshold, and that these results are similar for borrowers whose discharge is based on the SSA or physician's certification process. Second, borrowers who currently qualify for TPD discharges based on SSA disability determinations must be in SSA's Medical Improvement Not Expected (MINE) category to qualify, although there are other SSA disability categories that may support a discharge. For borrowers applying for a TPD discharge based on a disability determination by the SSA, acceptable documentation for the TPD discharge is limited to the notice of award that the borrower receives from the SSA and for borrowers applying for a TPD discharge based on a physician's certification, only a Doctor of Medicine or a Doctor of Osteopathy may certify the TPD discharge form. This ruleset aims to mitigate and to streamline total and permanent disability discharge process.

False Certification Discharge:

The Department also identified opportunities to improve false certification discharges. These are

discharges available to borrowers under the HEA if the institution that certifies the borrower's eligibility for the loan does so under false pretenses, such as when the borrower did not have a high school diploma or equivalent and did not meet alternative criteria; when the borrower had a status that disqualified them from meeting legal requirements for employment in the occupation for which they are training; or if the institution signed the borrower's name without authorization.

One challenge the Department identified with false certification discharges is that the different standards and processes for false certification discharges depending on when the loan was disbursed that can create confusion for borrowers. The proposed regulations would streamline the false certification discharge process for student loan borrowers to establish standards that apply to all claims, regardless of when the loan was first disbursed, and provide for a group discharge process. The proposed rules would also reduce the burden on borrowers to prove eligibility for false certification discharges if they did not have a high school diploma, if the institution falsely signed the borrower's name for the loan, or if the borrower had a disqualifying condition (those that would prevent the borrower from obtaining employment due to applicable State requirements related to criminal record, age, physical or

mental condition, or other factors) at the time they took out the loan.

Public Service Loan Forgiveness:

The HEA provides forgiveness of remaining balances for borrowers who work in qualifying employment in public service and who make 120 qualifying payments. However, the Department is concerned that too many borrowers have found it difficult to navigate the program's requirements due to unclear or complex definitions and complex, overly stringent requirements regarding the payments made on the loan. For instance, the current regulations leave the definition of what constitutes full-time employment up to interpretation by each employer, even though the underlying statutory requirement is only that the borrower be employed for at least 30 hours a week. This creates inconsistency, such as through scenarios where one employer considers 40 hours a week as full-time employment and another employer may consider 35 hours as full-time employment, so a borrower employed 35 hours a week may be denied or granted qualifying employment depending on their employer, despite working in the same type of work. There are also situations where professors and contingent faculty have difficulty obtaining employer certification of their qualifying employment because their employers are unsure of what conversion factor to use in converting course load into hours worked per week.

The Department would like to improve the PSLF application process and provide automation in instances where the Secretary has enough information to determine eligibility for forgiveness. This will significantly reduce the borrower's burden, as well as the Department's burden, to review and approve applications. The current PSLF application process is difficult for many borrowers, who often struggle both with meeting the complex terms of the program and with the process of applying to demonstrate their eligibility.

Borrower Defense to Repayment:

Borrowers whose colleges take advantage of them, such as by misrepresenting job placement rates or other important information about the program, are eligible for a borrower defense discharge on their loans. However, the process--which was rarely used prior to 2015--has resulted in many borrowers filing claims that remain pending due to burdensome review processes and differing standards and processes depending on when the borrower took out their loan. The Department proposes changes to the borrower defense regulations to make these policies more consistent, regardless of when the borrower took out the loan, and to ensure a more timely and effective process for reviewing borrowers' claims. The Department also seeks to implement measures that would reduce the burden on institutions of participating in borrower defense proceedings with the

proposed changes in group claims and recoupment. Allowing group claims ensures that institutions with large numbers of outstanding claims would likely only have to respond once to a request for information regarding the allegations that could lead to an approved borrower defense claim. Institutions would not face some financial liabilities because the Department would only seek recoupment for discharges tied to conduct that would have been approved under the applicable prior regulation in place at the time the loans were disbursed. Additionally, separating the approval of borrower defense claims from recoupment of loan discharge costs from the institution also limits the burden on educational institutions, when we seek to establish liabilities from a discharge paid. The use of pre-existing processes for recoupment proceedings also means institutions will not need to learn and participate in an entirely new liability and appeals process.

2. Summary

Provision	Reg Section	Description of Provision
Borrower Defense to Repayment		
Uniform Borrower Defense to Repayment Framework	§ 685, subpart D	Would establish a new uniform borrower defense to repayment framework based on applications received following or already pending with the Secretary on the effective date of these regulations, rather than based on a loan's disbursement date.
Grounds for Borrower Defense Claims	§ 685.401(b)	Outlines the five grounds on which a defense to repayment claim could be brought: substantial misrepresentation, substantial omission of fact, breach of contract, aggressive recruitment, or a State or Federal judgment or final Department action against an institution that could give rise to a borrower defense claim. A misrepresentation or omission

		would be substantial if a borrower relied upon it, with the Department using a presumption of reasonable reliance for individual and group claims.
Preponderance of Evidence Standard	§ 685.401(b)	Would establish that the Department would review the claims based on a preponderance of the evidence standard.
Group Process	§ 685.402	Would establish two processes for pursuing group borrower defense claims. Under the first, the Department determines if a group of borrowers it identifies has a defense to repayment. Under the second, the Department may initiate a group process upon request from a State requestor.
Forbearance and Stop Collection	§ 685.402(d)(2), § 685.403(c)(3)	Would establish that, during adjudication of a borrower defense claim, all of the borrower's Title IV loans would be placed in forbearance or stopped collection status, including loans that are not associated with the borrower defense claim. Loans associated with an individual claim would cease accumulating interest after the claim has been pending for 180 days. Loans associated with a group claim would cease accumulating interest upon formation of the group.
Prior Final Departmental Actions	§ 685.404	Would establish a process by which the Department could consider prior final Departmental actions against an institution in the context of determining whether to form a group borrower defense claim.
Institutional Response Process	§ 685.405	Would establish that the institution would have 90 days to respond to the Department official's notification to the institution of the borrower defense claim and its basis.
Timeline	§ 685.406(f)	Would establish that group claims would be adjudicated within 2 years of the Department's notification of group claim formation, while individual claims would be adjudicated within 3 years from the submission of a materially complete application package.
Written Decision	§ 685.406(e)	Would establish that the Department would issue a written decision on the outcome of an adjudication. The written decision also would describe the process for the borrower to request reconsideration of the decision. The written decision would be made available to an individual or member of a group and, to the extent practicable, the institution.
Reconsideration Process	§ 685.407	Sets forth the circumstances under which a borrower would be able to seek reconsideration of a Department official's decision on their borrower defense claim.

		The Department official's written notice would be final, but if the borrower's claim is denied in full or in part, that individual borrower, or for a group claim, a State requestor, would be able to request reconsideration. A reconsideration request would be allowed if there were administrative or technical errors, new evidence became available, or the borrower or State requestor wishes the claim to be reconsidered under a State law standard. Group reconsideration requests could be made for the same reasons as an individual request, but a request for reconsideration under State law would require additional documentation, including an analysis of the applicable State law standard and why it would lead to an approved borrower defense claim.
Discharge	§ 685.408	Would establish discharge process. For an approved claim, the Department official would recommend a discharge amount for a borrower or group of borrowers. All borrowers within an approved group claim would receive the same recommended discharge, either in amount or as a percentage of their loans. In making a discharge recommendation, the Department official would apply a rebuttable presumption that the borrower or group of borrowers with an approved claim should receive a full discharge of the loans they received for attendance at the institution that is the subject of the claim, unless in certain circumstances a preponderance of the evidence demonstrates that the discharge should be for a lower amount.
Recovery from Institution	§ 685.409	Would strike 34 CFR 668.87 in its entirety and establish a general framework to recover from institutions the amounts that the Secretary discharges and to leverage the processes already in place at 34 CFR Part 668, part H.
Limitations Period	§ 685.409(c)	Would adopt a 6-year limitations period to recover from the institution the amount of the borrower defense discharge received by borrowers who attended the institution, running from the borrower's last date of attendance at the institution or at any time if the act or omission was a judgment against an institution.
False Certification Discharge		
Uniform Standard	§ 685.215(a)(1)	Would use the borrower's status regarding having a high school diploma or its recognized equivalent or meeting the alternative to graduation from high school eligibility requirements at the time the loan was originated, not at the time the loan was disbursed.

Specification	§ 685.215(c), § 682.402(e)(3)	Would explicitly state in the regulations that all loans may qualify for the discharge based on a false certification of high school diploma or equivalent by the school.
Disqualifying Status	§ 685.215(c)(2), § 682.402(e)(3)	Would include disqualifying status as a false certification discharge condition for all loans.
Signature Specimen	§ 685.215(c)(3), § 685.215(c)(4), § 682.402(e)(3)	Would remove the requirement that borrowers submit signature specimens.
Judicial Determination	§ 685.215(c)(5), § 682.402(e)(3)	Would replace the provision which requires a judicial determination of identity theft with provisions allowing alternative evidence.
Grant Without Applying	§ 685.215(c)(9), § 682.402(e)(15)	Would specify that the Secretary may grant a false certification discharge without an application due to the institution's falsification of Satisfactory Academic Progress for all loans.
Timeline	§ 685.215(d), § 682.402(e)(6)	Would require borrowers to submit an application for a false certification discharge within 60 days of their loan being placed into forbearance but allow borrowers an additional 30days to submit supplemental information.
Rescind Regulation	§ 685.215(e)	Would rescind the provision that any borrower who attests to a high school diploma or equivalent does not qualify for a false certification discharge.
PSLF		
Definitions	§ 685.219(b)	Would add eleven new terms: "civilian service to the Military," "early childhood education program," "non-tenure track employment," "public health," "non-governmental public service," "public service for individuals with disabilities," "public service for the elderly," "public education service," "public library services," "school library services," and "qualifying repayment plan." Would modify five existing terms: "employee or employed," "full-time," "military service," "other school-based service," and "qualifying employer." These definitions are relevant for nonprofit organizations that provide certain specific public services listed in § 455(m)(3)(B) of the HEA, other than a business organized for profit, a labor union, or a partisan political organization.
Amounts Paid	§ 685.219(c)(1)(iii)	Would establish amounts paid by the borrower on a loan that are equal to the full scheduled payment due would count toward forgiveness even if the payment is made in multiple installments or outside the 15-day period in current regulations.
Amounts Paid	§ 685.219(c)(2)	Would clarify that the lump sum or monthly payments equal to or greater than the full scheduled amount made in advance of the

		borrower's scheduled payment due date could count for a period of months not to exceed the date of the borrower's next annual repayment plan recertification date under the qualifying repayment plan.
Deferment or Forbearance Period	§ 685.219(c)(2)(v)	Would allow months in which a borrower is in an identified determent or forbearance period to count as a month of payment for PSLF if the borrower certifies qualifying employment for the period of time covered by the deferment or forbearance.
Direct Consolidation Loan	§ 685.219(c)(3)	Would count those payments made on an eligible Direct Loan that the borrower later consolidates into a Direct Consolidation Loan as qualifying payments for PSLF.
Current Practice	§ 685.219(e)	Would reflect the Department's current practice and process for borrowers to document qualifying employment and request PSLF after making 120 qualifying payments.
Automation	§ 685.219(f)	Would establish that the Department would grant PSLF without an application if the Department has sufficient information to determine eligibility without an application. The Department would attempt to determine if the borrower was working for a qualifying employer at the time the payment was made. If the Department determines the borrower is eligible for PSLF, the Department would notify the borrower and forgive the remaining balance. If the borrower is ineligible for PSLF, the Department would notify the borrower, resume loan repayment obligation, and grant forbearance for the time spent in forbearance.
Reconsideration Process	§ 685.219(h)	Would formalize a reconsideration process for PSLF applications who were denied or disagree with the Department's determination regarding the number of qualifying payments or months of qualifying employment. Borrowers would have 90 days from application denial to request consideration and 180 days from the effective date of the regulation to request reconsideration if denied prior to the effective date of these final regulations.
Qualified Payment During Deferment or Forbearance	§ 685.219(h)(6)	Would count time toward PSLF for a borrower who postponed monthly payments under a deferment or forbearance that would not lead to a qualifying payment. During the forbearance or deferment period, the borrower must have been employed full-time at a qualifying employer and then make an additional payment or payments equal to or greater than the amount the borrower would have

		paid at the time of a qualifying repayment plan.
Federal Family Education Loans (FFEL)	§ 682.414(b)(4)	Would require FFEL Program guaranty agencies to report detailed information related to deferments, forbearances, repayment plans, delinquency, and contact information on any FFEL.
Interest Capitalization		
When Entering Repayment	§ 685.202(b)(2)	Would remove section that provides that, for Direct Unsubsidized Loans, Direct Unsubsidized Consolidation Loans that qualify for a grace period under the regulations that were in effect for consolidation applications received before July 1, 2006, and for Direct PLUS Loans, or Direct Subsidized Loans for which the first disbursement is made on or after July 1, 2012, and before July 1, 2014, the Secretary may capitalize the unpaid interest that accrues on the loan when the borrower enters repayment.
During Forbearance	§ 685.202(b)(3)	Would remove provision that provides that the Secretary capitalizes interest that accrues on Direct Loans during periods of forbearance.
Under Alternative Repayment or ICR Plan	§ 685.202(b)(4)	Would remove section that provides that, subject to some exceptions, the Secretary annually capitalizes unpaid interest when a borrower is paying under the alternative repayment plan or the income-contingent repayment plan described in §685.209(b) and the borrower's scheduled payments do not cover the interest that has accrued on the loan.
Upon Loan Default	§ 685.202(b)(5)	Would remove section that provides that the Secretary may capitalize unpaid interest when a borrower defaults on a loan.
When Leaving PAYE Plan	§ 685.209(a)(2)(iv)(A)(2)	Would remove section that provides that accrued interest is capitalized at the time a borrower chooses to leave PAYE repayment plan.
Under PAYE Plan	§ 685.209(a)(2)(iv)(B)	Would remove section that limits the amount of accrued interest capitalized under §685.209(a)(2)(iv)(A)(1) to 10 percent of the original principal balance at the time the borrower entered repayment under PAYE repayment plan, and that, after the amount of accrued interest reaches that limit, interest continues to accrue, but is not capitalized while the borrower remains on PAYE repayment plan.

When Leaving REPAYE Plan	§ 685.209(c)(2)(iv)	Would remove section that provides that any unpaid accrued interest is capitalized at the time a borrower leaves REPAYE plan.
Total and Permanent Disability Discharge		
Certification and SSA Documentation	§ 674.61(b)(2)(iv), § 682.402(c)(2)(iv), § 685.213(b)(2)	Would add language to provide that, in addition to an MD or DO, a Total and Permanent Disability (TPD) discharge application may be certified by an NP, a PA licensed by a State, or a licensed certified psychologist at the independent practice levels. Would expand the types of SSA documentation that may qualify a borrower for a TPD discharge to include an SSA Benefit Planning Query or other SSA documentation deemed acceptable by the Secretary; in addition to SSA documentation indicating that a borrower qualifies for SSDI or SSI benefits with a next scheduled disability review in 5 years to 7 years, a borrower would qualify for a TPD discharge based on SSA documentation indicating that the borrower— • Qualifies for SSDI or SSI benefits with a next scheduled disability review within 3 years, and the borrower's eligibility for disability benefits in 3-year review category has been renewed at least once; • Has a disability onset date for SSDI or SSI of at least 5 years prior or has been receiving SSDI or SSI benefits for at least 5 years prior to application for TPD; • Qualifies for SSA compassionate allowance program; or • Is currently receiving SSA retirement benefits and met any of the above requirements prior to qualifying for SSA retirement benefits.
Certification Conforming Changes	§ 674.61(b), § 682.402(c), § 685.213(b)	Would add conforming changes to Perkins, FFEL, and Direct Loan regulations identifying the additional medical professionals who would be authorized to certify a TPD discharge application, and the additional SSA documentation that would be acceptable for a TPD discharge.
Reinstatement Requirements	§ 674.61(b)(6)(i), § 682.402(c)(6), § 685.213(b)(7)(i)	Would remove existing reinstatement requirements, except for provision that provides that a borrower's loan is reinstated if borrower receives a new TEACH Grant or a new Title IV loan within 3 years of date the TPD discharge was granted.
Reinstatement Notification	§ 674.61(b)(6)(iii), § 682.402(c)(6)(iii), § 685.213(b)(7)(iii)	Would revise language regarding notification of reinstatement to borrowers; provides that notice would explain to the borrower that first payment

		due date following reinstatement would be no earlier than 90 days after date of the notification of reinstatement, instead of no earlier than 60 days.
Borrower Responsibilities	§ 674.61(b)(7), § 682.402(c)(7), § 685.213(b)(8)	Would remove provisions that describe a borrower's responsibilities after receiving a total and permanent disability discharge.
VA or SSA Documentation	§ 685.213(d)	Would add language that provides that the Secretary would grant a TPD discharge without an application if the Secretary obtains appropriate documentation from the Department of Veterans Affairs (VA) or SSA.
Closed School Discharge		
Application Requirements	§ 685.214	Would remove separate closed school discharge application requirements for Direct Loans disbursed on or after July 1, 2020, and Direct Loans disbursed before July 1, 2020, that appear in current §§ 685.214(c), (d)(1), (f) and (g).
Application Completion	§ 674.33(g)(4) and § 685.214(d)(1)	Would codify current practice by adding language that provides that the borrower must submit a completed closed school discharge application to the Secretary and that factual assertions in the application must be true and made by the borrower under penalty of perjury.
Application Extension	§ 674.33(g)(8)(v), § 682.402(d)(6)(ii)(H), § 685.214(g)(4)	Would extend the time period that a borrower has to submit a closed school discharge application before the forbearance period expires to within 90 days of the Secretary or other loan holder providing the discharge application to the borrower. Under § 685.214(g)(4), if the Secretary resumes collection on Direct Loan after the 90 days the Secretary would not capitalize unpaid interest that accrued on the loan during the period of suspension of collection activity that exists in current § 685.214(f)(4) and (g)(4).
School Closure Date	§ 674.33(g)(1)(ii)(A), § 682.402(d)(1)(ii)(A), § 685.214(a)(2)(i)	Would specify that, for purposes of a closed school discharge, a school's closure date is the earlier of the date that school ceases to provide educational instruction in most programs, as determined by the Secretary, or a date chosen by the Secretary that reflects when school had ceased to provide educational instruction for most of its students.
Definition of Program	§ 674.33(g)(1)(ii)(D), § 682.402(d)(1)(ii)(D), § 685.214(a)(2)(iii)	Would add definition of "program" for purposes of determining school's closure date as credential defined by level and Classification of Instructional Program (CIP) code in which a student is enrolled; under the proposed definition, the

		Secretary may define a borrower's program as multiple levels or CIP codes if: • The enrollment occurred at same institution in closely proximate periods; • The school granted a credential in a program while the student was enrolled in a different program; or • The programs were presented as necessary for borrowers to complete to succeed in relevant field of employment.
Discharge for Teach-Out	§ 674.33(g)(3)(i)(B), § 682.402(d)(8)(i)(B), § 685.214(c)(1)	Would add language to provide that the Secretary (and a guaranty agency, in the case of a FFEL loan) may discharge a loan without an application for an eligible borrower based on information in the Secretary or guaranty agency's possession if the borrower did not complete an institutional teach-out plan implemented by the school or a teach-out agreement at another school, approved by the school's accrediting agency and, if applicable, the school's State authorizing agency.
Borrower Does Not Re-Enroll	§ 674.33(g)(3)(ii), § 682.402(d)(8)(ii), § 685.214(c)(1)	Would remove limitation that a borrower may only qualify for a closed school discharge without an application if the borrower does not re-enroll in an eligible Title IV school within 3 years of the school's closure date. Instead, would provide a discharge automatically if a borrower within 1 year of the school's closure date unless the borrower accepts and completes an approved teach-out agreement.
Teach-Out Plan on Application	§ 674.33(g)(4)(i)(C), § 682.402(d)(3)(iii), § 685.214(d)(1)(i)(C)	Would maintain requirement that a borrower state on the closed school discharge application that the borrower did not complete an eligible institutional teach-out plan performed by the school or a teach-out agreement at another school and would remove requirement that the borrower state that they did not complete a comparable program of study at another school.
Discharge For Not Completing Teach-Out Plan	§ 674.33(g)(3)(ii), § 682.402(d)(8)(ii), § 685.214(c)(2)	Would add language that provides if a borrower accepts but does not complete an institutional teach-out plan implemented by the school or a teach-out agreement at another school, approved by the school's accrediting agency and, if applicable, the school's State authorizing agency, then the Secretary would discharge the loan within one year of the borrower's last date of attendance in the teach-out program.
Discharge for Borrowers 180 Days Before Closure	§ 674.33(g)(4)(i)(B), § 682.402(d)(1)(i), § 685.214(d)(1)(i)(A)	Would add language to standardize the time frame for closed school discharge eligibility to allow borrowers who

		withdrew from the school not more than 180 days before the school closed to qualify.
List of Exceptional Circumstances	§ 674.33(g)(9), § 682.402(d)(9), § 685.214(h)	Would expand non-exhaustive list of exceptional circumstances that would justify the Secretary extending the 180-day time frame. The expanded list of exceptional circumstances would include, but not be limited to: • Revocation or withdrawal by an accrediting agency of school's institutional accreditation; • Placement of school on probation, issuance of a show-cause order, or an equivalent status by the institution's accrediting agency for failing to meet one or more of the agency's standards; • Revocation or withdrawal by State authorization or licensing authority to operate or to award academic credentials in the State; • Termination by the Department of school's participation in a Title IV, HEA program; • A finding by a State or Federal government agency that school violated State or Federal law related to education or services to students; • A State or Federal court judgment that a school violated State or Federal law related to education or services to students; • The teach-out of student's educational program exceeds 180-day look back period for a closed school discharge; • The school responsible for teach-out of student's educational program fails to perform the material terms of teach-out plan or agreement, such that the student does not have a reasonable opportunity to complete his or her program of study; • The school discontinued a significant share of its academic programs; • The school permanently closed all or most of its in-person locations while maintaining online programs; or • The Department placed the school on heightened cash monitoring payment method as defined in section 668.162(d)(2).
Pre-Dispute Arbitration		
Complaint Through Internal Dispute Process	§ 685.300(d)	Would prohibit institutions, as a condition of participating in the Direct Loan program, from requiring students to pursue a complaint based on a borrower defense claim through an internal dispute process before presenting it to an accreditor or relevant government agency.
Relying on Pre-Dispute Arbitration	§ 685.300(e)	Would prohibit institutions from relying on a pre-dispute arbitration agreement, or any other pre-dispute agreement with a

Agreement with Respect to a Class Action		student who obtained or benefitted from a Direct Loan, in any aspect of a class action related to a borrower defense claim, until presiding court rules that case cannot proceed as a class action. Would include a non-exhaustive list of what would constitute reliance on a pre-dispute arbitration agreement with respect to a class action, including seeking dismissal, deferral, or stay of a class action; excluding a person or persons from joining a class action; avoiding discovery; and/or filing an arbitration claim. Would add provisions regarding class action bans being included in any agreement with a student who receives a Direct Loan to attend the school or for whom a Direct PLUS Loan was obtained.
Arbitrate Borrower Defense Claim and List of What Constitutes Reliance	§ 685.300(f)	Would require an institution, as part of the PPA, to agree it would not enter into a pre-dispute arbitration agreement to arbitrate a borrower defense claim or rely in any way on a pre-dispute arbitration agreement with respect to any aspect of a borrower defense claim. Would include a non-exhaustive list of what would constitute reliance on a pre-dispute arbitration agreement, including seeking dismissal, deferral, or stay of a judicial action; avoiding discovery; and/or filing an arbitration claim. Would add provisions relating to notices and the terms of the pre-dispute arbitration agreements be included in any agreement with a student who receives a Direct Loan to attend the school or for whom a Direct PLUS Loan was obtained.
Arbitral and Judicial Records	§ 685.300(g), § 685.300 (h)	Would require institutions to submit certain arbitral records and judicial records connected with any borrower defense claim filed against the school to the Secretary by certain deadlines.
Definitions	§ 685.300(i)	Would add general definitions section that includes a revised definition of "borrower defense claims" that maintains congruence with definitions elsewhere in the Title IV regulations.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as a "major rule," as defined by 5 U.S.C. 804(2).

3. Discussion of Costs and Benefits

The proposed regulations are broadly intended to provide benefits to struggling borrowers by improving the administration of specific aspects of Federal student loan programs. These are borrowers who have difficulty keeping up with their payments, often ending up in forbearance, delinquency, or default, and as a result, see their balances grow through interest accrual and capitalization. Borrowers often struggle to manage their student loan debt due, in part, to acts or omissions by the institution of higher education they attended, a category that includes closed schools and schools that engage in the types of behaviors that can lead to approved borrower defense claims.

The Department believes that these proposed regulations will provide critical support to underserved borrowers. For instance, Black borrowers are disproportionately likely to face repayment difficulties and growing balances. Within recent cohorts, Black college graduates faced a likelihood of default that was five times larger than that of white borrowers.[35] Black borrowers enter repayment after earning a bachelor's degree with

[35] Scott-Clayton, J. (2018, January 10). The looming student loan default crisis is worse than we thought. Brookings Institution Evidence Speaks Report, vol. 2 #34. Retrieved from: https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/.

higher debt than borrowers in other racial groups, and also continue to see their balances increase rather than fall.[36]

Family income, college completion status, and the type of college a student borrowed to attend are additional factors that relate to repayment difficulties. One study finds that students who borrowed to attend two-year for-profit colleges were 26 percent more likely to default than those who borrowed at four-year public colleges, and that family income is a strong predictor of default risk.[37] Using data from the College Scorecard, a different analysis finds that across all institution types, undergraduate noncompleters have substantially higher default rates compared to those who completed a degree or credential.[38] Borrowers in these groups also spend more time with their loans in forbearance and are more likely to see their balances increase after entering repayment.[39]

The remainder of this subsection of the RIA summarizes the conclusions and information which the Department relied on, such as technical studies, assumptions, data, and methodologies, to develop this regulation.

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[36] Scott-Clayton, J. (2016, October 10). Black-white disparity in student loan debt more than triples after graduation. Brookings Institution Evidence Speaks Report, vol. 2 #3. Retrieved from: https://www.brookings.edu/wp-content/uploads/2016/10/es_20161020_scott-clayton_evidence_speaks.pdf.

[37] Hillman, N. W. (2014). College on credit: A multilevel analysis of student loan default. *The Review of Higher Education*, 37(2), 169-195.

[38] Itzkowitz, M. (2018, August 8). Want More Students To Pay Down Their Loans? Help Them Graduate. Third Way report. Retrieved from: http://thirdway.imgix.net/pdfs/want-more-students-to-pay-down-their-loans-help-them-graduate.pdf.

[39] Department analysis of the 2004/2009 Beginning Postsecondary Students Study, estimated via PowerStats (table references: ivbztb and qobjsb).

3.1 Borrower Defense:

These proposed regulations seek to improve the process for adjudicating borrower defense claims and for recouping from institutions the cost of discharges associated with approved claims. The Department anticipates that these proposed regulations would have many benefits for borrowers, as well as some reduction of burden for institutions of higher education. In total, the Department believes the expected increase in borrower defense discharges and the expected increase in recoupment, as compared with the 2019 regulations, would deter behavior that could form the basis for a borrower defense claim and ensure more borrowers are able to access a loan discharge, as provided for in the HEA.

The Department's proposal would establish a uniform Federal standard for initial adjudication of borrower defense claims, regardless of when a loan was disbursed, which would streamline administration of the borrower defense regulations and increase protections for students. This would ensure that all borrower defense claims could be adjudicated under the same standard. However, institutions would not be subject to recoupment actions for applications that are granted based upon this regulation that would not have been approved under the standards of the 1994, 2016, or 2019 regulations. Nor would institutions be subject to a recoupment amount greater than what they would have faced

under the standards of the 1994, 2016, or 2019 regulations, as applicable. A uniform standard also would significantly reduce the time necessary to determine eligibility and relief for borrower defense claims, ensuring that borrowers would receive faster determinations. The use of a uniform Federal standard for initial adjudication would also ensure all borrowers receive consistent review, unlike current rules that outline different requirements depending on when a loan was disbursed.

The Federal standard would provide a clearer path for approval of borrower defense claims while still limiting approval to circumstances where the Department determines that serious improper behavior occurred. We propose to add aggressive recruitment as grounds for a borrower defense to repayment. The Department is adding this category based upon its experience in administering the borrower defense regulation and because the Department is concerned about instances in which aggressive and deceptive recruitment tactics have prevented a borrower from making an informed choice. The proposed language would also clarify that if a recruiter engages in these tactics but then provides accurate written disclosures, the latter cannot undo the actions of the former. We also propose to restore the categories of breach of contract and judgment as grounds for a borrower defense claim, which were included in the 2016 regulation but removed in the 2019 regulation. We

have also expanded the category of judgment to include final Department actions against an institution that could give rise to a borrower defense claim. This includes actions such as a final program review determination that finds an institution has engaged in misrepresentations. To clearly delineate that omission of fact is a form of misrepresentation we have listed it separately.

The regulations also propose clearer protections for borrowers while their cases are under consideration by Department officials by placing a borrower's loan in forbearance or stopping collections activity would stop while the case is being adjudicated. Interest accumulation would cease immediately in the case of a group claim or after 180 days for an individual claim. Individual claims would be adjudicated within 3 years from the receipt of a complete application. Group claims would be adjudicated within 2 years from the receipt of a complete application. Previously, there was no timeline for adjudicating borrower defense claims. As a result, many borrowers who filed claims have found themselves waiting for years to have their claims adjudicated; of nearly 81,000 claims submitted in 2017, for instance, more than 15,000 (nearly one in five) remaining pending. More than one in five claims submitted in 2018 and nearly one in four claims submitted in 2019 also remain pending.[40] In late June 2022, the

[40] Department analysis of data retrieved from the CEMS Borrower Defense System in June 2022. Values were rounded to the nearest 10.

Department announced it had reached a settlement agreement with the plaintiffs in *Sweet v. Cardona*, a lawsuit challenging the Department's timeliness in rendering decisions on borrower defense claims, as well as other matters. Because that settlement process is still underway any effects of that agreement are not contemplated in this regulation. The Department's failure to render a decision by the end of the timeline would render the loans unenforceable. Loans in such a circumstance would not be viewed as a borrower defense claim so an institution would not face a recoupment action for the cost of those loans.

The Department has proposed to include a group process for borrower defense to repayment claims. This process would allow for the use of existing information within the Department's records, such as prior Secretarial actions, which were limited by the 2019 regulations. This would ensure a more efficient process. The process would also invite State requestors to provide evidence that could lead the Department to initiate a group claim, which would provide critical assistance for the Department in investigating and assessing borrower defense claims. The Department estimates that as much as 75 percent of borrower defense volume associated with private for-profit colleges could be associated with group claims, with the rates in public and private nonprofit sectors a minority of volume. While the staff time required to investigate the evidence

behind a group claim could be longer than what is needed for an individual claim, applying the same adjudication result to a group of borrowers would result in an overall reduction in staff time. Approving group claims would also result in the filing of fewer individual claims, as the approved group claims would result in discharges for borrowers who have not yet applied, eliminating the need for such borrowers to submit applications.

The Department proposes to presume that a borrower with an approved claim is eligible for a full discharge and specify limited instances in which the Department could rebut that presumption. All borrowers with approved claims to date have been approved for a full discharge. However, as the Department continues to review and adjudicate claims, there may be circumstances where a claim is approved, and a partial discharge is warranted. The Department believes a presumption that borrowers would get a full discharge would help to ease the burden on both the borrower and the Department by limiting the cases in which it must determine the relief amount to a subset of claims.

If a claim is not approved, or is not approved for full discharge, a reconsideration process would allow a borrower to submit new evidence that was not available in the initial application. This process would afford borrowers an opportunity to be considered under a State law

standard if a decision under the Federal standard does not result in an approved claim for a full discharge.

By increasing relief to borrowers, improving the borrower defense standard, restoring a group process, establishing the presumption of full relief, and providing a reconsideration process, these proposed regulations would result in additional transfers from the Department to borrowers, or from institutions to borrowers when the Department successfully recovers from the institutions. All borrowers would fall under a single, more expansive rule and would be able to receive relief more quickly and efficiently.

The process that the Department proposes would also afford institutions an appropriate opportunity to respond. The Department's allowance for group processes in the proposed regulations means that institutions would need to respond only once regarding a group claim, instead of sending responses to a potentially large number of individual claims. While institutions would be expected to provide a response within 90 days to claims, the separation of approval and recovery processes means that institutions would not be expected to engage in extended contestation of claims for which the Department decides not to pursue recoupment.

In the past, the Department has seen institutions attempt to increase enrollment by resorting to conduct that

later leads to borrower defense approvals. For instance, institutions aggressively marketed inflated job placement rates to encourage students to enroll in their institution. Holding institutions accountable for this type of misrepresentation, as well as adding in aggressive recruitment as a type of conduct that can lead to approved borrower defense claims, would benefit institutions that do not engage in these tactics. This is because approved borrower defense claims may deter institutions from providing students with inaccurate information and from using aggressive recruitment tactics, helping institutions with better conduct and outcomes more successfully compete for enrollment.

The proposed rules provide for a process to recover the discharged amount from institutions after the adjudication of borrower defense cases. Recovery from institutions is important to offset costs to the Federal government and taxpayers from approved borrower defense claims. It also holds institutions accountable for past behavior and would help to deter future practices that could form the basis for additional borrower defense claims. The Department anticipates that, by establishing a process for recoupment from institutions and by providing for a faster adjudication process, it would be able to recover more funds from institutions because those schools

would be less likely to have closed by the time liabilities are assessed than is the case under current regulations.

The Department also believes that a stronger and more expansive borrower defense process would result in positive changes in institutional behavior. For instance, as past title IV policy changes to increase accountability, such as the cohort default rate measure and the 90/10 rule, have demonstrated, institutions are likely to change their practices to respond and conform to new regulations. Accordingly, we expect that, over time, institutions would engage less frequently in acts or omissions that could give rise to a borrower defense claim.

Costs of the Regulatory Changes:

As detailed in the Net Budget Impact section, the proposed changes to borrower defense are expected to reduce transfers from affected borrowers to the Federal government as their obligation to repay loans is discharged. We estimate this transfer to have an annualized net budget impact of $2.6 billion and $2.3 billion at 7 percent and 3 percent discount rates, respectively. This would be partially reimbursed by affected institutions with the annualized recoveries estimated at $51 and $49 million at 7 percent and 3 percent discount rates. The Department anticipates that all costs are transfers, other than minimal costs related to implementation. If the Department recoups from institutions the forgiven dollars, they are

transfer from institutions to borrowers. Otherwise, they are transfers from Federal budget to borrowers. Details about these estimates are in the Net Budget Impacts section of this document, and the Department invites further feedback on the estimates.

In the proposed Federal standard for defense to repayment claims, a claim could be brought on any of the following five grounds: substantial misrepresentation, substantial omission of fact, breach of contract, aggressive recruitment, and a State or Federal judgment or final Department action against an institution that could give rise to a borrower defense claim. The first two grounds incorporate and expand 34 CFR Part 668, subpart F, which currently defines three categories of misrepresentation, relating to the nature of education programs, the nature of financial charges, and the employability of graduates. Aggressive recruitment is added as a new ground for a borrower defense to repayment application and is outlined in 34 CFR Part 668, Subpart R. The proposed Federal standard would be applied to all borrowers regardless of when their loans were disbursed. Borrower defense to repayment applications that are currently awaiting adjudication upon the effective date of the regulations would be adjudicated based on the proposed regulations. Since the proposed regulations expanded on the categories in which borrowers may be eligible for a

borrower defense claim, these pending cases could be approved where they otherwise may not be under existing regulations. In addition, the Department expects an increase in the number of borrower defense to repayment applications when the proposed regulations would go into effect due to the expanded coverage of types of institutional misconduct. However, the Department also expects a deterrent effect from the proposed regulations as institutions adjust their behavior according to the proposed rules.

The proposal to expand group borrower defense claims includes a process initiated by State requestors and a process based on prior Secretarial final actions, as well as general ability for the Secretary to form a group. With these changes, the Department expects that individuals who have a valid borrower defense to repayment claim they could assert, but who were previously unaware of their eligibility or unfamiliar with the process, could become members of a group claim. The Department would presume that a borrower with an approved claim is eligible for a full discharge, except in limited situations. All borrowers with approved claims to date have been approved for a full discharge.

The proposed reconsideration process could increase costs in the form of burden for the Department, although these costs are likely to be small. In general, there are

three possible outcomes for a borrower defense to repayment application: denial, approval with partial discharge, and approval with full discharge. The Department expects a percentage of borrowers whose borrower defense applications are denied or approved with partial discharge to seek reconsideration, which would increase administrative costs and time compared to previous regulations that do not have reconsideration processes. In addition, cases brought by State requestors may also seek reconsideration, provided that the State requestor specifies the exact State standard that applies and why they think it would result in a different decision.

While these proposed regulations would result in higher short-term costs for the Federal government in the form of transfers to borrowers, the Department expects that some of these payments would be recovered from institutions over time. While the Department would likely be unable to recover from institutions that are no longer operating when borrower defense claims have been adjudicated, the proposed regulations would increase the likelihood that the Department could recover from relevant institutions before they are closed because (1) group claims against an institution would increase the expected benefit of recovering from the institution since it would result in large amounts of discharge if approved; (2) the Department is expected to respond to group claims within 2 years of a

materially complete application, which would increase the possibility that the institution is still in operation; and (3) the streamlined process of borrower defense claims would allow borrowers, State requestors, and the Department to act more quickly on borrower defense applications. As a result, the costs in the form of transfers to borrowers that would result from the proposed regulations on borrower defense to repayment could be smaller for the Federal government in the long term as it receives transfers from institutions.

Benefits of the Regulatory Changes:

The proposed regulations would result in administrative cost savings for the Department, efficiencies in responding to claims for institutions, and benefits to borrowers. In addition, borrowers may benefit from a deterrent effect of these proposed regulations.

Borrowers who would benefit the most from these proposed regulations are relatively disadvantaged. To date, borrower defense applicants have disproportionately attended schools in the proprietary sector. Of more than 487,000 borrower defense claims received since 2015, more than 367,000--about three out of four borrower defense applicants--attended proprietary institutions. Meanwhile, just 5 percent of applicants attended public institutions.[41]

[41] Department analysis of data retrieved from the CEMS Borrower Defense System in June 2022. School Type is determined using the "School Type" field on each case in the system. Each value is rounded to the nearest 10.

These numbers understate the share of borrowers who attended private for-profit institutions because the data reflect the sector of an institution at the time a borrower applied, not when they attended. That means a borrower who attended a college when it was a proprietary institution but applied after it became a nonprofit would be coded as an application from a nonprofit institution.

Borrowers who received Pell Grants while enrolled and borrowers who struggle to repay their loans and default would benefit from these proposed regulations. Eighty-two percent of borrower defense applicants received a Pell Grant indicating they were low-income while in college, and at least 22 percent of applicants are currently in default on their loans, consisting of approximately 95,000 borrowers.[42] This number does not include borrowers previously in default who have had their claims approved and discharged, but it does include some borrowers whose claims have been approved and are in the process of being discharged. As a result, it potentially understates the potential degree to which borrower defense applicants have been in default.

The proposed single Federal standard for initial adjudication, uniform borrower defense regulations, and a more streamlined process (such as presuming a full discharge) would reduce the staff time per borrower needed

[42] Data analysis of borrower defense applicants.

to adjudicate borrower defense applications. These savings would largely come from being able to apply consistent rules across all borrowers while still ensuring that each case receives a thorough and rigorous review to determine whether their claims should be approved or denied.

The proposed group process would significantly reduce the staff time required to investigate and adjudicate borrower defense cases on a per-borrower basis. The proposed regulations include two means by which the Department can pursue a group process. Specifically, a group process can be initiated by the Department based on either common evidence from cases being adjudicated or prior Secretarial final action, or a State may request that a group process be initiated.

When the Department initiates a group process, it would thus be considering the possibility of approval for tens of borrowers all at once, if not hundreds or thousands. While the scope of this work would require significantly more time than reviewing any one individual claim, it is far more efficient than on a per-borrower basis. In addition, the evidence available during group claims is expected to be more extensive than what the Department may possess for an individual claim. The process for group claims tied to prior final actions by the Secretary would be particularly efficient because the Department would draw upon prior work done by the agency,

minimizing the amount of duplication in investigation that needs to occur. This would result in a significant saving of Department staff time and ensure faster adjudication for borrowers, as well as a straightforward process for subsequent recoupment. This proposed process is more efficient than how the Department has addressed borrower defense claims to date. For those claims, it has first worked to reach common findings--a process similar to what would be done to determine a group claim. But after reaching those common findings for approval, the Department then conducts reviews of individual claims to determine if the allegations provided by the borrower match the common findings. This results in a second step of claim review that has disqualified some borrowers who may have experienced the misconduct that led to approvals, but whose claims did not necessarily articulate those experiences. Such a secondary review would not be necessary in the proposed group process, though the Department would continue to review borrower eligibility to ensure findings are applied appropriately only to affected borrowers.

The use of group processes can also provide some efficiencies for institutions in the process of responding to claims. Institutions would have to respond to individual claims separately, which could require them to respond to hundreds if not thousands of separate claims from similarly situated borrowers. By contrast, a group

approach would require institutions to offer only a single response back.

The proposed regulations could also result in significant benefits to borrowers who qualify for a borrower defense to repayment approval. In particular, it would help to reduce the burden of applying where the Department is able to identify eligible borrowers for relief on their loans but where some borrowers might not know they are eligible or how to access relief. These borrowers who are eligible for borrower defense discharges, but may not know how to access relief, are unlikely to have benefited from the education they received and may be distressed borrowers who are delinquent, in default, or have previously defaulted on their student loans. These loan repayment struggles create further barriers for borrowers' personal financial circumstances, but also add to the Department's administrative burden when there are borrowers in the system who are eligible for a discharge but instead are in default. The proposed regulation would allow more eligible borrowers access to relief through group claims, which would bring benefit to both borrowers and the Department.

The Department believes that the expansion of eligibility for borrower defense to repayment claims and the reintroduction of a rigorous group process would result in positive change in institutional behaviors due to the

deterrent effect. It would also benefit institutions that do not engage in conduct that leads to approved borrower defense claims. The Department has seen in the past that some institutions with poor outcomes have used fraudulent or misleading materials in marketing and recruitment to attract new students. This may place institutions that remain truthful about their outcomes at a competitive disadvantage in attracting and enrolling students. Curbing the conduct that leads to approved borrower defense claims thus helps institutions that never engaged in those behaviors in the first place. It is possible that in some limited circumstances tied to the worst behavior, the approval of borrower defense claims could result in the exit of an institution from the Federal financial aid programs. An institution that engages in problematic practices for years could face significant liabilities from approved borrower defense claims that they cannot afford. As with deterring institutions from engaging in misleading or other questionable marketing practices, having the institutions with the worst behaviors exit the Federal aid programs would provide benefits to all other institutions that are operating in more truthful and ethical manners.

3.2 False Certification Discharge:

False certification discharges ensure that borrowers whose institutions falsely certified their eligibility for a Federal student loan are able to access relief on that

debt. The Department decided in September 2019 that borrowers who took out loans after July 1, 2020, are ineligible for a false certification discharge if they were unable to provide an official high school transcript or diploma, and loans disbursed after July 1, 2020, are not eligible for disqualifying status discharge as well. After these regulatory changes, we observed a sharp decline in the number of borrowers and total amounts of false certifications discharged in 2021. The number of borrowers who were granted false certification discharge was 400 in 2020 but was only 100 in 2021, and the total amount of false certification discharges was $4.8 million in 2020 but only $0.8 million in 2021, suggesting that borrowers were facing increased barriers to accessing false certification discharges to which they were entitled.

Table 1. False Certification Discharges, by Calendar Year.

Calendar Year	Borrowers	Amount ($ M)	Average per borrower ($ K)
2019	300	3.8	12.7
2020	400	4.8	12.0
2021	100	0.8	8.0
Total	800	9.4	11.8

The effects for borrowers could be significant. In 2020, prior to the new regulations, the discharge approval rate was about 7.3 percent, and the average amount discharged per application was $9,310.

Table 2. Number of False Certification Approvals and Discharge Amounts, by Reason.

	Discharge Type	7/1/19 to 6/30/20	7/1/20 to 6/30/21	2020 calendar year estimated	2020 subtotal
Applications Approved	FC – ATB	520	145	330	470
	FC – DQS	30	10	30	
	FC – UNS	200	30	120	
Applications Denied	FC – ATB	3500	1510	2510	6000
	FC – DQS	1500	770	1130	
	FC – UNS	3530	1190	2360	
Loans Discharged	FC – ATB	1170	250	710	980
	FC – DQS	50	40	50	
	FC – UNS	400	40	220	
Amount Discharged	FC – ATB	$5,764,280	$1,274,520	$3,519,400	$4,404,220
	FC – DQS	$219,130	$305,600	$262,370	
	FC – UNS	$1,161,290	$83,610	$622,450	
Average amount discharged per application					$9,310
Average amount discharged per loan					$4,510
Average approve rate					7.3%

Data source: Federal Student Aid (FSA)

Note: 2020 calendar year is estimated with the average of 2020 and 2021 fiscal years. ATB stands for the ability to benefit, DQS for disqualifying status, and UNS for unauthorized signature. All figures are rounded to the nearest 10.

To address the decline in borrower access to necessary discharges on their loans, and to ensure the regulations governing these discharges are streamlined and understandable to eligible borrowers, the Department proposes one set of regulatory standards to cover all false certification discharge claims.

The Department proposes a uniform standard that would improve borrower access to false certification discharges by clarifying that eligibility for the discharge begins at the time the loan was originated, not at the time the loan was disbursed. Current regulations for Direct Loan and

FFEL (FFEL) Program loans also contain separate requirements for loans first disbursed before July 1, 2020, and loans first disbursed on or after July 1, 2020, which confuse borrowers and create equity issues for borrowers who may struggle to navigate this complexity. This uniform standard would ensure that more borrowers have access to the proposed expanded eligibility and that they are not forced to navigate a complex and overlapping set of regulatory frameworks. As with the proposed borrower defense standard, we believe that this uniform standard would streamline the administration of the regulations and better protect students while reducing confusion among borrowers, institutions, servicers, and the Department.

The Department proposes to rescind the requirement that any borrower who falsely attests that they have a high school diploma or its equivalent does not qualify for a false certification discharge. This would ensure that borrowers can seek a discharge if they were coerced or deceived by their institution of higher education and as a result reported having a valid high school diploma or its equivalent when they in fact did not, further expanding access to false certification discharges.

The Department also proposes to specify that the Secretary may grant a false certification discharge, including without an application, if the institution falsified Satisfactory Academic Progress (SAP) for all

loans. We would grant group discharges based on the falsification of SAP and the Department would establish the dates and borrowers affected. The discharge would only cover loans for those borrowers for the period covered by the falsification of SAP and does not discharge all the borrower's other loans or all loans at the institution. The Department is aware of problematic practices by institutions that have falsified SAP, which is a basic eligibility requirement for continued access to Title IV, HEA aid, and believes that this proposed addition would ensure that borrowers whose institutions falsely confirmed their eligibility through these practices have access to loan relief, and that institutions may be held accountable for their actions.

The Department proposes to remove the requirement that borrowers submit signature specimens when applying for discharge due to unauthorized loan, unauthorized payment, or identity theft, and replace the need that a borrower provides a judicial determination of identity theft with the ability to submit alternative evidence. This would expand access to false certification discharges by reducing the burden of documents-preparation on borrowers and simplifying the application process.

The Department's proposal would also establish a group process for awarding discharges to similarly situated borrowers. In part, this addition was in response to

negotiators who noted that the Department has rarely utilized its authority to grant group false certification discharges. As a result, the Department believes that borrowers would receive more equitable and consistent treatment, because they would be able to access relief on their loans regardless of whether they applied, based on evidence the Department collects or has in its possession. A State attorney general or nonprofit legal services representative would be able to submit an application for a group false certification discharge to the Department. This would ensure a more efficient process than is typically available, whereby third-party requestors and other stakeholders would be able to contribute directly to the fact-finding process required before adjudicating the application. The group process, and associated improvements, would also help to significantly reduce staff time required to investigate and adjudicate individuals' applications when common facts and circumstances are present.

Costs of the Regulatory Changes:

Increased accessibility of discharges may encourage more borrowers to file claims or may result in additional discharges as a result of borrowers' access to a group process. The Department expects an increase in the Federal government's expenditure and an increase in the time in processing the claims in the short term, but a minimal

long-term cost. The Department anticipates the costs associated from these proposed changes will be transfer costs. The short-term increase in expenditures would come from the following proposed regulations:

The Department proposes to rescind the provision that any borrower who attests to having obtained a high school diploma or equivalent does not qualify for a false certification discharge on that basis. The Department is aware of numerous instances in which borrowers were forced or misled by their institution into attesting to holding a high school diploma, or into obtaining a diploma on false pretenses. In cases where such evidence is available, the Department believes the institution should be held accountable for its misconduct, and the borrower should be able to access a discharge of their eligible loans. This could lead to more borrowers applying and being granted loan discharges in the future.

The Department also proposes to remove the requirement that borrowers submit signature specimens and replaces the provision of a judicial determination of identity theft with alternative evidence. Similarly, the Department anticipates that removing this barrier would allow more eligible borrowers to apply without having their applications rejected, and may, therefore, increase the costs of approved false certification discharges.

Benefits of the Regulatory Changes:

The proposed process, which would be more streamlined, would ease the administrative burden on the Department for the review of claims and for appeals of denials that are escalated for further review. Most importantly, the proposed process contemplates the benefits to the borrowers themselves who are entitled to discharges when their institution wrongfully saddles them with debt they are not eligible for and wastes their aid eligibility.

The Department also expects that there would be some behavioral impact as institutions respond to changes in the regulations and reduce their use of such predatory practices, since the Department could assess liabilities against the institution for the discharges. In addition, this deterrent of strengthening and streamlining these regulations is expected to offer some benefit to taxpayers. Therefore, the long-term transfer costs may be reduced.

Taken together, the proposed regulations would result in a more streamlined process, rescind limitations on borrower eligibility from current regulations, and remove and replace requirements, which are expected collectively to improve borrowers' accessibility to false certification discharge. The Department expects that these proposed rules would ensure more borrowers have access to relief. While this would increase costs to taxpayers through additional false certification discharges, the Department also anticipates that some of these costs would be recouped

from the institutions responsible, and that these proposed rules would be more efficient.

3.3 PSLF:

The Department proposes to clarify its regulations on PSLF to help borrowers better understand and access the program, particularly by simplifying the rules regarding what constitutes a qualifying payment, and to streamline the Department's processing of the applications it receives for forgiveness. Overall, we anticipate that these proposed regulations would increase the amounts of Federal student loan forgiveness through PSLF.

The Department proposes to further clarify the types of employers whose employees can qualify for PSLF and to clarify the definition of full-time employment that meets the terms of the program to address inconsistencies in how different employers may consider full-time employment and in how non-tenured faculty are treated. While most of these changes are modest, we believe they would bring benefits to borrowers in the form of more consistent treatment. This may also provide additional clarity to employers, ensuring they can better understand the program and inform borrowers of their eligibility.

Where possible, the Department would seek to automate the process of identifying public servants and accounting for their time worked to ensure they automatically receive progress toward PSLF. For instance, the Department is

working to implement data matches with other Federal agencies that would enable it to account for federal employees and service members. The benefit of these data matches for borrowers is increased access for those who would otherwise not have met the paperwork requirements, but who may be eligible for relief on their loans. The Department has also announced longer-term efforts to work with States and private nonprofit organizations to obtain data that would similarly allow for discharges without an application. We anticipate a significant percentage increase in the total amount of loans forgiven due to greater use of automation made possible by changes proposed in these regulations. Most borrowers employed by the Federal government would be able to receive PSLF benefits without submitting an application. We also expect that borrowers identified for forgiveness through these data matches would have information that is validated by government agencies, ensuring greater program integrity among a larger share of applicants who receive forgiveness.

Automation would also have considerable benefits, both for the Department and for borrowers, in terms of reducing the administrative burden. While there are initial costs associated with developing the automation, the future cost savings far outweigh the development costs. In 2021, the Department received 776,000 applications for employment certification and/or forgiveness, all of which needed to be

evaluated individually. Prior to any data match, the Department was aware of approximately 110,000 Federal employees and 17,000 service members who had certified some employment toward PSLF and anticipates that many others could opt to certify employment in the future. Automating the consideration of those borrowers' employment and/or PSLF applications would reduce the investment of staff resources required to analyze PSLF applications.

The Department proposes to relax the requirements around loan payments to ensure more eligible borrowers have access to PSLF, partially addressing the low success rate of PSLF applications. Currently, the regulations governing qualifying payments are extremely rigid. Payments must be made on-time (within 15 days of the due date), or they do not count as qualifying payments. Payments also must be made in full, so payments off by only a few cents or payments that are made in more than one installment are disqualified. Additionally, some public servants have opted for deferments or forbearances available to borrowers who are working in public service jobs--such as for AmeriCorps and Peace Corps--without realizing those months would not qualify for PSLF. The Department believes simpler payment rules and counting some deferments and forbearances would significantly reduce confusion around the program. In addition, borrowers would significantly benefit by being able to make qualifying payments for prior

deferment or forbearances where there was no qualifying payment. This change grants borrowers the ability to make up payments that did not previously qualify as well as not reset the clock toward consolidation.

These changes would increase costs to the government in the form of greater transfers to borrowers eligible for PSLF, as take-up of the benefit increases due to automation and as more borrowers become eligible for PSLF outside of the narrow constraints of the existing rules but consistent with the statutory purpose of the PSLF program. Borrowers who work in Federal agencies where data matching agreements are arranged will benefit as a higher fraction of eligible borrowers receive forgiveness and the burden in applying for benefits is reduced. All other things equal, among borrowers for whom receiving forgiveness becomes more likely, borrowers with higher debt levels, including some graduate borrowers, will experience greater amounts of loan forgiveness.

The Department also proposes to formalize a reconsideration process and establish a clear timeline by which borrowers must submit a reconsideration request. These refinements would streamline the application process and provide a clearer timeline to apply for PSLF or request a reconsideration. The Department anticipates that this reconsideration process would increase administrative burden for the agency and for borrowers, but that it would

allow for a fairer and more equitable process to access PSLF where borrowers believe the Department has erred in its determination.

Costs of the Regulatory Changes:

As detailed in the Net Budget Impact section, the proposed changes to PSLF are expected to reduce transfers from affected borrowers to the Federal government as their loans are forgiven. We estimate this transfer to have an annualized net budget impact of $3.0 billion and $2.8 billion at 7 percent and 3 percent discount rate, respectively. The Department anticipates most of these costs would be transfers as borrowers who are employed by a non-profit organization that provides non-governmental public services more easily access PSLF benefits. In particular, we expect that the expansion of eligibility, the inclusion of additional payments as qualifying payments, and increases in take-up facilitated by automating the benefit where it is possible to identify eligible borrowers through a data match would increase transfers from the government to eligible borrowers. The revised definitions of qualifying services are not anticipated to impact a significant number of borrowers but will provide greater clarity about eligibility.

Benefits of the Regulatory Changes:

The Department anticipates several benefits based on these regulatory changes to PSLF. The Department seeks to

reduce the burden of accessing PSLF benefits for borrowers who are employed by a non-profit organization that provides non-governmental public services and streamline the process to obtain these benefits. The Department received over 917,000 employment certification forms in 2019, certifying that borrowers are working toward forgiveness, and 825,000 employment certification forms in 2020. The Department also received 96,000 forgiveness applications in 2019 and 135,000 forgiveness applications in 2020 from borrowers who may believe they completed the requirements of the program to qualify for forgiveness. Starting in late 2020, the combined form replaced the separate process of borrowers submitting employment certification forms and forgiveness applications. The Department received 130,000 combined forms in 2020 and 776,000 combined forms in 2021. Over the last few years, the Department has seen fewer submitted PSLF forms, with 1,013,000 forms submitted in 2019; 1,090,000 forms submitted in 2020; and 776,000 forms submitted in 2021. However, after the announcement of the Limited PSLF Waiver in October 2021 that temporarily waived some program requirements through the end of October 2023, the Department has seen significant growth in applications compared to earlier periods. Due to the implementation of an automated process for some eligible borrowers, we are anticipating a significant decrease in the number of applications received because an application would not need

to be submitted if the Department has the necessary information to assess whether the borrower met the PSLF requirements during the automated process. Under this proposed process, a borrower would be notified if the borrower meets the requirements for loan forgiveness. After the borrower is notified, the Department would suspend collection and the remaining balance of principal and accrued interest would be forgiven.

By streamlining the PSLF process, the Department anticipates a reduction in the administrative burden and time savings for application processing. There would also be a burden reduction on qualifying employers as the employers would have a simpler time verifying what they are attesting to, such as the hours worked by the borrower.

We anticipate these regulations would impact numerous borrowers who would now qualify for PSLF under the clarified definitions of qualifying employment but previously did not qualify for PSLF. The updated list of deferments and forbearances are anticipated to benefit a significant number of borrowers who would otherwise not be able to consider those months toward forgiveness. A significant number of borrowers who would ordinarily have to apply for PSLF are anticipated to receive student loan forgiveness without submitting an application, namely military service members and Federal employee borrowers who

would automatically receive credit toward PSLF using Federal data matches.

3.4 Interest Capitalization:

Interest capitalization occurs when any unpaid interest is added to the principal loan amount of a Federal student loan, further increasing the outstanding principal balance. Interest is then charged on the higher principal balance, and the overall cost of repaying the loan increases. Capitalization can occur when a borrower changes repayment plans, as well as after periods of deferment or forbearance.

The Department is concerned that interest capitalization can adversely affect student loan borrowers by significantly increasing what they owe on their loans, which may extend the time it takes to repay them. Additionally, borrowers may not fully understand the impact of interest capitalization. While there are circumstances where interest capitalization is required by statute, such as when borrowers exit a deferment period and when they leave Income-Based Repayment plans, the Department believes that it is important to eliminate capitalization events where it has the authority to do so. Borrower misunderstanding of interest accrual and capitalization and resulting confusion about the accuracy of one’s loan balance contributed to the most frequent type of borrower

complaint received by the Department.[43] Qualitative evidence from focus groups with struggling borrowers also has shown that borrowers find capitalized interest to be complex and burdensome, noting that many borrowers do not realize which decisions result in capitalization and feel overwhelmed and frustrated by growing balances on loans.[44] A recent study suggests that among borrowers enter an income-driven repayment plan after becoming delinquent on their payments, most fail to recertify and, as a result, have their interest capitalize.[45]

Data from the 2003-04 Beginning Postsecondary Students Study (BPS), which tracked students from entry in 2003-04 through 2009 with an additional administrative match through 2015, sheds greater light on the distributional consequences of interest capitalization and the forbearance events that are a source of capitalization. The statistics that follow all concern students who first entered college in 2003-04 and borrowed a Federal student loan at some point within 12 years of entry (as of 2015). Among those students, 43 percent had a larger amount of principal

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[43] Report by the FSA Ombudsman, in Federal Student Aid. (2019, November 15). *Annual Report FY* 2019. https://www2.ed.gov/about/reports/annual/2019report/fsa-report.pdf

[44] Delisle, J. & Holt, A. (2015, March). *Why student loans are different: Findings from six focus groups of student loan borrowers.* New America Foundation. Retrieved from: https://files.eric.ed.gov/fulltext/ED558774.pdf; Pew Charitable Trusts (2020, May). Borrowers Discuss the Challenges of Student Loan Repayment. https://www.pewtrusts.org/-/media/assets/2020/05/studentloan_focusgroup_report.pdf.

[45] Herbst, D. (forthcoming.) "The Impact of Income-Driven Repayment on Student Borrower Outcomes." *American Economic Journal: Applied Economics*. Retrieved from: https://djh1202.github.io/website/IDR.pdf.

balance outstanding in 2015 compared to what they originally borrowed.

Among borrowers who did not consolidate their loans (e.g., the group for whom the growth in balance can be attributed to interest capitalization), 27 percent had a higher principal balance as seen in Table 3. Borrowers who are Black, received a Pell Grant, and borrowers from low-income families are overrepresented in this group. Specifically, 52 percent of Black borrowers had a higher principal balance compared to 22 percent of White borrowers. There are also differences based upon income, with 33 percent of Pell Grant recipients (versus 14 percent of non-recipients), and 34 percent of borrowers from families with income at or below the federal poverty line at college entry (versus 22 percent of borrowers with income at least 2.5 times the federal poverty line) having principal balances that exceed their original amount borrowed. Gaps also exist by attainment. Among borrowers who did not consolidate their loans, those who did not complete any degree or credential were 60 percent more likely to see their principal balance grow than bachelor's degree recipients.[46]

While the BPS data cannot break down the exact sources of interest capitalization, this analysis indicates that borrowers in the groups most likely to experience

[46] Department analysis of the 2004/2009 Beginning Postsecondary Students Study, estimated via PowerStats (table reference: qobjsb).

capitalization also are more likely to experience periods in forbearance, which is one cause of interest capitalization. Nearly 80 percent of Black or African-American student loan borrowers in the BPS sample had a forbearance at some point within 12 years of first enrollment as seen in Table 3 below. Among American Indian or Alaska Native or Hispanic or Latino borrowers, the rates of forbearance usage were 64 percent and 59 percent respectively. By contrast, about half of white students used a forbearance.[47]

The results are similar by Pell Grant receipt and family income at college entry. Nearly two-thirds of Pell Grant recipients who also borrowed had a forbearance at some point compared to just 40 percent of non-Pell students. Among borrowers from families with income at or below the federal poverty line in 2003-04, 64 percent had a forbearance at some point compared with 46 percent of borrowers from families with income at least 2.5 times the federal poverty line at college entry. Finally, 62 percent of borrowers who did not complete a degree or credential had a forbearance, compared with 46 percent of those who earned a bachelor's degree.

Data from the same study also show that the groups of borrowers that are more likely to have had a forbearance also had more total forbearances within 12 years of

[47] Department analysis of the 2004/2009 Beginning Postsecondary Students Study, estimated via PowerStats (table reference: ivbztb).

entering college. On average, Black or African American borrowers who had at least one forbearance had nearly six forbearances compared to four for white borrowers as seen in Table 3. Similarly, borrowers who received a Pell Grant and had a forbearance had an average of nearly five forbearances, compared to just over three for non-Pell students.[48] This means borrowers in these groups would be subject to more capitalizing events than their peers.

TABLE 3. PRINCIPAL BALANCE GROWTH AND FORBEARANCE USAGE AMONG 2003-04 COLLEGE ENTRANTS WHO BORROWED.

Borrower type	Share of borrowers whose principal balance exceeds original amount borrowed within 12 years of entry (among those who did not consolidate)	Share of borrowers who had a forbearance at any time within 12 years of entry	Average number of forbearances among borrowers who ever had a forbearance within 12 years of entry
All	27%	56%	4.5
Black or African American	52%	79%	5.7
White	22%	50%	4.0
Hispanic or Latino	25%	59%	4.5
American Indian or Alaska Native	***	64%	3.1

[48] Ibid.

Asian or Native Hawaiian/ other Pacific Islander	13%	39%	3.0
Received a Pell Grant	33%	64%	4.8
Never received a Pell Grant	14%	41%	3.4
Family income at or below 100% FPL in 2003-04	34%	64%	5.0
Family income 101 – 250% FPL in 2003-04	31%	63%	4.7
Family income above 250% FPL in 2003-04	22%	48%	3.9
No degree or credential as of 2009	31%	62%	4.8
Earned undergraduate certificate or associate degree as of 2009	30%	61%	4.6
Earned bachelor's degree as of 2009	19%	46%	3.8

Source: Beginning Postsecondary Students Study, estimated via PowerStats.

Capitalizing events present a significant burden to borrowers as they see their balances quickly rise with interest capitalization that is compounded over time. The events described in the table below are circumstances in which the Department proposes to eliminate interest capitalization.

Capitalization Events Being Eliminated
Borrower who repaying under the PAYE plan fails to recertify income, or chooses to leave the plan
Borrower who is repaying under the REPAYE plan leaves the plan
Negative Amortization Under the alternative repayment plan or the ICR plan
Exiting Forbearance
Entering Repayment
Default

Costs of the Regulatory Changes:

As detailed in the Net Budget Impact section, the changes to interest rate capitalization are expected to reduce transfers from affected borrowers to the Federal government as their obligation to repay loans is lessened by the removal of capitalizing events. We estimate this transfer to have an annualized net budget impact of $1.29 billion and $1.26 billion at 7 percent and 3 percent discount rate, respectively. The main costs associated with the ruleset represent a transfer of benefits from the Federal government to the eligible borrower, primarily forgone revenue from payments on the higher balance and resulting increase in interest due to elimination the capitalizing events listed above. In addition, as less interest income is received by the government, the costs of

the programs to taxpayers increase, as less income is available to offset losses. More details on the costs to the government are provided in the Net Budget Impact Section.

Benefits of the Regulatory Changes:

The Department anticipates that some borrowers may see the lack of capitalizing events for borrowers exiting certain Income-Driven Repayment (IDR) plans as enabling them to switch out of IDR and instead enroll in a Standard or other repayment plan. For some borrowers, this could mean that they pay less on either a monthly basis or over the life of the loan (e.g., if they exit an IDR plan and enter an Extended or Graduated repayment plan with lower monthly payments). For some, they could pay more; a borrower could switch out of IDR and into a Standard plan, for instance, before their IDR monthly payment reaches that amount.

The lack of capitalizing events can also have broader societal benefits by reducing debt burdens for groups that may be most affected by interest capitalization – borrowers from low-income families, Black borrowers, and borrowers who do not complete a college credential.[49] First, student debt has been shown to reduce households' ability to accumulate wealth through homeownership.[50] Thus,

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[49] Department analysis of the 2004/2009 Beginning Postsecondary Students Study, estimated via PowerStats (table reference: ivbztb and qobjsb).
[50] Mezza, A., Ringo, D., Sherlund, S., & Sommer, K. (2020). Student loans and homeownership. *Journal of Labor Economics*, 38(1), 215-260.

eliminating interest capitalization for these events may help reduce existing disparities in this wealth-building asset by race and family income.[51] Additionally, student loan debt is negatively correlated with the probability that a borrower starts a business, suggesting that gaps in entrepreneurship by race may decrease if eliminating capitalization events reduces disparities in debt burdens for borrowers of color.[52]

3.5 Total and Permanent Disability Discharge:

The Department is committed to simplifying the Total and Permanent Disability (TPD) process for eligible borrowers. In addition to allowing for automatic discharges when a borrower is identified through a data match with the Social Security Administration (SSA), which was announced in summer 2021, the Department is also proposing new regulations for TPD to ensure it provides relief to eligible borrowers uniformly across its loan programs, including Federal Perkins Loans, FFEL loans, and William D. Ford Federal Direct Loans.

The Department proposes to expand the categories of SSA disability status that qualify for TPD discharges.

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[51] U.S. Census Bureau (2019). *Table 22: Homeownership Rates by Race and Ethnicity of Householder.* Retrieved from https://www.census.gov/housing/hvs/data/ann19ind.html.

[52] For evidence on the correlation between student debt and entrepreneurship, see Krishnan, K., & Wang, P. (2019). The cost of financing education: can student debt hinder entrepreneurship? *Management Science*, 65(10), 4522-4554.
For evidence on gaps in entrepreneurship by race, see Hipple, S. F. & Hammond, L. A. (2016). *Self-Employment in the United States*. U.S. Bureau of Labor Statistics. https://hdl.handle.net/1813/79426.

Currently regulations only allow borrowers to qualify for a discharge if their status is Medical Improvement Not Expected (MINE). In this status, an individual's status is reviewed every 5 to 7 years, which fits the requirement in the HEA that a borrower have a disability that is expected to result in death or that has persisted or is expected to persist for at least 60 consecutive months while the borrower does not engage in gainful employment. The Department proposes to add additional categories for Compassionate Allowance (applied where the applicant has one of a certain set of predefined conditions); Medical Improvement Possible (MIP), if that status has been renewed at least once and therefore has been or would be in a disability status for at least 6 years; if the borrower had one of the qualifying statuses and has since aged into retirement; and borrowers with a disability onset data for SSDI or SSI that is at least 5 years prior to the TPD application. More borrowers would be eligible for TPD discharges with the addition of these categories.

The Department also proposes to eliminate the post-discharge income monitoring period. Currently, borrowers must supply their income information annually through a 3-year post-discharge monitoring period to ensure that they continue to meet the criteria for the program. If borrowers do not respond to these requests, their loans are reinstated, regardless of whether the borrowers' earnings

are above set thresholds. The Department is concerned that high numbers of borrowers have their loans reinstated not because they fail to meet the criteria but simply because they fail to submit the required paperwork. The Government Accountability Office's (GAO) 2016 report on Social Security offsets reported that more than 61,000 loans discharged through TPD, totaling more than $1.1 billion, were reinstated in fiscal year 2015 alone; and that 98 percent of those were reinstated because the borrower did not provide the requisite information for the monitoring period.[53] Meanwhile, an analysis conducted by the Department using Internal Revenue Service (IRS) data suggests that 92 percent of these borrowers did not exceed the earnings criteria required to retain their eligibility.

The Department also proposes to streamline the process for applying for a TPD discharge where automation is not feasible. We propose to amend the TPD regulations to expand allowable documentation that can be submitted as evidence of a qualifying disability status, including the current practice of accepting a Benefit Planning Query Handbook, and to expand the list of medical professionals eligible to certify an individual's total and permanent disability to include nurse practitioners, physician

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[53] Government Accountability Office. (2016). "Social Security Offsets: Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permitted Relief." (GAO Publication No. GAO-17-45.) Washington, DC: U.S. Government Printing Office. Retrieved from https://www.gao.gov/products/gao-17-45.

assistants, and licensed or certified psychologists at independent practice level who are licensed to practice in the United States.

Costs of the Regulatory Changes:

As detailed in the Net Budget Impact section, the changes to total and permanent disability are expected to reduce transfers from affected borrowers to the Federal government as their obligation to repay loans is discharged. We estimate this transfer to have an annualized net budget impact of $2.4 billion and $2.2 billion at 7 percent and 3 percent discount rate, respectively.

As a result of expanding the SSA categories that qualify for TPD discharges, the Department estimates increased costs to the taxpayer in the form of transfers to the additional borrowers who would be eligible for, and receive, TPD discharges.

Because more borrowers would also be able to retain their discharges and not see their loans reinstated, the Department also anticipates that this proposed change would increase costs to taxpayers in the form of transfers in direct benefits to those borrowers.

The proposed changes to expand allowable documentation and the list of certifying medical professionals are expected to modestly increase the amounts discharged through TPD through transfers to affected borrowers, as

more borrowers overcome these barriers and apply for discharges.

Benefits of the Regulatory Changes:

The Department believes that many more borrowers would be eligible for TPD discharges with the addition of SSA categories. Based on the Social Security Administration's Disability Analysis File (DAF) Public Use File for 2019 (PUF19), the MINE population represented approximately 24.5 percent of total SSI recipients, while the MIP category represented 22.9 percent at first reexamination.[54]

Eliminating the post-discharge income monitoring period would also ensure consistency between borrowers with an SSA determination of disability status and those with a VA determination. Total and permanent disability discharges based on determinations by the Department of Veteran Affairs are not subject to a post-discharge monitoring period (though some veterans may apply for or receive a TPD discharge based on an SSA determination instead). The Department believes this change would reduce the burden that borrowers with a total and permanent disability face in retaining their discharge, as the time and effort involved in providing income information during the monitoring process would be eliminated.

[54] Note that 44.9 percent of the SSA data also contains missing reason code for medical re-examination where there is no data available, but applicable to the beneficiary having a populated date of initial SSDI or SSI eligibility, so it is likely that the MIP and MINE categories may represent a higher portion of the overall data; however, no additional description is publicly available.

The Department also believes that expanding allowable documentation and the list of certifying medical professionals would increase transfers to borrowers through discharges by lowering administrative burdens that borrowers face, including in reducing the costs that borrowers face in obtaining the necessary documentation of their disability.

3.6 Closed School Discharge:

The Department proposes to improve access to closed school loan discharges for borrowers who are unable to complete their programs due to the closure of their institution. While there are many closures that occur in an orderly fashion with advance notice, the majority of students affected by closures in the last several years were mid-program and unable to complete their program at the college where they started.

Presently, the process for closed school discharges includes specific eligibility requirements that can limit borrowers who have been affected by school closure from receiving the loan discharge. Through the proposed regulations, the Department aims to expand eligibility for closed school discharges. In 2016, the Department issued regulations that provided automatic closed school discharges to borrowers who were eligible for a closed school discharge but did not apply for one and who did not enroll elsewhere within 3 years of the institution's

closure.[55] A 2021 GAO report on college closures found that 43 percent of those eligible for a CSD had not re-enrolled 3 years later. Moreover, the report found that 70 percent of borrowers who eventually received an automatic discharge were in default or past due, a sign of significant financial distress among this subset of borrowers. Given this, the Department proposes to implement the automatic process for borrowers. We propose to provide such automatic discharges within 1 year of closure, which would significantly benefit affected borrowers.

Borrowers who left a school shortly before it closed can also receive a closed school discharge. However, the discharge windows have not been consistent across years for these borrowers. Loans made prior to July 1, 2020, were generally subject to a 120-day window, while borrowers with loans made after that date were subject to a 180-day window. The Department proposes to standardize the window, making it 180 days for all borrowers, regardless of when the loan was disbursed.

The Secretary can also extend this 180-day window under exceptional circumstances. However, the current non-exhaustive list under §685.214(c)(1)(i)(B) does not include many events that may reasonably be associated with a closure, such as the school being placed on probation. Additionally, the 2019 regulations removed items that were

[55] 81 FR 75926

included in prior regulations, such as "a finding by a State or Federal government agency that the school violated State or Federal law."[56] The Department proposes to expand this list to include this and several other items.

Finally, the Department proposes to remove the requirement that borrowers may not receive a closed school discharge if they opt to transfer credits to a "comparable program." Borrowers currently lose access to a closed school discharge if they transfer any of their credits to another program, even if they only transfer a single credit and otherwise reset their progress to completion. This makes the borrower's choice to continue their education needlessly high stakes. The possibility of losing the discharge, even if a borrower only transfers a low number of credits, could also dissuade borrowers from even trying to continue their education; and risks punishing a borrower who chooses to continue their education but determines the new program is not working for them, as they would have lost the ability to discharge their loans. The Department proposes to address these concerns by removing the "comparable program" requirement and instead providing discharges for all borrowers unless they accept and complete an approved teach-out.

Costs of the Regulatory Changes:

[56] 84 FR 49788

As detailed in the Net Budget Impact section, the changes to closed school discharge are expected to reduce transfers from affected borrowers to the Federal government as their obligation to repay loans is discharged. We estimate this transfer to have an annualized net budget impact of $763 million and $697 million at 7 percent and 3 percent discount rate, respectively. The Department will work to recover from institutions the amounts that the Secretary discharges and to leverage the processes already in place at 34 CFR Part 668, part H. Based on historical Closed School Discharge data, the average discharge amount at the institutional level was $2.4 million based on discharge amounts from 573 closed institutions. Based on the same data, the majority of closed school discharge loan amounts (88.5 percent), were from closed proprietary schools. The table below illustrates the historical average closed school discharge amounts by institution type from 1991 through early April 2022, which are a good estimate of the discharge costs per loan by institution type for future closed school loan discharges.

TABLE 4. CLOSED SCHOOL DISCHARGE AMOUNTS BY INSTITUTION GROUP.

Institution Group	Average Discharge Amount	Sum of Closed School Discharges	% of Total Closed School Discharges

Private 2 to 3 Years	$ 2,876	$ 5,771,862	0.41
Private 4 Years or More	$ 5,030	$ 106,347,003	7.60
Private Less Than 2 Years	$ 2,610	$ 1,461,896	0.10
Proprietary 2 to 3 Years	$ 3,265	$ 387,352,052	27.68
Proprietary 4 Years or More	$ 5,074	$ 823,679,386	58.85
Proprietary Less Than 2 Years	$ 3,002	$ 74,336,389	5.31
Public 4 Years or More	$ 3,258	$ 570,211	0.04
Public Less Than 2 Years	$ 3,692	$ 116,264	0.01

In addition to the cost that the closed institutions will bear, the Department will also incur costs associated with the closed school discharges. These costs would represent a transfer of benefits between the Federal government and the borrower. The Department would have to discharge the affected loans prior to trying to recover the funds from the institutions in order to provide a timely discharge for the borrower. Ultimately, the size of the transfer from the Department to borrowers would be the difference in funds between the discharge amount and the recovery amount from the institution. The Department would also incur administrative costs associated with the process of recovering funds from closed institutions, especially in cases where the institutions may be facing litigation, such as due to bankruptcy or legal violations. This represents net new costs to the Department.

Benefits of the Regulatory Changes:

Automatic loan discharges would significantly benefit affected borrowers who are eligible for a discharge. In particular, after entering repayment, affected borrowers may receive a discharge before they could default on their loans. The Department would also face a reduced administrative burden due to the reduced staff time required to review applications for borrowers who meet the eligibility criteria for a closed school discharge.

Regarding the proposal to standardize the closed school discharge window, the Department believes this would modestly increase eligibility for the discharge for some borrowers, though application rates for closed school discharge tend to be relatively low and are not likely to increase significantly. The Department is also proposing to expand the non-exhaustive list of exceptional circumstances required for the Secretary to use their authority to extend the 180-day window. In certain cases, this would increase eligibility for closed school discharges, potentially by several years. However, this authority would be employed on a case-by-case basis and thus the overall impact is expected to be modest.

The Department believes that by removing the "comparable program" requirement and instead providing discharges for all borrowers unless they accept and complete an approved teach-out would encourage borrowers to

continue their education because they would still be able to keep their discharge if the teach out option does not work for them. It also means a borrower who continues seeking higher education but loses all or most progress toward their degree would not have to worry about whether they would receive relief.

This approach would also encourage institutions to manage closures more carefully. In particular, institutions would have a stronger incentive to make sure borrowers have access to high-quality and affordable teach-out options; otherwise, the institution that is closing would face larger liabilities associated with closed school discharges.

3.7 Pre-dispute Arbitration:

The Department proposes to prohibit pre-dispute arbitration and class action waivers in institutions' enrollment agreements to ensure borrowers have access to fair processes and to provide insight and evidence to the Department that may be needed to adjudicate borrower defense claims. Mandatory pre-dispute arbitration and class action waivers may allow institutions to minimize financial risk associated with wrongdoing and instead may shift the risk of wrongdoing to taxpayers and the Federal government through subsequent borrower defense discharges. In addition, a quick result provided by arbitration does not necessarily consider the interests of taxpayers who

have funds at stake for borrower defense claims and Direct Loans. While the Department included a similar provision in its 2016 borrower defense regulations, the prohibition was rescinded by the 2019 regulations.

Borrowers also may not understand the implications of agreeing to a mandatory pre-dispute arbitration requirement or a class action waiver and what that means for future attempts to seek relief. In a study on arbitration clauses, legal researchers surveyed a random sample of consumers and concluded respondents generally lacked an understanding about the terms of the arbitration agreement and what that meant for their ability to seek relief in court. These researchers expressed concern about whether the consent consumers provide when they enter into a contract that contains an arbitration clause is knowing consent, and therefore valid.[57]

By prohibiting Direct Loan-participating institutions from using certain restrictive contractual provisions regarding dispute resolution and requiring notification and disclosure regarding their use of arbitration, schools would be prevented from keeping complaint information hidden from borrowers facing potential borrower defense issues faced by their borrowers. Keeping complaint and

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[57] Sovern, Jeff and Greenberg, Elayne E. and Kirgis, Paul F. and Liu, Yuxiang, 'Whimsy Little Contracts' with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements (February 19, 2015). 75 Maryland Law Review 1 (2015), St. John's Legal Studies Research Paper No. 14-0009, http://dx.doi.org/10.2139/ssrn.2516432

arbitration information hidden from public view hinders the Department's ability to investigate patterns of student complaints.

In addition, borrowers' ability to pursue individual and class-action litigation would make it difficult for schools to hide potentially deceptive practices from current or prospective students and would allow students who have been harmed by an institution to sue for damages and recoup their financial losses. Providing a litigation option could also mitigate the potential conflict of interest between the arbitrators and the institutions that hire them, leading to more fair outcomes for students. Taxpayer dollars would be better protected by ensuring that grievances from enrollees in problematic schools could be publicly aired through the court system.

The Department notes that the impact of these proposed changes would be largely limited to the for-profit sector. In a 2016 study by an independent think tank, researchers looked at enrollment contracts of more than 270 institutions across the country. None of the public colleges surveyed and only one private nonprofit college required its students to agree to arbitration as a condition of enrollment. Among private for-profit colleges, the researchers found significant differences depending on whether the institution participated in the Federal student aid programs. A majority (93 of the 158)

private for-profit colleges that participate in the Federal aid programs used a forced arbitration clause compared to just one of the 49 that do not participate in the aid programs.[58]

Costs of the Regulatory Changes:

The costs associated with the proposed changes would be affected by whether institutions are less likely to engage in behavior that could lead to an approved borrower defense claim as a result of not using mandatory pre-dispute arbitration clauses or class action waivers. If institutions that engage in conduct that could lead to an approved borrower defense claim do not change their behavior, then there could be a number of costs related to more grievances ending up in court. This would include the cost to students of seeking judicial intervention, though such costs may be offset if their claims in court are successful. Costs can also increase for institutions, as they tend to incur higher legal fees during litigation. Institutions would not only face higher administrative costs, but institutions are also likely to face higher number of settlements and the costs associated with them, as it is expected that the students will be able to reach more favorable decisions in court than during arbitration. These costs would, however, decrease if institutions

[58] Habash, Tariq, and Robert Shireman. "How College Enrollment Contracts Limit Students' Rights." *The Century Foundation*, 28 Apr. 2018, https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/.

currently engaging in conduct that could lead to an approved borrower defense claim cease such conduct as a result of this change. These external factors do not represent any additional costs for the Department.

In addition to costs in the form of transfers to borrowers and administrative burden for the Department, there may be an increase in the time it takes to resolve disputes through non-arbitration means, as litigation proceedings rely on more detailed discovery and presentation of evidence than arbitration. Finally, bringing additional cases to court that have generally been resolved through arbitration may create a burden on the courts, leading to longer litigation time and increased costs for students and institutions.

Benefits of the Regulatory Changes:

Borrowers will see benefits due to a prohibition on arbitration clauses and class-action waivers. Research indicates that the rate at which consumers receive favorable decisions in arbitration is quite low and the amounts they secure when they do are very small. Only 9 percent of disputes that go to arbitration end with relief for the consumer.[59] When a 2015 CFPB report looked at cases from one of the major arbitration companies it found that consumers won just over $172,000 in damages and $189,000 in

[59] Shierholz, Heidi. "Correcting the Record: Consumers Fare Better under Class Actions than Arbitration." *Economic Policy Institute*, 1 Aug. 2017, https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/.

debt forbearance across more than 1,800 disputes in six different financial markets. By contrast, the CFPB's analysis of individual cases brought in Federal court for all but one of these markets found that consumers were awarded just under $1 million in cases where the judge issued a decision. It is difficult to directly compare the success rate for an individual in arbitration compared to those who take their claims to court because the overwhelming majority of cases end in settlements in which the results are not easily ascertainable. The same CFPB study referenced above found that about 50 percent of the more than 1,200 individual cases filed in federal court that were analyzed resulted in settlement. But the analysis could not determine what share of those settlements were favorable to borrowers. [60]

Given that pre-arbitration agreements are prevalent in for profit institutions' enrollment agreements, these benefits would have a greater impact on Black students, who tend to be overrepresented at for-profit institutions compared to other educational institutions.[61] The prohibition would also support these students in filing borrower defense claims where warranted.

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[60] *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a).* Consumer Financial Protection Bureau. (2015, March). Retrieved from https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

[61] Urban Institute. (2020, June). Racial and Ethnic Representation in Postsecondary Education. Tomás Monarrez, Kelia Washington. https://www.urban.org/research/publication/racial-and-ethnic-representation-postsecondary-education

4. Net Budget Impacts

These proposed regulations are estimated to have a net Federal budget impact in costs over the affected loan cohorts of $85.1 billion, consisting of a modification of $46.3 billion for loan cohorts through 2022 and estimated costs of $38.7 billion for loan cohorts 2023 to 2032. A cohort reflects all loans originated in a given fiscal year. Consistent with the requirements of the Credit Reform Act of 1990, budget cost estimates for the student loan programs reflect the estimated net present value of all future non-administrative Federal costs associated with a cohort of loans.

The provisions most responsible for the costs of the proposed regulations are those related to the discharge of borrower's loans, especially the changes to borrower defense, closed school discharges, and total and permanent disability discharges. The specific costs for each provision are described in the following subsections covering the relevant topics.

4.1 Borrower Defense:

As noted in this preamble, the regulatory provisions related to borrower defense have undergone revisions starting in 2016 and then again in 2019 and the patterns of claim submission and processing have not reached a steady level to serve as a clear basis for estimating future claims. Additional claims are expected from existing loan

cohorts, and the level and timing of claims from older cohorts is not likely to be indicative of claims for future cohorts because borrower defense was not an active area of loan discharges during the early years in repayment of those older cohorts. In addition, the institutions that to date have been among the largest sources of borrower defense claims have been closed for many years. Therefore, we are using a revised version of the approach used to estimate the costs of borrower defense for the 2016 and subsequent regulations to generate estimates for the proposed borrower defense provisions. The Department has used the data it has available on borrower defense claims, projected loan volumes, Departmental expertise, the discussions at negotiated rulemaking, and information about past investigations into the type of institutional acts or omissions that would give rise to borrower defense claims to develop scenarios that the Department believes would capture the range of net budget impacts associated with the borrower defense proposed regulations. The estimated cost of the proposed borrower defense changes is a modification to cohorts through 2022 of $17.26 billion and a cost of $2.75 billion for cohorts 2023-2032. The Department would continue to refine these estimates, welcomes comments about the assumptions used in developing them, and would consider those comments as the final regulations are developed.

Where possible, we are adjusting the assumptions made about school conduct, borrowers' chances of making a successful claim, and recovery rates to reflect information from pending claims.

Almost 90 percent of borrower defense claims are from the proprietary sector. This also includes institutions that have a significant number of claims and therefore may be more likely to have a group claim process applied to them. This is reflected in the school conduct assumption in Table 5.

While there are many factors and details that would determine the cost of the proposed regulations, ultimately a borrower defense claim entered into the student loan model (SLM) by risk group, loan type, and cohort would result in a reduced stream of cash flows compared to what the Department would have expected from a particular cohort, risk group, and loan type. The net present value of the difference in those cashflow streams generates the expected cost of the proposed regulations.

In order to generate an expected level of claims for processing in the SLM, the Department used President's Budget 2023 (PB2023) loan volume estimates to identify the maximum potential exposure to borrower defense claims for each cohort, loan type, and sector. The Department expects only a fraction of that amount to be affected by institutional behavior that results in a borrower defense

claim. Other factors that would affect the cost are the rate of consolidation from the FFEL program, the percentage of claims that go through a group process, the potential deterrent effect of claims on school practices, investigative activities of State authorities, increased borrower awareness of borrower defense, and borrower eligibility for other discharges, especially closed school discharges.

As costs are estimated against a specific baseline, it is important to note that the President's Budget for 2023 assumed a higher level of borrower defense claims based more on the 2016 assumptions[62] than the 2019 regulation assumptions[63]. This was based on processing of claims and other announcements that led the Department's Budget Service to assume successful claims would be increasing. Some of the costs that could have been attributed to the proposed regulations are already in the baseline as a result of this modeling change. As the 2016 borrower defense assumptions were fairly conservative, the borrower defense adjustment for some cohort and risk group combinations may be lower than the current baseline levels. In order to provide some information about this factor, the Department ran the President's Budget Fiscal Year 2023 (PB23) baseline with any addition for borrower defense removed and also with the 2019 regulatory assumptions

[62] 81 F.R. 211 p. 76057
[63] 84 F.R. 184 p. 49894

applied. Removing the borrower defense adjustment had a net budget impact of $-8.6billion and using the reduced adjustment associated with the 2019 regulations resulted in a net budget impact of $-8.0 billion in savings compared to the PB23 baseline.

The model to estimate borrower defense claims under the proposed regulations relies upon the following factors:

Conduct Percent, which represents the share of loan volume estimated to be affected by institutional behavior resulting in a defense to repayment application.

Group Process percent, which is the share of affected loan volume we expect to be subject to a group claim.

Claim Balance Adjustment Factor, which captures the potential change in borrowers' balances from origination to the time of their discharge and was added because this regulation addresses claims from older cohorts, not just future loan cohorts so this factor could be more significant.

Borrower Percent, which is the percent of loan volume associated with approved defense to repayment applications; and

Recovery Percent, which estimates the percent of gross claims for which funds are recovered from institutions, with both of these varying by inclusion in a group process or not.

To generate gross claims volume (gc), loan volumes (lv) by risk group were multiplied by the Conduct Percent (cp), Group Process percent (gpp), the Claim Balance Adjustment factor (cbf), and the Borrower Percent for groups and individual claims (bp_g or bp_i). To generate net claims volume (nc) processed in the Student Loan Model, gross claims were then multiplied by the Recovery Percent. That is, gc = gc_g + gc_i when gc_g = (lv * cp *cbf * gc* bp_g) and gc_i= (lv * cp *cbf * (1-gc)* bp_i) and nc = nc_g + nc_i where nc_g= gc_g – (gc_g * rp_g) and nc_i = gc_i – (gc_i * rp_i).

Additional discussion of these factors follows their presentation in Table 5, with the comparable values for the 2016 and 2019 borrower defense regulations presented in Table 6.

Table 5: Assumptions for Primary Borrower Defense Scenario

	Loan volume related to borrower defense claims				
Cohort Range	**2-yr proprietary**	**2-yr NFPT/Public**	**4-yr Proprietary**	**4-yr NPFT/Public**	**GRAD**
pre-2000	5.0%	1.0%	5.0%	1.0%	1.6%
2000-2005	10.0%	2.0%	10.0%	2.0%	3.2%
2006-2010	16.0%	2.0%	16.0%	2.0%	4.1%
2011-2016	18.0%	1.7%	18.0%	1.7%	4.1%
2017-2022	14.0%	1.5%	14.0%	1.5%	3.4%
2023-2028	10.0%	1.3%	10.0%	1.3%	2.6%
2028+	8.0%	1.1%	8.0%	1.1%	2.1%

	Percentage of borrower defense volume from group claims				
Cohort Range	**2-yr proprietary**	**2-yr NFPT/Public**	**4-yr Proprietary**	**4-yr NPFT/Public**	**GRAD**
pre-2000	15.0%	5.0%	15.0%	5.0%	8.0%
2000-2005	35.0%	12.0%	35.0%	12.0%	15.5%
2006-2010	65.0%	14.0%	65.0%	14.0%	20.7%

2011-2016	75.0%	14.0%	75.0%	14.0%	28.0%
2017-2022	65.0%	9.5%	65.0%	9.5%	20.0%
2023-2028	45.0%	5.5%	45.0%	5.5%	14.0%
2028+	35.0%	5.0%	35.0%	5.0%	10.0%

Percentage of borrower defense volume from individual claims

Cohort Range	2-yr proprietary	2-yr NFPT/Public	4-yr Proprietary	4-yr NPFT/Public	GRAD
pre-2000	85.0%	95.0%	85.0%	95.0%	92.0%
2000-2005	65.0%	88.0%	65.0%	88.0%	84.6%
2006-2010	35.0%	86.0%	35.0%	86.0%	79.3%
2011-2016	25.0%	86.0%	25.0%	86.0%	72.0%
2017-2022	35.0%	90.5%	35.0%	90.5%	80.0%
2023-2028	55.0%	94.5%	55.0%	94.5%	86.0%
2028+	65.0%	95.0%	65.0%	95.0%	90.0%

Share of volume approved in group claims

Cohort Range	2-yr proprietary	2-yr NFPT/Public	4-yr Proprietary	4-yr NPFT/Public	GRAD
pre-2000	25.0%	15.0%	25.0%	15.0%	20.0%
2000-2005	65.0%	50.0%	65.0%	50.0%	60.0%
2006-2010	70.0%	50.0%	70.0%	50.0%	60.0%
2011-2016	75.0%	50.0%	75.0%	50.0%	60.0%
2017-2022	75.0%	50.0%	75.0%	50.0%	60.0%
2023-2028	75.0%	60.0%	75.0%	60.0%	65.0%
2028+	75.0%	60.0%	75.0%	60.0%	65.0%

Share of volume approved in individual claims

Cohort Range	2-yr proprietary	2-yr NFPT/Public	4-yr Proprietary	4-yr NPFT/Public	GRAD
pre-2000	5.0%	2.0%	5.0%	2.0%	4.0%
2000-2005	8.0%	2.0%	8.0%	2.0%	6.0%
2006-2010	12.0%	5.0%	12.0%	5.0%	8.0%
2011-2016	12.0%	5.0%	12.0%	5.0%	10.0%
2017-2022	12.0%	8.0%	12.0%	8.0%	10.0%
2023-2028	12.0%	8.0%	12.0%	8.0%	10.0%
2028+	12.0%	8.0%	12.0%	8.0%	10.0%

Recovery percentage on approved claims

Group Claims	2-yr proprietary	2-yr NFPT/Public	4-yr Proprietary	4-yr NPFT/Public	GRAD
pre-2000	1.0%	1.0%	1.0%	1.0%	1.0%
2000-2005	6.0%	4.0%	6.0%	4.0%	4.0%

2006-2010	10.0%	8.0%	10.0%	8.0%	8.0%
2011-2016	10.0%	8.0%	10.0%	8.0%	8.0%
2017-2022	10.0%	8.0%	10.0%	8.0%	8.0%
2023-2028	15.0%	12.0%	15.0%	12.0%	12.0%
2028+	15.0%	12.0%	15.0%	12.0%	12.0%

Table 6: Assumptions for Primary Borrower Defense Scenarios in 2016 and 2019 regulations

	2016 Regulation			**2019 Regulation**		
Cohort	**Public**	**Private**	**Proprietary**	**Public**	**Private**	**Proprietary**
			Conduct Percent			
2017	3.0	3.0	20	N/A	N/A	N/A
2018	2.4	2.4	16	N/A	N/A	N/A
2019	2.0	2.0	13.6	N/A	N/A	N/A
2020	1.7	1.7	11.6	1.62	1.62	11.02
2021	1.5	1.5	9.8	1.43	1.43	9.31
2022	1.4	1.4	8.8	1.33	1.33	8.36
2023	1.3	1.3	8.4	1.24	1.24	7.98
2024	1.2	1.2	8.0	1.14	1.14	7.6
2025	1.2	1.2	7.8	1.14	1.14	7.41
2026	1.2	1.2	7.7	1.05	1.05	7.32
2027	N/A	N/A	N/A	1.05	1.05	7.32
2028	N/A	N/A	N/A	1.05	1.05	7.32
2029	N/A	N/A	N/A	1.05	1.05	7.32
			Allowable Applications Percent			
All Cohorts	N/A	N/A	N/A	70	70	70
			Borrower Percent			
2017	35	35	45	N/A	N/A	N/A
2018	36.8	36.8	47.3	N/A	N/A	N/A
2019	38.6	38.6	49.6	N/A	N/A	N/A
2020	42.4	42.4	54.6	3.3	3.3	4.95
2021	46.7	46.7	60	3.75	3.75	5.475
2022	50	50	63	4.125	4.125	5.925
2023	50	50	65	4.5	4.5	6.3
2024	50	50	65	4.8	4.8	6.75
2025	50	50	65	5.25	5.25	6.975
2026	50	50	65	5.25	5.25	7.5
2027	N/A	N/A	N/A	5.25	5.25	7.5
2028	N/A	N/A	N/A	5.25	5.25	7.5
2029	N/A	N/A	N/A	5.25	5.25	7.5
			Recovery Percent			
2017	75	23.8	23.8	N/A	N/A	N/A
2018	75	23.8	23.8	N/A	N/A	N/A
2019	75	26.18	26.18	N/A	N/A	N/A
2020	75	28.8	28.8	75	16	16
2021	75	31.68	31.68	75	20	20

2022	75	33.26	33.26	75	20	20
2023	75	34.93	34.93	75	20	20
2024	75	36.67	36.67	75	20	20
2025	75	37.4	37.4	75	20	20
2026	75	37.4	37.4	75	20	20
2027	N/A	N/A	N/A	75	20	20
2028	N/A	N/A	N/A	75	20	20
2029	N/A	N/A	N/A	75	20	20

Conduct Percent:

As with previous estimates, the conduct percent reflects the experience with existing claims coming predominantly from the proprietary sector. This factor also captures the potential deterrent effect of the proposed regulations. As claims are processed and examples of conduct that results in claims become better known, we believe institutions would strive to avoid similar behavior. We also expect that the improvement or closing of some institutions that have significant findings against them should reduce the level of potential claims in future loan cohorts.

Group Process Percent:

The share of claims suitable for a group process is expected to vary by institutional control and loan cohort. The further back a cohort of loans were originated, the less likely there is to be evidence of conduct that would support a group claims process, so the group process percent for the pre-2000 loan cohort group is lower than for more recent years. Of current pending claims, approximately 90 percent of those expected to be subject to

a group claims process have come from cohorts 2006 to 2016 and we would expect that period to generate the highest share of group claims. We expect conduct that would generate a group claim to decrease following the 2016 regulation and subsequent attention to borrower defense, with more of an effect in future years when more claims have been processed through the system.

Claim Balance Factor:

The assumptions generating our borrower defense claims are applied to volume estimates at origination, but borrower defense claims are likely to happen several years into repayment when payments that have been made would be subject to refund or balances will have grown through accrued interest or fees. To account for this, the Department looked at borrower defense claims in 2021 and determined the maximum potential claim between the claim amount, the current outstanding balance, and the balance when the loan entered repayment plus accumulated interest through 2021. This maximum balance was compared to the origination amount to generate an adjustment factor that was averaged across loan type. The factors applied to Stafford, PLUS, and Unsubsidized loans are 1.32, 1.68, and 1.54, respectively. These factors are based on balance comparisons for existing loans and include capitalization events that will be eliminated under this rule as well as potential interest accrual beyond the 180-day window for

loan subject to a borrower defense claim established in these regulations. Other changes such as the revisions to the REPAYE plan anticipated in a separate regulatory package could also affect these adjustment factors. We are not reducing the adjustment factors for those potential effects to provide a conservative estimate of borrower defense claims, but the interaction with other regulatory or legislative actions is a source of uncertainty for the net budget impact of the borrower defense provisions.

The claim balance factor also acknowledges that borrower defense gives discharge of outstanding balance (and potentially refunds payments made) so an estimate starting from volumes (origination amounts) needs to be increased to account for interest or payments.

Borrower Percent – Group and Individual:

This assumption captures the share of claims expected to lead to a discharge. Factors such as the federal standard, reconsideration process, the number of claims against individual institutions, enrollment periods associated with the claims, and type of allegations seen to date affect these figures. This is higher for group claims based on the potential referrals and common reliance on evidence from investigations.

Recovery Percent – Group and Individual:

The recovery percent would vary by cohort and institutional control. Recoveries for existing borrower

defense claims have not been high, which is consistent with other discharge recoveries, particularly closed school discharges. Another factor that affects potential recoveries is the timing as the limitations period and application of a standard to all claims pending or submitted after the effective date of the regulations may limit the Department's ability to recover claims related to activities many years ago. We expect claims for future cohorts to happen earlier in the repayment period of the loans and therefore to have a somewhat increased chance of having a recovery.

As noted throughout this RIA, the Department recognizes the uncertainty associated with the factors contributing to the primary budget assumptions presented in Table 6. To provide some information about the effect of this uncertainty, the Department developed two alternate scenarios to capture a range of net budget impact from the proposed borrower defense regulations. The low budget impact scenario reduces the group percentage and increases recoveries to the 37 percent maximum assumed in the 2016 regulations. The high budget impact scenario assumes a slower deterrent effect and keeps the highest conduct percent for an additional cohort range, increases the highest group percentage and maintains that level for future cohorts, and eliminates all recoveries. The revised

assumptions for these scenarios are detailed in Table 7 with the results presented in Table 8.

Table 7: Revised Assumptions for Alternate Scenarios

	Loan volume related to borrower defense claims					
Cohort Range	**Proprietary_Low**	**NPFT/Public_Low**	**GRAD_Low**	**Proprietary_High**	**NPFT/Public_High**	**GRAD_High**
pre-2000	5.00%	1.0%	1.6%	5.0%	1.0%	1.6%
2000-2005	10.00%	2.0%	3.2%	10.0%	2.0%	3.2%
2006-2010	16.00%	2.0%	4.1%	16.0%	2.0%	4.1%
2011-2016	18.0%	1.7%	4.1%	18.0%	2.0%	4.1%
2017-2022	14.00%	1.50%	3.38%	18.0%	1.7%	4.1%
2023-2028	10.00%	1.30%	2.61%	14.00%	1.50%	3.38%
2028+	8.00%	1.10%	2.14%	10.00%	1.30%	2.61%

	Percentage of borrower defense volume from group claims					
Cohort Range	**Proprietary_Low**	**NPFT/Public_Low**	**GRAD_Low**	**Proprietary_High**	**NPFT/Public_High**	**GRAD_High**
pre-2000	5%	2.5%	4%	15%	5%	8%
2000-2005	30%	6.0%	8%	35%	12%	15%
2006-2010	50%	7.0%	11%	70%	14%	24%
2011-2016	60%	7.0%	14%	80%	14%	30%
2017-2022	50%	5.0%	10%	80%	10%	30%
2023-2028	40%	3.0%	7%	80%	6%	30%
2028+	30%	2.5%	5%	80%	5%	30%

	Percentage of borrower defense volume from individual claims					
Cohort Range	**Proprietary_Low**	**NPFT/Public_Low**	**GRAD_Low**	**Proprietary_High**	**NPFT/Public_High**	**GRAD_High**
pre-2000	95%	98%	96%	85%	95%	92%
2000-2005	70%	94%	93%	65%	88%	85%
2006-2010	50%	93%	90%	30%	86%	76%
2011-2016	40%	93%	86%	20%	86%	70%
2017-2022	50%	95%	90%	20%	91%	70%
2023-2028	60%	97%	93%	20%	95%	70%
2028+	70%	98%	95%	20%	95%	70%

	Recovery percentage on approved claims					
Group Claims	**Proprietary_Low**	**NPFT/Public_Low**	**GRAD_Low**	**Proprietary_High**	**NPFT/Public_High**	**GRAD_High**
pre-2000	1.0%	1.0%	1.0%	0%	0%	0%

2000-2005	6.0%	6.0%	6.0%	0%	0%	0%
2006-2010	10.0%	10.0%	10.0%	0%	0%	0%
2011-2016	23.8%	23.8%	23.8%	0%	0%	0%
2017-2022	37.4%	37.4%	37.4%	0%	0%	0%
2023-2028	37.4%	37.4%	37.4%	0%	0%	0%
2028+	37.4%	37.4%	37.4%	0%	0%	0%

Table 8: Budget Estimates for Borrower Defense Scenarios Sensitivity Runs

$(mns)	**Low Budget Impact**	**Primary Budget Impact**	**High Budget Impact**
Modification	11,535	17,259	22,158
Outlays for Cohorts 2023-2032	1,565	2,750	6,966
Total	**13,100**	**20,010**	**29,124**

4.2 Closed School:

These proposed regulations are expected to increase closed school discharges by creating a uniform 180-day enrollment window, increasing the use of administrative data to provide discharges without an application, eliminating the re-enrollment condition, and some other process changes. To estimate the effect of these changes, the Department generated a data file summarizing borrower loan amounts for different enrollment windows prior to closure as well as any existing discharges associated with those loans. This was used to generate a ratio of potential additional claims compared to current discharges to be applied to the closed school component of the discharge assumption. The adjustment factor varied by loan model risk group from 1.11 to 7.46 and was applied to all cohorts for claims from 2023 on. Together, the changes

related to the closed school provisions cost $3.47 billion for past cohorts and $3.043 billion for cohorts 2023-2032.

4.3 Total and Permanent Disability:

The main driver of the Department's estimated costs for the total and permanent disability provisions of the proposed regulation is the inclusion of additional SSA determination categories that qualify a borrower for a discharge without an application and the inclusion of those receiving SSA retirement benefits who fit into those categories. These proposed changes are expected to result in additional transfers to borrowers. The Department's existing data match with SSA does not provide the data needed to estimate the increased discharge from this change. We know from SSA data that the added categories have 300,000 additional borrowers compared to approximately 323,000 borrowers included in the categories already eligible through the match from September 2021.[64] However, this is not necessarily indicative of student loan borrower distributions across those categories, since data are not currently available to the Department on the disability statuses of student loan borrowers. Additionally, these figures are inclusive of borrowers who might be eligible

[64] Department of Education analysis based on estimates of United States sample SSA data as of 2019 of those with a status of MINE or MIP and data provided by the Department in August 19, 2021, press release, "Over 323,000 Federal Student Loan Borrowers to Receive $5.8 Billion in Automatic Total and Permanent Disability Discharges," retrieved from https://www.ed.gov/news/press-releases/over-323000-federal-student-loan-borrowers-receive-58-billion-automatic-total-and-permanent-disability-discharges.

through the current regulations and/or who would apply for a discharge, rather than receiving the discharge automatically through a data match as under the proposed regulations. Thus, some of these borrowers would not be a new discharge but rather could simply be moving between categories. To estimate this effect, the Department used an adjustment factor in the TPD match with SSA in the Death, Disability, and Bankruptcy (DDB) assumption from 1.5 to 2.25, resulting in the $10.67 billion modification to past cohorts and $9.588 billion for cohorts 2023-2032. The initial adjustment factor was based on data related borrowers in the SSA match prior to September 2020 when it was an opt-in process that indicated total discharges were around 40 percent of total loan disbursements and around 70 percent of outstanding balances across all risk groups and cohorts. The other provisions to expand the types of medical professionals who can support an application and otherwise make the process of obtaining a discharge easier could also increase transfers to borrowers through total and permanent disability discharges. The Department does not have information to estimate this increase but assumes most of the future discharges will be through the automatic matches so the effect of these changes will be lower than the recent opt-out match provisions. We did not explicitly assign a certain percentage of the increased adjustment factor to these administrative changes but would not expect

it to be more than 0.10 percent of the total effect with the additional eligibility categories being more significant. By itself, that increase in TPD discharges would increase costs by $4.1 billion. We do not estimate a significant cost impact from the elimination of the 3-year monitoring period for reinstatement of payment obligations because our baseline is conservative in assuming that many of those income monitoring issues eventually get resolved. To estimate the effect of this provision, we did run a version of the DDB assumption that excluded any reinstatements from the disability claims from the PB23 baseline, but the resulting effect was not significant enough to change the overall discharge rate at the four decimal level used in the student loan model. We welcome comments on these assumptions and will consider any received in estimating the costs of the final regulations.

4.4 PSLF:

The proposed changes to the public service loan forgiveness regulations have an estimated cost of $12.7 billion as a modification to cohorts through 2022 and $13.2 billion for cohorts 2023-2032. One important factor to note is that the baseline for this estimate did not include any effect of the limited PSLF waiver announced in October 2021 as well as adjustments to the counting of progress toward income-driven repayment announced in April 2022, so the modification to past cohorts in this estimate is

picking up some of that effect. The change to include certain periods of deferment or forbearance to count toward PSLF and to count payments made on underlying loans prior to consolidation will reduce the time period for some existing PSLF recipients to achieve forgiveness. The Department used information linking consolidations to underlying loans to determine the months paid prior to consolidation and used that to reduce the time to PSLF forgiveness for affected borrowers. A similar process was followed for the deferments and forbearances that count toward PSLF. Estimated deferments and forbearances are tracked for PSLF borrowers in the budget model, and for the proposed change, time associated with qualifying deferments and forbearances were included toward the 10 years of payments required for forgiveness. Together, these changes led to the $25.9 billion estimated cost increase for the PSLF changes. Allowing lump sum payments, installments, and late payments to count toward PSLF will result in borrowers being more likely to reach 120 qualifying payments at the same time they have 120 months of qualifying employment. This is in contrast to the current situation where large numbers of payments not being counted means borrowers may need far more than 120 months of qualifying employment to reach that same number of qualifying payments. Reconsideration should also help those who had issues with their initial applications.

These factors are not specifically modeled in this estimate. The Department does not have data at this time regarding these factors and welcomes comments on the expected increase from them. These factors are not explicitly accounted for in the Department's baseline which is fairly conservative in assuming those assumed to have qualifying employment would make the appropriate payments other than periods of deferment or forbearance. These administrative and definitional factors are captured to some degree by a ramp up to the maximum percentage of borrowers assumed to receive PSLF forgiveness in our modeling, with levels that reflect the low percent of PSLF forgiveness in the initial years of borrowers potentially being eligible. To provide a sense of the effect of these changes, the Department considered an alternate scenario that increased the PSLF percent to the highest level we consider reasonable given the level of employment in government or nonprofit sectors based on U.S. Census bureau data on employment sector by educational attainment.[65] In the alternate scenario, we increased the maximum PSLF percent and shifted the ramp-up so each cohort range was one level higher than in the baseline, resulting in the PSLF percentages shown in Table 5. The PSLF percent is the percentage of borrowers assumed to receive PSLF in our

[65] Data from the American Community Survey from the U.S. Census Bureau on employment by sector (employer ownership) and educational attainment among workers age 25 to 64.

modeling and ramps up across years. An increase in the PSLF percent results in additional forgiveness. We are showing increases in the PSLF percent because nothing in the regulations would lead to reduced PSLF forgiveness compared to our baseline level. The alternate scenario is on top of the deferment, forbearance, and consolidation changes.

Table 9: Alternate Assumptions for PSLF

	PB23 Max	Alternate Scenario Max
2-year	14.65%	20.00%
4-year	28.88%	32.00%
Graduate	30.74%	38.00%

	Alternate Scenario PSLF Percents		
Cohort Range	**2-year**	**4-year**	**Graduate**
2010 or less	6.28%	10.83%	13.18%
2011-2015	10.46%	18.05%	21.96%
2016-2020	14.65%	28.88%	30.74%
2021 and above	20.00%	32.00%	38.00%

The net budget impact of the reduced transfers from borrowers to the government from increased forgiveness in this alternate scenario is shown in Table 10.

Table 10: Net Budget Impacts of PSLF in Primary and Alternate Assumptions

$(mns)	**PSLF_Primary**	**PSLF_Alternate**
Modification	12,724	36,379
Outlays for Cohorts 2023-2032	13,175	23,116
Total	**25,898**	**59,494**

The modification cost for early cohorts is significantly affected by the increase in the alternative scenario because the baseline PSLF level for the 2010 cohort and earlier are lower than the outyear cohorts. This reflects the level of forgiveness seen in the program to date.

4.5 Interest Capitalization:

The proposed provisions to remove all interest capitalization on Direct Loans that is not required by the HEA is estimated to cost $12.4 billion, consisting of a modification to cohorts through 2022 of $2.2 billion and increased outlays of $10.2 billion for cohorts 2023-2032. The estimated impact of $12.4 billion is for loans in all types of repayment plans, but the estimation process differs for non-IDR and IDR loans as noted below. Interest capitalization is calculated in the Student Loan Model in accordance with specific conditions, so to estimate this cost for non-IDR loans, we must turn off that capitalization as applicable. We expect capitalization upon entering repayment to be the primary driver of the net budget impact for these provisions since it affects all borrowers from the effective date of the regulations. For this NPRM, we calculated an adjustment factor by loan type, cohort, non-IDR repayment plan, years since loan origination, and SLM risk group to represent the effect of removing capitalization upon entering repayment to generate

the net budget impact for non-IDR loans. The adjustment factors vary significantly with later cohorts having increased adjustment since more of the cohort will enter repayment following the effective date of the proposed regulations. The SLM is being revised to fully incorporate the change to the rule and is expected to be completed by the publication of the final regulations.

For the interest capitalization that affects IDR borrowers, we adjusted the calculations in our IDR sub-model that capitalized interest. One limitation to note is that our current IDR modeling does not estimate borrowers leaving IDR plans so there is no capitalization for that in the baseline and no impact of that provision (leaving PAYE and REPAYE) in this estimate. However, we did create a capitalization event based on the estimated probability that a borrower would leave PAYE or REPAYE in 2023 or later. This estimate does not change the borrowers' plan or subsequent payments and just captures the effect of capitalization at that point. The proposed regulations would result in reduced repayments from borrowers by removing capitalization for leaving PAYE or REPAYE, and we estimate a net budget impact of $108.3 million, consisting of a modification to past cohorts of $29.8 million and $79.5 million for cohorts 2023-2032. While interest capitalization is a fairly straightforward calculation, there are several sources of uncertainty for these

estimates. As mentioned, the SLM is being revised to fully account for all the potential effects and our current adjustment factors may not account for the full level or timing of capitalization events that are being eliminated for non-IDR borrowers. Additionally, while entering repayment and the timing patterns for that are supported by significant history, other capitalization events affected by the proposed regulations may be more subject to behavioral changes. Predicting effects of eliminating capitalization related to forbearances or defaults does depend on having the level, timing, repayment plan, and risk group mix of those underlying events estimated accurately. If the pattern of those events changes from historical trends as borrowers return to payment following the Covid payment pause, the costs associated with eliminating capitalization for those events will vary from what we have estimated here. For IDR borrowers, the level of leaving plans or borrowers initial plan selection could be affected by other developments related to the IDR plans. The Department welcomes comments on the estimates presented here and will consider them in analysis of the final rule.

4.6 Pre-Dispute Arbitration Clauses:

At this time, the Department does not estimate a significant budget impact on title IV programs from the prohibition on pre-dispute arbitration agreements and the related disclosures. It is possible that borrowers not

having to go through arbitration could result in some additional borrower defense claims, but we expect those costs have been captured in the borrower defense score. Disclosure of certain judicial and arbitral records may cause some borrowers to enroll at other institutions than they would have attended, but we expect that borrowers would receive similar amounts of aid overall, so we do not estimate a significant impact on the Title IV portfolio from these changes.

4.7 False Certification:

The proposed regulations would also change the false certification discharge rules to establish common false certification discharge procedures and eligibility requirements, regardless of when a loan was originated, and to clarify that the Department would rely on the borrower's status at the time the loan was originated, rather than when the loan was certified, for determining false certification discharge. The proposed revisions to the identity theft provisions would make it easier for affected borrowers to provide evidence for a discharge.

All of the provisions related to false certification should increase transfers to borrowers through additional false certification discharges. Under existing regulations, false certification discharges represent a very low share of discharges granted to borrowers. Over the past 3 years, approximately 800 borrowers have received

a total of $9.4 million in false certification discharges, compared with approximately 455,000 borrowers and $10.67 billion in disability discharges or 573 closed institutions and $1.38 billion in closed school discharges. The Department does not expect an increase in false certification claims to result in a significant budget impact. The Department would continue to evaluate the changes to the false certification discharge and welcomes comments to consider as the final analysis of the proposed regulations is developed.

5. Accounting Statement:

As required by OMB Circular A-4, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these regulations. This table provides our best estimate of the changes in annual monetized transfers as a result of these proposed regulations. Expenditures are classified as transfers from the Federal Government to affected student loan borrowers.

Table 11: Accounting Statement: Classification of Estimated Expenditures (in millions)

Category	**Benefits**
Updated and clarified borrower defense process and Federal standard to increase protection for student borrowers and taxpayers	not quantified

Improved awareness and usage of closed school, TPD, and false certification discharges and PSLF.	not quantified
Improved consumer information about institutions' performance and practices	not quantified

Category	Costs	
	7%	**3%**
Costs of compliance with paperwork requirements	$5.83	$5.85

Category		Transfers	
		7%	**3%**
Borrower Defense claims from the Federal government to affected borrowers	Primary	2,632.3	2,292.2
Reimbursements of borrower defense claims from affected institutions to the Federal government	Primary	51.2	48.6
Closed school discharges from the Federal government to affected students		763	697
Total and Permanent discharges from the Federal government to affected students		2,375	2,172
Increased PSLF amounts to eligible borrowers from administrative changes, better definitions of qualifying employment, allowing lump sum and installment payments, and counting payments prior to consolidation, and counting certain periods of deferment and forbearance.		3,000	2,761
Elimination of non-statutory interest capitalization		$1,290	$1,260.5

6. Alternatives Considered

As part of the development of these regulations, the Department engaged in a negotiated rulemaking process in which we received comments and proposals from non-Federal negotiators representing numerous impacted constituencies. These included higher education institutions, consumer advocates, students, financial aid administrators, accrediting agencies, and State attorneys general, among others. Non-Federal negotiators submitted a variety of proposals relating to the issues under discussion. Information about these proposals is available on our rulemaking website at https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html.

6.1 Borrower Defense:

Some non-Federal negotiators believed that State standards should be a primary consideration rather than secondary, such as during reconsideration. The Department believes that a single Federal standard for initial adjudication would be easier for borrowers and affected parties to understand. Requiring adjudication of State laws at the outset would be confusing, burdensome, and can lead to inconsistent treatment across States. The Department thinks that the proposed single Federal standard for initial review of claims encompasses most items that would be in State standards and would result in fewer situations where something would be approved under a State

standard but not a Federal one. While the Department believes there would be few circumstances where a claim could be approved under State law but not the Federal standard, we propose allowing claims to be reconsidered under a State law. In the case of group claims brought by a State requestor this review could occur prior to the issuance of a formal denial.

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. The Department also already has existing collaborative oversight responsibilities with States as both are members of the regulatory triad that also includes accreditation agencies. With respect to individual borrowers, the Department thinks it is unlikely that an individual borrower would possess the type of evidence needed for forming a group claim. Having legal assistance organizations and individuals instead work with States to put together a group claim would thus result in

applications that are more likely to be turned into group claims.

The Department had considered tying together recovery from institution to adjudication for borrower defense to repayment cases, as under the 2016 rule, but ultimately decided against proposing that. The Department is concerned that the recovery process could significantly slow the process of providing relief to borrowers, which could result in significant costs for borrowers who are forced to put their lives on hold while they wait for relief. The Department would continue to recoup liabilities once claims have been approved and liabilities assessed, consistent with the Department's practices in other types of discharges where the school may be liable. The Department expects the deterrent effect that would result from the proposed regulation to be similar to that of the 2016 rule. Some non-Federal negotiators recommended that the Department identify broader instances in which it would not recoup funds out of concern that the Department would only approve claims in which it is going to be able to recoup funds. While the Department has a strong commitment to recoupment, it also recognizes that there are many instances of institutional conduct that could lead to approved borrower defense claims that either occurred at institutions that have since closed and lack assets to

recoup against or that occurred outside the limitations period for recoupment.

The Department also considered whether it should provide a full discharge for all borrowers with approved claims or adopt a higher evidentiary standard to rebut the presumption of full relief. The Department believes that adopting a higher evidentiary standard for rebutting the presumption of full relief would be inappropriate because the rest of the borrower defense regulation uses preponderance of the evidence, and it should use a consistent standard. Similarly, while borrowers are presumed to have a full discharge when their cases are approved in the proposed regulations, the Department believes that there would be circumstances where a borrower was subject to a substantial misrepresentation or other conduct that led to an approved claim, but the degree of harm suffered by the borrower is less than the amount of a full discharge. The Department believes that the use of a rebuttable presumption in limited circumstances balances the goal of erring on the side of full discharges while preserving flexibility to discharge lesser amounts when warranted.

Some non-Federal negotiators noted that it is difficult for the Department to ensure that collection is in fact stopped after a borrower has submitted a borrower defense application. These negotiators proposed that the

Secretary should reimburse the borrower for the amount collected if the Secretary collects on a loan placed in forbearance or stopped collections in violation of proposed § 685.403(d) or § 685.403(e). While the Department appreciates the concerns of negotiators and agrees that forbearances must be implemented accurately, the Department does not believe it is necessary or appropriate to mandate a reimbursement amount in regulations, as other remedies exist for correcting such administrative errors.

The Department also considered whether it should mandate that borrower defense claims be reviewed and decided by an individual who is completely independent from the rest of the Department. The Department, however, does not think it could mandate such a structure in regulations since it would require promising resources that are subject to annual appropriations.

6.2 False Certification:

The Department previously considered a new form for a common law forgery loan discharge for borrowers whose signature was forged by someone other than a school employee. This applied only to Department-held Federal student loans, but the Department is encouraging other loan holders to create a process like this one. Until we launched this form, the Department evaluated all forgery claims using the discharge forms that only apply where the school falsified a signature or if there was a judicially

proven crime of identity theft. This new form for a common law forgery loan discharge provides borrowers an alternative option. But it would not benefit many borrowers who do not fit into the false certification categories since the number of applications under the FFEL Program is very small and would continue to shrink.

The Department considered relying on the disbursement date as an alternative to relying on the origination date, but the Department is concerned that relying on the disbursement date allows institutions time to remedy an already completed false certification that a student was eligible for a loan (e.g., a student without a high school diploma or equivalent did not meet the ability to benefit requirement of having completed six credits toward their credential at the time of origination, but did at the time of disbursement). Instead, relying on the origination date would ensure that institutions may be held accountable for their misconduct even if it is subsequently corrected prior to disbursement.

The Department considered whether to expand eligibility for false certification discharges to cover circumstances such as barriers to employment. However, we are concerned that de facto barriers to employment (e.g., jobs that likely would not hire someone with a criminal background, despite there being no specific related requirement for state licensure in that field) rather than

being explicit prohibitions (e.g., jobs that cannot legally be held by someone with a criminal background) would create a substantial burden on institutions to be aware of such barriers and may not reliably identify borrowers eligible for such discharge.

6.3 PSLF:

Several alternatives to better define and improve PSLF were recommended by non-Federal negotiators. Currently, government employees and those who work for a nonprofit organization under section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of the Internal Revenue Code are eligible for qualifying PSLF employment. Furthermore, employees of other organizations (other than a business organized for profit, a labor union, or a partisan political organization) can only have their employment qualify if their organization provides one of the other public services identified in the HEA and mirrored in regulations.

One alternative proposed was to include PSLF eligibility for borrowers working to provide public services at nonprofit hospitals in certain states who are employed by for-profit organizations because they are barred by state law from working directly for the hospital. This negotiator stated that most of those borrowers provide public services under a for-profit organization. Other negotiators and documents submitted by negotiators

mentioned low-wage workers in areas such as home health care or early childhood education who are similarly more likely to work at a for-profit employer and are thus ineligible for PSLF under existing regulations. Some suggested that the Department assess eligibility based on SOC codes that classify workers into occupational categories. While the Department agrees that the other occupations identified by the negotiators provide valuable services, the Department lacks the resources to review for-profit employers, which also have far less required transparency than nonprofit organizations and which would thus require an even more extensive investigation, or to assess individual borrowers' job descriptions to determine whether their occupations should qualify for PSLF. The Department's longstanding position has been that there are meaningful distinctions between for-profit and nonprofit organizations that have been encoded in broader tax law and that it should honor those distinctions. Because of these concerns the Department is seeking additional comments on this issue from the public, as discussed in greater detail in the preamble.

The Department also heard from public commenters who expressed concerns about the presence of laws in certain states that prevent physicians from being directly employed by private nonprofit hospitals. The result is that those doctors are legally unable to get access to PSLF as

employees. The Department is considering whether this issue could be addressed by creating a separate eligibility test for situations such as these. We have included requests for additional public comment on this issue as described in the preamble.

The Department also considered whether it should count all deferments and forbearances toward PSLF, or all deferments or forbearances used before a certain date to capture when the Department made improvements to discourage practices that steered borrowers into deferments or forbearances unnecessarily. The Department is concerned that counting all forbearance and deferments could create a disincentive to make PSLF payments. In addition, there are some deferments and forbearances that directly conflict with PSLF employment requirements, for example, unemployment and rehabilitation training. The Department intends for those qualifying forbearances and deferments to align with the purpose of PSLF.

Several non-federal negotiators brought up forbearance-steering and wanted to include situations of forbearance steering as qualifying payments. While the Department is concerned about instances where borrowers have ended up in forbearances due to poor advice, there is not a clear definition of what forbearance-steering would include. In addition, this would require the borrower to prove steering, which the Department believes is a

difficult and unattainable bar for most borrowers and would have the effect of creating a process akin to borrower defense for loan repayment counting. Instead, the hold harmless period would provide borrowers a way to gain credit for those months in deferment or forbearance without needing to adjudicate why they ended up in that status.

6.4 Interest Capitalization:

While the Department put forth a proposal eliminating interest capitalization on non-statutory capitalizing events, some non-Federal negotiators suggested eliminating it for all capitalizing events in order to reduce confusion and inconsistency. However, certain capitalizing events are statutory, such as for IBR, FFEL, and deferments. The Department proposes to eliminate interest capitalization where we have the discretion to do so in order to reduce the cost of borrowing for students.

Some federal negotiators proposed not capitalizing interest when a borrower consolidates their federal student loans. The Department considered this proposal but thinks the capitalization that occurs in this instance is different than the other areas where the Department is eliminating it. A borrower must take intentional steps to consolidate their loans and is not required to do so. By contrast, many of the other instances of interest capitalization occur either without the borrower understanding that capitalization would occur or as an

added penalty for a borrower who is already struggling on their loan and pauses their payments.

The Department also considered whether the concerns of capitalization could instead be addressed by providing borrowers with greater education on what is capitalization and why it occurs. However, the Department concluded that such an approach would be unlikely to work because many instances of capitalization are either unavoidable or reflect borrower struggles. In the former category, all borrowers must eventually enter repayment, so educating them more about capitalization in that instance would not provide any benefits. The area where education could potentially make a greater difference is capitalization tied to forbearance usage. However, many borrowers rely on forbearance in times of struggle, so it is unclear that greater education could work.

6.5 Total and Permanent Disability Discharge:

Some proposed that the Department fully eliminate monitoring of borrowers' eligibility for loans following a total and permanent disability discharge. However, while the Department supports removing the income monitoring period, we feel it should be maintained for new loans. The Department is concerned that we should not be distributing new loans if borrowers have a demonstrated disability that prevents them from working and ultimately repaying that loan. A student's borrowing eligibility is made under the

assumption that repayment can be made. If a borrower is trying to take out loans already knowing that repayment will not be possible, then the Department is taking on the risk of default and should not distribute the loan. We have a duty to protect taxpayer money, and if there is no probability of repayment, we do not deem it prudent to provide such loans.

6.6 Closed School Discharge:

Some non-federal negotiators suggested a different definition of closure that would have restricted discharges in circumstances where other nearby institutions were willing to allow the borrower to continue their program, among other conditions. The Department believes such an approach would have unfairly made discharges unavailable to borrowers for reasons we would struggle to judge, such as how accessible a nearby program is for specific borrowers. Negotiators also wrestled with difficulties in defining adequate proximity regarding closed schools. However, the Department is concerned that identifying nearby programs within "reasonable proximity" would be highly subjective, and a narrowed definition could mean that a borrower loses their discharge unfairly.

When looking at automatic discharges, the Department decided to reduce the period before automatic discharges occur following closure from 3 years (as provided for under the 2016 regulations) to 1 year. GAO noted in its report

on college closures that a majority of the borrowers who received automatic discharges were in default, and that without automatic relief, only a small percentage of eligible borrowers ever got the relief they were owed. This change would make it less likely that borrowers who do not apply for closed school discharges could end up in default before receiving automatic relief.

Regarding the window to qualify for a discharge, some non-Federal negotiators questioned whether this period of time should be increased, but the Department notes that 180 days is consistent with past regulations. Our expanded list of exceptional circumstances would address other circumstances where the path to closure begins earlier.

At present, a borrower loses access to a discharge if they transfer any of their credits to another program. The Department assessed the potential value of retaining that requirement but is proposing to eliminate the requirement that the borrower cannot have transferred credits (other than through an approved teach-out that they complete) because we are concerned it is confusing to borrowers and may be preventing them from accessing discharges. We believe that, instead, it is preferable to ensure borrowers are able to access the loan relief benefits to which they are entitled. Looking ahead, the Department believes the improvement of data sources would allow us to better identify and automate closed school discharges.

Negotiators also suggested making the set of exceptional circumstances included in the regulations as required rather than possible extensions of the eligibility window for closed school discharges. The Department feels that this standard should be on a case-by-case basis, and notes that the use of the exceptional circumstance's provisions would require individualized determinations to assess the individual case of each school closure. However, the Department believes that its proposal to expand the non-exhaustive list would send clear signals on how the Secretary may use this authority going forward.

6.7 Pre-Dispute Arbitration:

During rulemaking sessions, negotiators considered expanding the proposed prohibition on pre-dispute arbitration clauses to include all types of complaints, not just those related to borrower defense. The Department's legal authority is based on the relevance of arbitration to the making of a Direct Loan or provision of educational services for which the Direct Loan was intended. In this NPRM, the Department takes the position that, in order to protect the interests of the United States and to promote the purposes of the Direct Loan Program in accordance with the HEA and the Department's PPA with institutions, mandatory pre-dispute arbitration agreements cannot foreclose on borrowers' right to file a borrower defense claim with the Secretary.

Additionally, some negotiators proposed that the Department should not collect arbitral and judicial records. However, the Department needs to be able to see and understand the patterns of complaints to anticipate and investigate possible claims since these arbitral records and outcomes from arbitration are largely not publicly accessible but are highly relevant for enforcement and investigation purposes.

Negotiators also proposed allowing institutions to require arbitration clauses through enrollment agreements. At the crux of these proposed rules, the Department aims to protect borrowers by prohibiting mandatory arbitration clauses and believes borrowers should have an opportunity to have their day in court. Allowing borrowers the opportunity to go through the judicial system could help deter bad acting schools from engaging in behaviors that the Department does not endorse or allow. Borrowers' ability to litigate can also provide a certain level of transparency to the general public and to the Department and allows for understanding of resolutions in instances of litigation. Litigation may also allow claimants to band together to bring class action lawsuits and reduce potential legal costs, as well as bring about attention to misconduct that may also be affecting other students.

Additionally, although arbitration is conducted by a third party, there is some evidence of bias in favor of the

company over the consumer, at least where the company is regularly involved in such claims.[66] With litigation, that problem is eliminated as the judge acts as an impartial body without receiving payment from either of the parties.

7. Regulatory Flexibility Act:

Section 605 of the Regulatory Flexibility Act (5 U.S.C. 603(a)) allows an agency to certify a rule if the rulemaking does not have a significant economic impact on a substantial number of small entities.

The Small Business Administration (SBA) defines "small institution" using data on revenue, market dominance, tax filing status, governing body, and population. The majority of entities to which the Office of Postsecondary Education's (OPE) regulations apply are postsecondary institutions, however, which do not report such data to the Department. As a result, for purposes of this NPRM, the Department proposes to continue defining "small entities" by reference to enrollment, to allow meaningful comparison of regulatory impact across all types of higher education institutions.[67]

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[66] Horton, D. and Chandrasekher, A. After the Revolution: An Empirical Study of Consumer Arbitration (June 4, 2015), *Georgetown Law Journal*, Vol. 104, 2015, Forthcoming, UC Davis Legal Studies Research Paper No. 436, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2614773. "…consumers facing corporations that arbitrate routinely suffer a pronounced disadvantage" (page 110).

[67] In previous regulations, the Department categorized small businesses based on tax status. Those regulations defined "non-profit organizations" as "small organizations" if they were independently owned and operated and not dominant in their field of operation, or as "small entities" if they were institutions controlled by governmental entities with populations below 50,000. Those definitions resulted in the categorization of all private nonprofit organization as small and

Table 12. SMALL INSTITUTIONS UNDER ENROLLMENT-BASED DEFINITION

Level	Type	Small	Total	Percent
2-year……	Public……	328	1182	27.75
2-year……	Private……	182	199	91.46
2-year……	Proprietary……	1777	1952	91.03
4-year……	Public……	56	747	7.50
4-year……	Private……	789	1602	49.25
4-year……	Proprietary……	249	331	75.23
Total……	……	3381	6013	56.23

Source: 2018-19 data reported to the Department.

Table 12 summarizes the number of institutions affected by these proposed regulations.

Table 13. ESTIMATED COUNT OF SMALL INSTITUTIONS AFFECTED BY THE PROPOSED REGULATIONS

	Small institutions affected	As percent of small institutions
Borrower Defense……	50	1.47
False Certification……	0	0
PSLF……	0	0
Eliminate Interest Capitalization……	0	0
Total Permanent Disability Discharge	0	0
Closed School Discharge……	0	0
Pre-dispute Arbitration……	1,285	38.0

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no public institutions as small. Under the previous definition, proprietary institutions were considered small if they are independently owned and operated and not dominant in their field of operation with total annual revenue below $7,000,000. Using FY2017 IPEDs finance data for proprietary institutions, 50 percent of 4-year and 90 percent of 2-year or less proprietary institutions would be considered small. By contrast, an enrollment-based definition captures a similar share of proprietary institutions, allowing consistent comparison to other types of institutions.

The Department has determined that the negative economic impact on small entities affected by the regulations would not be significant. The proposed changes to False Certification, PSLF, Total Permanent Disability Discharge, and Closed School Discharge would not have an impact on small institutions. These types of discharges are between the borrower and the lender, which often is the Department. The Department anticipates this will impact 310 small lenders that will be required to expand their current reporting and will take approximately 50 hours to update their systems. A few small institutions could be impacted by the proposed regulations where there is a large group Borrower Defense claim. Based on recent experience of the Department, adjudicating borrower defense to repayment cases and recouping from institutions, small institutions are not expected to be impacted by the proposed regulations in BD because the Department is unlikely to recoup from isolated BD cases from small institutions. The proposed changes to eliminate interest capitalization will not have an impact on small institutions as this is also an action between the borrower and lender.

The Department anticipates approximately 38 percent of small institutions will be impacted by these pre-dispute arbitration proposed regulations. We derived the percentage that would be impacted from a report by the

Century Foundation which sampled schools using arbitration clauses in their enrollment contracts.[68] Of the sampled schools, 62 percent of proprietary institutions and 2.9 percent of private nonprofit institutions used arbitration clauses. The study found public schools did not utilize arbitration clauses. We applied those proportions to the number of small proprietary institutions (both 2 year and 4 year) and Private nonprofit (both 2 year and 4 year) and arrived at 1,285 or 38.01 percent of total small business institutions. We would not anticipate there is a significant cost impact to amend future contracts.

TABLE 14. ESTIMATED COST RANGE FOR SMALL INSTITUTIONS AFFECTED BY THE PROPOSED REGULATIONS.

Compliance Area	Small institutions affected	Cost range per institution		Estimated overall cost range	
BD employment rate background check	50	500	750	25,000	37,500
Pre-dispute arbitration update future agreements	1285	125	160	160,625	205,600
Lenders	310	2,231	2,343	691,622.40	726,330

While these proposed regulations would have an impact on some small institutions, there will not be a significant cost and compliance impact.

8. Paperwork Reduction Act of 1995

[68] *How College Enrollment Contracts Limit Students' Rights*. (2016, April 28). The Century Foundation. https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that: The public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents. Sections 668.41, 668.74, 674.33, 674.61, 682.402, 682.414, 685.213, 685.214 685.215, 685.219, 685.300, 685.304, 685.402, 685.403, and 685.407, of this proposed rule contain information collection requirements. Under the PRA, the Department has or will at the required time submit a copy of these sections and an Information Collections Request to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of

information if the collection instrument does not display a currently valid OMB control number. In the final regulations, we will display the control numbers assigned by OMB to any information collection requirements proposed in this NPRM and adopted in the final regulations.

Section 668.41 Reporting and disclosure of information.

Requirements: The Department proposes to remove the requirements in current § 668.41(h).

Burden Calculation: With the removal of the regulatory language in § 668.41(h) the Department would remove the associated burden of 4,720 hours under OMB Control Number 1845-0004.

Student Assistance General Provisions - Student Right to Know (SRK)—OMB CONTROL NUMBER: 1845-0004

Affected Entity	Respondent	Responses	Burden Hours	Cost $44.41 per institution from the 2019 Final Rule
For-Profit	-944	-944	-4,720	-$209,615

Section 668.74 Employability of graduates.

Requirements: In the course of adjudicating borrower defense claims, the Department has persistently seen misrepresentations about the employability of graduates.

In this NPRM, the Department is explicitly including as a form of job placement rate misrepresentation placement rates that are inflated through manipulation of data inputs. Proposed section 668.74(g)(2) contains a provision that allows the Department to verify that an institution correctly calculated its job placement rate by requiring an institution to furnish to the Secretary, upon request, documentation and other data that was used to calculate the institution's employment rate calculations.

Burden Calculation: The Department believes that such a request will impose only a modest burden on the part of any institution to provide the existing background data upon which the employment rates that are presented were calculated. We believe that such required reporting would be made by 2 Private Not-for-profit, 2 For-Profit and 2 Public institutions annually. It is anticipated that 6 institutions will receive such a request and that it will take 8 hours to copy and prepare for submission to the Department such evidence of their calculated employment rates for a total of 48 burden hours (6 institutions X 1 response x 8 hours = 48 burden hours).

Student Assistance General Provisions – OMB Control Number 1845-0022

Affected Entity	Respondent	Responses per respondent	Burden Hours = 8 hours per response	Cost $46.59 per hour for institutions
Private Not-for-Profit	2	1	16	$745
For-Profit	2	1	16	$745
Public	2	1	16	$745
Total	6		48	$2,235

Sections 674.33(g), 682.402(d), and 685.214 Closed School Discharge

Requirements: The proposed regulations would amend the Perkins, FFEL, and Direct Loan regulations to simplify the closed school discharge process. Proposed §§ 674.33(g)(4), 682.402(d)(3) and 685.214(d)(1) would provide that the borrower must submit a completed closed school discharge application to the Secretary and that the factual assertions in the application must be true and made by the borrower under penalty of perjury. Additionally, the number of days that a borrower had withdrawn from a closed school to qualify for a closed school discharge would be extended from 120 days to 180 days.

Burden Calculation: These changes would require an update to the current closed school discharge application form. We do not believe that the language update will significantly change the amount of time currently assessed

for the borrower to complete the form from those which has already been approved. The form update would be completed and made available for comment through a full public clearance package before being made available for use by the effective date of the regulations. The burden changes would be assessed to OMB Control Number 1845-0058, Loan Discharge Applications (DL/FFEL/Perkins).

Sections 674.61, 682.402(d), and 685.213 - Total and Permanent Disability (TPD) Discharge.

Requirements: Under proposed changes to §§ 674.61(b)(2)(iv), 682.402(c)(2)(iv), and 685.213(b)(2), a TPD discharge application would be allowed to be certified by a nurse practitioner, a physician's assistant licensed by a State, or a licensed certified psychologist at the independent practice level in addition to a physician who is a Doctor of Medicine or Osteopathy legally authorized to practice in a State. The type of Social Security Administration (SSA) documentation that may qualify a borrower for a TPD discharge would be expanded to include an SSA Benefit Planning Query or other SSA documentation deemed acceptable by the Secretary. The NPRM also proposes to amend the Federal Perkins Loan (Perkins), Direct Loan, and Federal Family Education Loan (FFEL) Program regulations to improve the process for granting total and permanent disability (TPD) discharges by eliminating the

income monitoring period. Proposed §§ 674.61(b)(6)(i), 682.402(c)(6), and 685.213(b)(7)(i) would eliminate the existing reinstatement requirements, except for the provision which provides that a borrower's loan is reinstated if the borrower receives a new TEACH Grant or a new title IV loan within 3 years of the date the TPD discharge was granted.

Burden Calculation: These proposed changes would require an update to the current total and permeant disability discharge application form. We do not believe that the language update will significantly change the amount of time currently assessed for the borrower to complete the Discharge Application (TPD-APP) application form from those which has already been approved. These proposed rules would eliminate the Post-Discharge Monitoring form (TPD-PDM) from the collection and will create a decrease in overall burden from the 1845-0065 collection. The forms update would be completed and made available for comment through a full public clearance package before being made available for use by the effective date of the regulations. The burden changes would be assessed to OMB Control Number 1845-0065, Direct Loan, FFEL, Perkins and TEACH Grant Total and Permanent Disability Discharge Application and Related Forms.

682.402(e), 685.215(c) and 685.215(d) False Certification Discharge

Requirements: These proposed regulations streamline the FFEL and Direct Loan false certification regulations to provide one set of regulatory standards that would cover all false certification discharge claims. Sections 682.402(e) and 685.215(c)(5) state that a borrower qualifies for a false certification discharge if the school certified the borrower's eligibility for a FFEL or Direct Loan as a result of the crime of identity theft. Additionally, 685.215(c)(10) would provide for a new application to allow a state Attorney General or nonprofit legal services representative to submit a request to the Secretary for a group discharge under section (c).

Burden Calculation: These changes would require an update to the current false certification discharge application forms. We do not believe that the language update will significantly change the amount of time currently assessed for the borrower to complete the forms from those which has already been approved. The forms update would be completed and made available for comment through a full public clearance package before being made available for use by the effective date of the regulations. New forms to capture the requirements of the identity theft section and the group discharge request will be created and made available for comment through a full public clearance

package before being made available for use by the effective date of the regulations. The burden changes would be assessed to OMB Control Number 1845-0058, Loan Discharge Applications (DL/FFEL/Perkins).

Requirements: Under proposed § 682.402(e)(6)(i) if a holder of a borrower's FFEL loan determines that a borrower may be eligible for a false certification discharge the holder provides the borrower with the appropriate application and explanation of the process for obtaining a discharge. The borrower burden to complete the form is captured under the form collection 1845-0058. Under proposed § 682.402(e)(6)(iii) if a FFEL borrower submits an application for discharge that a FFEL program loan holder determines is incomplete, the loan holder would notify the borrower of that determination and allow the borrower 30 days to amend the application and provide supplemental information.

Burden Calculation: The Department believes that such a request will require burden on the part of any FFEL lender. Of the 310 FFEL lenders it is anticipated that 31 lenders will make such determinations of borrower discharge eligibility and that it will take 20 minutes to send an estimated 100 borrowers the correct form for completion for a total of 33 burden hours (100 borrowers applications x 20 minutes per application (.33 hours) = 33 burden hours).

It is anticipated that 15 lenders would make a determination of 25 borrower's incomplete application and that it would take 15 minutes to send borrowers the notice to amend their application for a total of 6 burden hours (25 borrowers receiving lender notices x 15 minutes (.25 hours) = 6 burden hours).

It is anticipated that of the 25 borrowers who receive notice of an incomplete application, 20 will resubmit an amended application or provide additional documentation and it would take 30 minutes to make such amendments for a total of 10 burden hours (20 borrowers amending initial filings x 30 minutes (.50 hours) = 10 hours under OMB Control Number 1845-0020.

Requirements: Proposed § 682.402(e)(6)(vii) would require a guaranty agency to issue a decision that explains the reasons for any adverse determination on a false certification discharge application, describes the evidence on which the decision was made, and provides the borrower, upon request, copies of the evidence. The guaranty agency would consider any response or additional information from the borrower and notify the borrower as to whether the determination is changed.

Burden Calculation: The Department believes that such a request will require burden on the part of any guaranty agency. Of the 18 guaranty agencies it is anticipated that the guaranty agencies will make such adverse determinations

of 75 borrower discharge eligibility and that it will take 30 minutes to send borrowers the decision for a total of 38 burden hours (75 borrowers receiving adverse determination notifications X 30 minutes (.50 hours) = 38 burden hours) under OMB Control Number 1845-0020.

Requirements: Proposed § 682.402(e)(6)(ix) would provide the borrower with the option to request that the Secretary review the guaranty agency's decision.

Burden Calculation: The Department believes that such a request will require burden on the part of any borrower. Of the 75 borrowers whose applications were denied by the guaranty agency, it is anticipated that 30 borrowers will request Secretarial review of the guaranty agencies decision and that it will take 30 minutes to send such a borrower request for a total of 15 burden hours (30 borrowers X 30 minutes (.50 hours) = 15 burden hours) under OMB Control Number 1845-0020.

Federal Family Education Loan Program Regulations – OMB Control Number 1845-0020

Affected Entity	Respondent	Responses	Burden Hours	Cost $46.59 Institutional $22.00 Individual
Individual	50	50	25	$550
Private Not-for-Profit	14	55	23	$1,071.57

For-Profit	24	99	31	$1,444.29
Public	11	46	23	$1,071.57
TOTAL	99	250	102	$4,137.43

Section 682.414 – Reports

Requirements: In § 682.414(b)(4), the Department proposes to require FFEL Program lenders to report detailed information related to a borrower's deferments, forbearances, repayment plans, delinquency, and contact information on any FFEL loan to the Department by an established deadline.

Burden Calculation: The Department believes that such a request will require burden on the part of any FFEL lender. It is anticipated that 310 lenders will be required to expand their current reporting and that it will take 50 hours to update systems and to initially provide the additional data for a total of 15,500 burden hours (310 institutions X 50 hours = 15,500 burden hours) under OMB Control Number 1845-0020.

Federal Family Education Loan Program Regulations – OMB Control Number 1845-0020

Affected Entity	Respondent	Responses	Burden Hours	Cost $46.59 Institutional
Private Not-for-Profit	64	64	3,200	$149,088
For-Profit	246	246	12,300	$573,057

Totals	310	310	15,500	$722,145

Section 685.219 Public Service Loan Forgiveness

Requirements: The Department proposes new, modified, and restructured definitions in § 685.219(b) which would expand the use of the form.

Burden Calculation: These changes would require an update to the current Public Service Loan Forgiveness form. We do not believe that the language update will significantly change the amount of time currently assessed for the borrower to complete the form from those which has already been approved. The form update would be completed and made available for comment through a full public clearance package before being made available for use by the effective date of the regulations. The burden changes would be assessed to OMB Control Number 1845-0110, Application and Employment Certification for Public Service Loan Forgiveness.

Requirements: In this NPRM, the Department also proposes regulations to create a reconsideration process under proposed § 685.219(g) for borrowers whose applications for Public Service Loan Forgiveness were denied or who disagree with the Department's determination of the number of qualifying payments or months of qualifying employment that have been earned by the borrower which formalizes the current non-regulatory process.

Burden Calculation: The Department is currently in the clearance process for an electronic Public Service Loan Forgiveness Reconsideration Request, OMB Control Number 1845-0164. Public comment on the web-based format is currently being accepted through the normal information clearance process under docket number ED-2022-SCC-0039.

Section 685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program

Requirements: The Department proposes to reinstate prior regulations that barred institutions, as a condition of participating in the Direct Loan program, from requiring borrowers to accept pre-dispute arbitration agreements and class action waivers as they relate to borrower defense claims. Specifically, in proposed § 685.300(e), institutions would be prohibited from relying on a pre-dispute arbitration agreement, or any other pre-dispute agreement with a student who obtained or benefitted from a Direct Loan, in any aspect of a class action related to a borrower defense claim, until the presiding court rules that the case cannot proceed as a class action. In proposed § 685.300(f) of the regulations, the Department proposes to require that certain provisions relating to notices and the terms of the pre-dispute arbitration agreements be included in any agreement with a student who

receives a Direct Loan to attend the school or for whom a Direct PLUS Loan was obtained.

Burden Calculation: There will be burden on any school that meets the conditions for supplying students with the changes to any agreements. Based on the Academic Year 2020-2021 Direct Loan information available, there were 1,026,437 Unsubsidized Direct Loan recipients at 1,587 for-profit institutions. Assuming 66 percent of these students will continue to be enrolled at the time these regulations become effective, about 677,448 students will be required to receive the agreements or notices required in § 685.300(e) or (f). We anticipate that it will take 1,587 for-profit institutions .17 hours (10 minutes) per student to develop these agreements or notices, research who is required to receive them, and forward the information accordingly for 115,166 burden hours (677,448 students X .17 hours) under OMB Control Number 1845-0021.

Requirements: Under the proposed rules at § 685.300(g) and (h), institutions would be required to submit certain arbitral records and judicial records connected with any borrower defense claim filed against the school to the Secretary by certain deadlines.

Burden Calculation: The Department believes that such a request will require burden on any school that meets the conditions for supplying the records to the Secretary. We continue to estimate that 5 percent of 1,587 for-profit

institutions or an estimated 79 for-profit institutions would be required to submit documentation to the Secretary to comply with the proposed regulations. We anticipate that each of the 79 schools will have an average of four filings thus there will be an average of four submissions for each filing. Because these are copies of documents required to be submitted to other parties, we anticipate 5 burden hours to produce the copies and submit to the Secretary for an increase in burden of 6,320 hours (79 institutions × 4 filings × 4 submissions/filing × 5 hours) under OMB Control Number 1845-0021.

William D. Ford Federal Direct Loan Program (DL) Regulations- OMB Control Number 1845-0021

Affected Entity	Respondent	Responses	Burden Hours	Cost $46.59 Institutional
For-Profit	1,587	678,712	121,486	$5,660,033
Total	1,587	678,712	121,486	$5,660,033

Section 685.304 - Counseling Borrowers.

Requirements: The Department proposes to remove § 685.304(a)(6)(xiii) through (xv). The proposed regulations at § 685.300 would state the conditions under which disclosures would be required and provide deadlines for such disclosures.

Burden Calculation: With the removal of the regulatory language in § 685.304(a)(6)(xiii) through (xv) the Department would remove the associated burden of 30,225 hours under OMB Control Number 1845-0021.

William D. Ford Federal Direct Loan Program (DL) Regulations– OMB Control Number 1845-0021

Affected Entity	Respondent	Responses	Burden Hours	Cost $44.41 per institution; $16.30 per individual from 2019 Final Rule
Individual	-342,407	-342,407	-27,393	-$446,506
For-Profit	-944	-944	-2,832	-$125,769
Total	-343,351	-343,351	-30,225	-$572,275

Section 685.402 – Group process for borrower defense.

Requirements: In these proposed § 685.402(c), the Department may initiate a group process upon request from a state requestor, on the condition that the state requestor submit an application and other required information to the Department to adjudicate the claim.

Burden Calculation: A new form to capture the requirements of § 685.402(c) will be created and made available for comment through a full public clearance package before being made available for use by the effective date of the regulations.

Section 685.405 –Institutional response.

Requirements: In proposed § 685.405, the Department proposes to continue to provide for an institutional response process to borrower defense claims. Under the proposed regulations in § 685.405(a), the Department official would notify the institution of the borrower defense claim and its basis for any group or individual borrower defense claim. Under the proposed regulations in § 685.405(b) the institution would have 90 days to respond. Under the proposed regulations in § 685.405(c), with its response, the institution would be required to execute an affidavit confirming that the information contained in the response is true and correct under penalty of perjury on a form approved by the Secretary.

Burden Calculation: A new form to capture the requirements of § 685.405(c) will be created and made available for comment through a full public clearance package before being made available for use by the effective date of the regulations.

Section 685.407 - Reconsideration

Requirements: Proposed § 685.407 sets forth the circumstances under which a borrower or a State requestor may seek reconsideration of a Department official's denial of their borrower defense claim. Proposed § 685.407(a)(4) identifies the reconsideration process, which includes an application approved by the Secretary.

Burden Calculation: A new form to capture the requirements of § 685.407(a) will be created and made available for comment through a full public clearance package before being made available for use by the effective date of the regulations.

Consistent with the discussions above, the following chart describes the sections of the proposed regulations involving information collections, the information being collected and the collections that the Department will submit to OMB for approval and public comment under the PRA, and the estimated costs associated with the information collections. The monetized net cost of the increased burden for institutions, lenders, guaranty agencies and students, using wage data developed using Bureau of Labor Statistics (BLS) data. For individuals we have used the median hourly wage for all occupations, $22.00 per hour according to BLS. https://www.bls.gov/oes/current/oes_nat.htm#00-0000. For institutions, lenders, and guaranty agencies we have used the median hourly wage for Education Administrators, Postsecondary, $46.59 per hour according to BLS. https://www.bls.gov/oes/current/oes119033.htm.

COLLECTION OF INFORMATION

Regulatory section	Information Collection	OMB Control Number and	Estimated cost

		estimated burden	$46.59 Institutional $22.00 Individual unless otherwise noted.
§ 668.41	The Department proposes to remove the requirements in current § 668.41(h).	1845-0004; -4,720 hrs.	Cost from the 2019 Final Rule ($44.41 per institution) -$209,615.
§ 668.74	Proposed section 668.74(g)(2) contains a provision that allows the Department to verify that an institution correctly calculated its job placement rate by requiring an institution furnish to the Secretary, upon request, documentation and other data that was used to calculate the institution's employment rate calculations.	1845-0022 +48 hrs.	+$2,235

§§ 674.33(g), 682.402(d), 685.214	Proposed §§ 674.33(g)(4), 682.402(d)(3) and 685.214(d)(1) would provide that the borrower must submit a completed closed school discharge application to the Secretary and that the factual assertions in the application must be true and made by the borrower under penalty of perjury.	1845-0058 Burden will be cleared at a later date through a separate information collection for the form.	Costs will be cleared through separate information collection for the form
§§ 674.61, 682.402(d), 685.213	Proposed changes expand the type of medical professional who can certify the Total Permanent Disability (TPD) application. The proposed changes also include an expansion of the acceptable Social Security Administration documentation for filing a TPD application. The	1845-0065 Burden will be cleared at a later date through a separate information collection for the form.	Costs will be cleared through separate information collection for the form

	proposed regulations also eliminate the income monitoring period for all TPD applicants except those who receive a new TEACH Grant or new title IV loan within 3 years of the TPD discharge.		
§§ 682.402(e), 685.215(c) and 685.215(d)	These proposed regulations streamline the FFEL and Direct Loan false certification regulations to provide one set of regulatory standards that would cover all false certification discharge claims. Sections 682.402(e) and 685.215(c)(5) adds qualification for a false certification discharge if the school certified the borrower's eligibility for a FFEL or Direct Loan	1845-0058 Burden will be cleared at a later date through a separate information collection for the form.	Costs will be cleared through separate information collection for the form

	as a result of the crime of identity theft. Additionally, 685.215(c)(10) provides for a new application to allow a state Attorney General or nonprofit legal services representative to submit a request to the Secretary for a group discharge.		
§ 682.402(e)(6)	Under proposed § 682.402(e)(6)(i) if a holder of a borrower's FFEL loan determines that a borrower may be eligible for a false certification discharge the holder provides the borrower with the appropriate application and explanation of the process for obtaining a discharge. Under proposed § 682.402(e)(6)(iii) if a FFEL borrower	1845-0020 +102 hrs.	+$4,137.43

	submits an application for discharge that a FFEL program loan holder determines is incomplete, the loan holder would notify the borrower of that determination and allow the borrower 30 days to amend the application and provide supplemental information. Proposed § 682.402(e)(6)(vii) would require a guaranty agency to issue a decision that explains the reasons for any adverse determination on a false certification discharge application, describes the evidence on which the decision was made, and provides the borrower, upon request, copies of		

	the evidence. The guaranty agency would consider any response or additional information from the borrower and notify the borrower as to whether the determination is changed. Proposed § 682.402(e)(6)(ix) would provide the borrower with the option to request that the Secretary review the guaranty agency's decision.		
§ 682.414(b)	In § 682.414(b)(4), the Department proposes to require FFEL Program lenders to report detailed information related to a borrower's deferments, forbearances, repayment plans, delinquency, and contact information on any FFEL loan to	1845-0020 +15,500	+$722,145

	the Department by an established deadline.		
§ 685.219	The Department proposes new, modified, and restructured definitions for the Public Service Loan Forgiveness Program in § 685.219(b) which would expand the use of the form.	1845-0110 Burden will be cleared at a later date through a separate information collection for the form.	Costs will be cleared through separate information collection for the form
§ 685.219(g)	The Department proposes regulations to create a reconsideration process for borrowers whose applications for Public Service Loan Forgiveness were denied or who disagree with the Department's determination of the number of qualifying payments or months of qualifying employment that have been earned by the borrower which formalizes the	1845-0164 This process is currently in public review under docket number ED-2022-SCC-0039.	Costs will be cleared through separate information collection for the form

	current non-regulatory process.		
§ 685.300	The Department proposes to reinstate prior regulations that barred institutions, as a condition of participating in the Direct Loan program, from requiring borrowers to accept pre-dispute arbitration agreements and class action waivers. Also, institutions would be required to submit certain arbitral records and judicial records connected with any borrower defense claim filed against the school to the Secretary by certain deadlines.	1845-0021 +121,486	+$5,660,033
§ 685.304	The Department proposes to remove§ 685.304(a)(6)(xiii) through (xv). The	1845-0021 -27,393 individual hrs.;	Costs from 2019 Final Rule ($44.41

	proposed regulations at § 685.300 would state the conditions under which disclosures would be required and provide deadlines for such disclosures.	-2,832 institutional hrs. = -30,225 hrs.	per institution; $16.30 per individual) -$446,506 individual costs; -$125,769 institutional costs = -$572,275
§ 685.402	In these proposed § 685.402(c), the Department may initiate a group process upon request from a State requestor, on the condition that the State requestor submit an application and other required information to the Department to adjudicate the claim.	1845-NEW Burden will be cleared at a later date through a separate information collection for the form.	Costs will be cleared through separate information collection for the form
§ 685.405	Under the proposed regulations in § 685.405(a), the Department official would notify the	1845-NEW Burden will be cleared at a later date	Costs will be cleared through

	institution of the borrower defense claim and its basis for any group or individual borrower defense claim. Under the proposed regulations in § 685.405(b) the institution would have 90 days to respond. Under the proposed regulations in § 685.405(c), with its response, the institution would be required to execute an affidavit confirming that the information contained in the response is true and correct under penalty of perjury on a form approved by the Secretary.	through a separate information collection for the form.	separate information collection for the form
§ 685.407	Proposed § 685.407 sets forth the circumstances under which a borrower or a State -requestor may	1845-NEW Burden will be cleared at a later date	Costs will be cleared through

	seek reconsideration of a Department official's denial of their borrower defense claim. Proposed § 685.407(a)(4) identifies the reconsideration process, which includes an application approved by the Secretary.	through a separate information collection for the form.	separate information collection for the form

The total burden hours and change in burden hours associated with each OMB Control number affected by the proposed regulations follows:

Control No.	**Total proposed burden hours**	**Proposed change in burden hours**
1845-0004	24,016	-4,720
1845-0020	8,265,122	+15,602
1845-0021	831,007	+91,261
1845-0022	2,288,248	+48
Total	11,413,065	+102,191

We have prepared Information Collection Requests for these information collection requirements. If you wish to review and comment on the Information Collection Requests, please follow the instructions in the ADDRESSES section of this notification. Note: The Office of Information and Regulatory Affairs in OMB and the Department review all comments posted at www.regulations.gov.

In preparing your comments, you may want to review the Information Collection Requests, including the supporting materials, in www.regulations.gov by using the Docket ID number specified in this notification. These proposed collections are identified as proposed collections 1845-0004, 1845-0020, 1845-0021, 1845-0022.

We consider your comments on these proposed collections of information in—

• Deciding whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;

• Evaluating the accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;

• Enhancing the quality, usefulness, and clarity of the information we collect; and

• Minimizing the burden on those who must respond.

This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques. Between 30 and 60 days after publication of this document in the Federal Register, OMB is required to make a decision concerning the collections of information contained in these proposed regulations. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives your comments on these Information Collection Requests by [MONTH DAY, YEAR]. This does not affect the deadline for your comments to us on the proposed regulations. If your comments relate to the Information Collection Requests for these proposed regulations, please specify the Docket ID number and indicate ''Information Collection Comments'' on the top of your comments.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e-4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Accessible Format: On request to the program contact person(s) listed under FOR FURTHER INFORMATION CONTACT, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the *Federal Register*. You may access the official edition of the *Federal Register* and the Code of Federal Regulations at www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the *Federal Register*, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the *Federal Register* by using the article search feature at www.federalregister.gov. Specifically,

through the advanced search feature at this site, you can limit your search to documents published by the Department. (Assistance Listing Numbers: 84.032 Federal Family Education Loan Program; 84.038 Federal Perkins Loan Program; 84.268 William D. Ford Federal Direct Loan Program)

List of Subjects

34 CFR Part 600

Colleges and universities, Foreign relations, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Consumer protection, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

34 CFR Part 674

Loan programs—education, Reporting and recordkeeping requirements, Student aid.

34 CFR Part 682

Administrative practice and procedure, Colleges and universities, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

34 CFR Part 685

Administrative practice and procedure, Colleges and universities, Education, Loan programs-education, Reporting and recordkeeping requirements, Student aid, Vocational education.

_____

Miguel A. Cardona,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend parts 600, 668, 674, 682, and 685 of title 34 of the Code of Federal Regulations as follows:

PART 600—INSTITUTIONAL ELIGIBILITY UNDER THE HIGHER EDUCATION ACT OF 1965, AS AMENDED

1. The authority citation for part 600 continues to read as follows:

AUTHORITY: 20 U.S.C. 1001, 1002, 1003, 1088, 1091, 1094, 1099b, and 1099c, unless otherwise noted.

2. Section 600.41 is amended by revising paragraphs (a) introductory text, (a)(1) introductory text, and (a)(1)(i) to read as follows:

§ 600.41 Termination and emergency action proceedings.

(a) If the Secretary believes that a previously designated eligible institution as a whole, or at one or more of its locations, does not satisfy the statutory or regulatory requirements that define that institution as an eligible institution, the Secretary may -

(1) Terminate the institution's eligibility designation in whole or as to a particular location -

(i) Under the procedural provisions applicable to terminations contained in 34 CFR 668.81, 668.83, 668.86, 668.88, 668.89, 668.90(a)(1) and (4) and (c) through (f), and 668.91; or

* * * * *

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

3. The authority citation for part 668 is revised to read as follows:

AUTHORITY: 20 U.S.C. 1001-1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c, 1099c-1, and 1231a, unless otherwise noted.

Section 668.14 also issued under 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099a-3, 1099c, and 1141.

Section 668.41 also issued under 20 U.S.C. 1092, 1094, 1099c.

Section 668.91 also issued under 20 U.S.C. 1082, 1094.

Section 668.171 also issued under 20 U.S.C. 1094 and 1099c and section 4 of 92 Stat. 1101-1109.

Section 668.172 also issued under 20 U.S.C. 1094 and 1099c and section 4 of 92 Stat. 1101-1109.

Section 668.175 also issued under 20 U.S.C. 1094 and 1099c.

4. Section 668.41 is amended by revising paragraph (c)(2) introductory text and removing paragraph (h).

The revision reads as follows:

§ 668.41 Reporting and disclosure of information.

* * * * *

(c) * * *

(2) An institution that discloses information to enrolled students as required under paragraph (d), (e), or (g) of this section by posting the information on an Internet website or an Intranet website must include in the notice described in paragraph (c)(1) of this section—

* * * * *

5. Subpart F is revised to read as follows:

Subpart F—Misrepresentation

Sec.

668.71 Scope and special definitions.
668.72 Nature of educational program or institution.
668.73 Nature of financial charges or financial assistance.
668.74 Employability of graduates.
668.75 Omission of fact.
668.79 Severability.

Subpart F—Misrepresentation

§ 668.71 Scope and special definitions.

(a) If the Secretary determines that an eligible institution has engaged in substantial misrepresentation, the Secretary may -

(1) Revoke the eligible institution's program participation agreement, if the institution is provisionally certified under § 668.13(c);

(2) Impose limitations on the institution's participation in the title IV, HEA programs, if the institution is provisionally certified under § 668.13(c);

(3) Deny participation applications made on behalf of the institution; or

(4) Initiate a proceeding against the eligible institution under subpart G of this part.

(b) This subpart establishes the types of activities that constitute substantial misrepresentation by an eligible institution. An eligible institution is deemed to have engaged in substantial misrepresentation when the institution itself, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, marketing, advertising, recruiting or admissions services, makes a substantial misrepresentation about the nature of its educational program, its financial charges, or the employability of its graduates. Substantial misrepresentations are prohibited in all forms, including those made in any advertising, promotional materials, or in the marketing or sale of courses or programs of instruction offered by the institution.

(c) The following definitions apply to this subpart:

Misrepresentation. Any false, erroneous or misleading statement an eligible institution, one of its

representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services makes directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to the Secretary. A misleading statement includes any statement that has the likelihood or tendency to mislead under the circumstances. A misleading statement may be included in the institution's marketing materials, website, or any other communication to students or prospective students. A statement is any communication made in writing, visually, orally, or through other means. Misrepresentation includes any statement that omits information in such a way as to make the statement false, erroneous, or misleading. Misrepresentation includes the dissemination of a student endorsement or testimonial that a student gives either under duress or because the institution required such an endorsement or testimonial to participate in a program. Misrepresentation also includes the omission of facts as defined under § 668.75.

Prospective student. Any individual who has contacted an eligible institution for the purpose of requesting information about enrolling at the institution or who has

been contacted directly by the institution or indirectly through advertising about enrolling at the institution.

Substantial misrepresentation. Any misrepresentation, including omission of facts as defined under § 668.75, on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment.

§ 668.72 Nature of educational program or institution.

Misrepresentation concerning the nature of an eligible institution's educational program includes, but is not limited to, false, erroneous or misleading statements concerning -

(a) The particular type(s), specific source(s), nature and extent of its institutional, programmatic, or specialized accreditation;

(b)(1) The general or specific transferability of course credits earned at the institution to other institution(s); or

(2) Acceptance of credits earned through prior work or at another institution toward the educational program at the institution.

(c) Whether successful completion of a course of instruction qualifies a student -

(1) For acceptance into a labor union or similar organization; or

(2) To receive, to apply to take, or to take the examination required to receive a local, State, or Federal license, or a nongovernmental certification required as a precondition for employment, or to perform certain functions in the States in which the educational program is offered, or to meet additional conditions that the institution knows or reasonably should know are generally needed to secure employment in a recognized occupation for which the program is represented to prepare students;

(d) The requirements for successfully completing the course of study or program and the circumstances that would constitute grounds for terminating the student's enrollment;

(e) Whether its courses are recommended or have been the subject of unsolicited testimonials or endorsements by:

(1) Vocational counselors, high schools, colleges, educational organizations, employment agencies, members of a particular industry, students, former students, or others; or

(2) Governmental officials for governmental employment;

(f) Its size, location, facilities, equipment, or institutionally-provided equipment, books, or supplies;

(g) The availability, frequency, and appropriateness of its courses and programs in relation to the employment objectives that it states its programs are designed to meet;

(h) The number, availability, and qualifications, including the training and experience, of its faculty, instructors, and other personnel;

(i) The nature and availability of any tutorial or specialized instruction, guidance and counseling, or other supplementary assistance it will provide to its students before, during or after the completion of a course;

(j) The nature or extent of any prerequisites established for enrollment in a course;

(k) The subject matter, content of the course of study, or any other fact related to the degree, diploma, certificate of completion, or any similar document that the student is to be, or is, awarded upon completion of the course of study;

(l) Whether the academic, professional, or occupational degree that the institution will confer upon completion of the course of study has been authorized by the appropriate State educational agency;

(m) Actual institutional selectivity rates, rankings, or student admissions profiles or requirements, if they are materially different from those included in the

institution's marketing materials, website, or other communications made to the student or from those provided by the institution to national ranking companies, accrediting agencies, the Secretary, or others;

(n) The classification of the institution (nonprofit, public or proprietary) for purposes of its participation in title IV, HEA programs, if that is different from the classification determined by the Secretary;

(o) Specialized, programmatic, or institutional certifications, accreditation, or approvals that were not actually obtained, or that the institution fails to remove from marketing materials, websites, or other communications to students within a reasonable period of time after such certifications or approvals are revoked or withdrawn;

(p) Assistance that will be provided in securing required externships or the existence of contracts with specific externship sites;

(q) Assistance that will be provided to obtain a high school diploma or General Educational Development Certificate (GED);

(r) The pace of completing the program or the time it would take to complete the program contrary to the stated length of the educational program; or

(s) Any matters required to be disclosed to prospective students under §§ 668.42, 668.43, and 668.45.

§ 668.73 Nature of financial charges or financial assistance.

Misrepresentation concerning the nature of an eligible institution's financial charges, or the financial assistance provided includes, but is not limited to, false, erroneous, or misleading statements concerning-

(a) Offers of scholarships to pay all or part of a course charge;

(b) Whether a particular charge is the customary charge at the institution for a course;

(c) The cost of the program and the institution's refund policy if the student does not complete the program;

(d) The availability, amount, or nature of any financial assistance available to students from the institution or any other entity to pay the costs of attendance at the institution, including part-time employment, housing, and transportation assistance;

(e) A student's responsibility to repay any loans provided, regardless of whether the student is successful in completing the program and obtaining employment;

(f) The student's right to reject any particular type of financial aid or other assistance, or whether the student must apply for a particular type of financial aid, such as financing offered by the institution; or

(g) The amount, method, or timing of payment of tuition and fees that the student would be charged for the program.

§ 668.74 Employability of graduates.

Misrepresentation regarding the employability of an eligible institution's graduates includes, but is not limited to, false, erroneous, or misleading statements concerning -

(a) The institution's relationship with any organization, employment agency, or other agency providing authorized training leading directly to employment;

(b) The institution's intentions to maintain a placement service for graduates or to otherwise assist its graduates to obtain employment, including any requirements to receive such assistance;

(c) The institution's knowledge about the current or likely future conditions, compensation, or employment opportunities in the industry or occupation for which the students are being prepared;

(d) Whether employment is being offered by the institution exclusively for graduates of the institution, or that a talent hunt or contest is being conducted, including, but not limited to, through the use of phrases such as “Men/women wanted to train for . . .,” “Help Wanted,” “Employment,” or “Business Opportunities”;

(e) Government job market statistics in relation to the potential placement of its graduates;

(f) Actual licensure passage rates, if they are materially lower than those included in the institution's marketing materials, website, or other communications made to the student or prospective student; or

(g)(1) Actual employment rates, if they are materially lower than those included in the institution's marketing materials, website, or other communications made to the student or prospective student, including but not limited to:

(i) Rates that are calculated in a manner that is inconsistent with the standards or methodology set forth by the institution’s accreditor or a State agency that regulates the institution, or in its institutional policy.

(ii) Actual rates that the institution discloses are inflated by means such as:

(A) Including individuals in an employment rate calculation who are not bona fide employees, such as individuals placed on a 1-day job fair, an internship, externship, or in employment subsidized by the institution;

(B) Including students in the employment rate calculation who were employed in the field prior to graduation;

(C) Excluding students from an employment rate calculation due to the difficulty of placing that student; or

(D) Excluding non-respondents to a survey for calculating an employment rate.

(2) Upon request, the institution must furnish to the Secretary documentation and other information used to calculate the institution's employment rate calculations.

§ 668.75 Omission of fact.

An omission of fact includes the concealment, suppression, or absence of material information relating to the nature of the institution's educational programs, financial charges, or the employability of the institution's graduates. An omission of fact is a misrepresentation under § 668.71 if a reasonable person would have considered the omitted information in making a decision to enroll or continue attendance at the institution. An omission of fact includes, but is not limited to, the concealment, suppression, or absence of material information or statement concerning—

(a) The entity that is actually providing the educational instruction, or implementing the institution's recruitment, admissions, or enrollment process;

(b) The availability of enrollment openings, or requirements for obtaining admission;

(c) The factors that would prevent an applicant from meeting the legal or other requirements to be employed in the field for which the training is provided, for reasons such as prior criminal record or preexisting medical conditions;

(d) The factors that would prevent an applicant from meeting the legal or other requirements to be employed, licensed, or certified in the field for which the training is provided because the academic, professional, or occupational degree or credential that the institution will confer upon completion of the course of study has not been authorized by the appropriate State educational or licensure agency, or requires specialized accreditation that the institution does not have; or,

(e) The nature of the institution's educational programs, the institution's financial charges, or the employability of the institution's graduates.

§ 668.79 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

6. Section 668.81 is amended by revising paragraph (a)(5)(i) to read as follows:

§ 668.81 Scope and special definitions.

(a) * * *

(5) * * *

(i) Borrower defense to repayment claims that are brought by the Department against an institution under § 685.206, § 685.222 or part 685, subpart D, of this chapter; and

* * * * *

§ 668.87 [Removed and Reserved]

7. Section 668.87 is removed and reserved.

8. Section 668.89 is amended by revising paragraph (b)(3)(iii) to read as follows:

§ 668.89 Hearing.

* * * * *

(b) * * *

(3) * * *

(iii) For borrower defenses under §§ 685.206(c) and (e) and 685.222 of this chapter, the designated department official has the burden of persuasion in a borrower defense and recovery action; however, for a borrower defense claim based on a substantial misrepresentation under § 682.222(d) of this chapter, the designated department official has the burden of persuasion regarding the substantial misrepresentation, and the institution has the burden of

persuasion in establishing any offsetting value of the education under § 685.222(i)(2)(i).

* * * * *

§ 668.91 [Amended]

9. Section 668.91 is amended by:

a. Removing paragraph (a)(2)(ii);

b. Redesignating paragraph (a)(2)(i) as (a)(2); and

c. Removing paragraph (c)(2)(x).

10. Section 668.100 is added to subpart G to read as follows:

§ 668.100 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

11. Subpart R is added to read as follows:

Subpart R—Aggressive and Deceptive Recruitment Tactics or Conduct

Sec.

668.500 Scope and purpose.
668.501 Aggressive and deceptive recruitment tactics or conduct.
668.509 Severability.

Subpart R—Aggressive and Deceptive Recruitment Tactics or Conduct

§ 668.500 Scope and purpose.

(a) This subpart identifies the types of activities that constitute aggressive and deceptive recruitment tactics or conduct by an eligible institution. An eligible institution has engaged in aggressive and deceptive recruitment tactics or conduct when the institution itself, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, marketing, advertising, lead generation, recruiting or admissions services, engages in one or more of the prohibited practices in § 668.501. Aggressive and deceptive recruitment tactics or conduct are prohibited in all forms, including the effects of those tactics or conduct reflected in the institution’s advertising or promotional materials, or in the marketing or sale of courses or programs of instruction offered by the institution.

(b) If the Secretary determines that an eligible institution has engaged in aggressive and deceptive recruitment tactics or conduct, the Secretary may:

(1) Revoke the eligible institution's program participation agreement, if the institution is provisionally certified under § 668.13(c);

(2) Impose limitations on the institution's participation in the title IV, HEA programs, if the institution is provisionally certified under § 668.13(c);

(3) Deny participation applications made on behalf of the institution;

(4) Initiate a proceeding against the eligible institution under subpart G of this part.

§ 668.501 Aggressive and deceptive recruitment tactics or conduct.

(a) Aggressive and deceptive recruitment tactics or conduct include but are not limited to actions by the institution, any of its representatives, or any institution, organization, or person with whom the institution has an agreement to provide educational programs, marketing, recruitment, or lead generation that:

(1) Demand or pressure the student or prospective student to make enrollment or loan-related decisions immediately, including on the same day of first contact;

(2) Falsely claim that the student or prospective student would lose the opportunity to attend the institution if they did not enroll immediately or otherwise place an unreasonable emphasis on unfavorable consequences of delay;

(3) Take advantage of a student's or prospective student's lack of knowledge about, or experience with, postsecondary institutions, postsecondary programs, or financial aid to pressure the student into enrollment or borrowing funds to attend the institution;

(4) Discourage the student or prospective student from consulting an adviser, a family member, or other resource or individual prior to making enrollment or loan-related decisions;

(5) Fail to respond to the student's or prospective student's requests for more information, including about the cost of the program and the nature of any financial aid;

(6) Obtain the student's or prospective student's contact information through websites that:

(i) Falsely appear to offer assistance to individuals seeking Federal, state or local benefits;

(ii) Falsely advertise employment opportunities; or,

(iii) Present false rankings of the institution or its programs;

(7) Use threatening or abusive language or behavior toward the student or prospective student; or,

(8) Repeatedly engage in unsolicited contact for the purpose of enrolling or reenrolling after the student or prospective student has requested not to be contacted further.

(b) [Reserved].

§ 668.509 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

PART 674--FEDERAL PERKINS LOAN PROGRAM

12. The authority citation for part 674 continues to read as follows:

AUTHORITY: 20 U.S.C. 1070g, 1087aa—1087hh; Pub. L. 111-256, 124 Stat. 2643; unless otherwise noted.

13. Section 674.33 is amended by:

a. Revising paragraph (g)(1);

b. In paragraph (g)(2)(iv) removing the words "credit bureaus" and adding in their place the words "consumer reporting agencies";

c. Revising paragraphs (g)(3) and (4);

d. In paragraph (g)(6)(i) introductory text, removing the words "In order to" and adding in their place the word "To";

e. In paragraph (g)(8)(i), removing the number "120" and adding in its place the number "180";

f. Revising paragraphs (g)(8)(v) and (vii); and

g. Adding paragraph (g)(9).

The revisions and addition read as follows:

§ 674.33 Repayment.

* * * * *

(g) * * *

(1) *General.* (i) The holder of an NDSL or a Federal Perkins Loan discharges the borrower's (and any endorser's) obligation to repay the loan if the borrower did not complete the program of study for which the loan was made because the school at which the borrower was enrolled closed.

(ii) For the purposes of this section -

(A) A school’s closure date is the earlier of the date that the school ceases to provide educational instruction in most programs, as determined by the Secretary, or a date chosen by the Secretary that reflects when the school ceased to provide educational instruction for most of its students;

(B) “School” means a school's main campus or any location or branch of the main campus regardless of whether the school or its location or branch is considered title IV eligible;

(C) The “holder” means the Secretary or the school that holds the loan; and

(D) “Program” means the credential defined by the level and Classification of Instructional Program code in

which a student is enrolled, except that the Secretary may define a borrower’s program as multiple levels or Classification of Instructional Program codes if--

(*1*) The enrollment occurred at the same school in closely proximate periods;

(*2*) The school granted a credential in a program while the student was enrolled in a different program; or

(*3*) The programs must be taken in a set order or were presented as necessary for students to complete in order to succeed in the relevant field of employment.

* * * * *

(3) *Discharge without an application.* (i) The Secretary may discharge the borrower's obligation to repay an NDSL or Federal Perkins Loan without an application from the borrower if the--

(A) Borrower qualified for and received a discharge on a loan pursuant to § 682.402(d) (Federal Family Education Loan Program) or § 685.214 (Federal Direct Loan Program) of this chapter, and was unable to receive a discharge on an NDSL or Federal Perkins Loan because the Secretary lacked the statutory authority to discharge the loan; or

(B) Secretary determines that the borrower qualifies for a discharge based on information in the Secretary's

possession. The Secretary discharges the loan without an application from the borrower if the borrower did not complete an institutional teach-out plan performed by the school or a teach-out agreement with another school, approved by the school's accrediting agency and, if applicable, the school's State authorizing agency.

(ii) If the borrower accepts but does not complete an institutional teach-out plan performed by the school or a teach-out agreement at another school approved by the school's accrediting agency and, if applicable, the school's State authorizing agency, then the Secretary discharges the loan within 1 year of the borrower's last date of attendance in the teach-out program.

(4) *Borrower qualification for discharge.* Except as provided in paragraph (g)(3) of this section, to qualify for discharge of an NDSL or Federal Perkins Loan, a borrower must submit to the holder of the loan a completed closed school discharge application on a form approved by the Secretary, and the factual assertions in the application must be true and must be made by the borrower under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to--

(i) State that the borrower—

(A) Received the proceeds of a loan, in whole or in part, on or after January 1, 1986, to attend a school;

(B) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 180 days before the school closed. The Secretary may extend the 180-day period if the Secretary determines that exceptional circumstances such as those described in paragraph (g)(9) of this section justify an extension; and

(C) On or after July 1, 2023, did not complete an institutional teach-out plan performed by the school or a teach-out agreement at another school, approved by the school’s accrediting agency and, if the applicable, the school’s State authorizing agency.

(ii) State whether the borrower has made a claim with respect to the school's closing with any third party, such as the holder of a performance bond or a tuition recovery program, and, if so, the amount of any payment received by the borrower or credited to the borrower's loan obligation; and

(iii) State that the borrower -

(A) Agrees to provide to the holder of the loan upon request other documentation reasonably available to the borrower that demonstrates that the borrower meets the qualifications for discharge under this section; and

(B) Agrees to cooperate with the Secretary in enforcement actions in accordance with paragraph (g)(6) of this section and to transfer any right to recovery against a third party to the Secretary in accordance with paragraph (g)(7) of this section.

* * * * *

(v) If the borrower fails to submit the completed application described in paragraph (g)(4) of this section within 90 days of the holder of the loan's mailing the discharge application, the holder of the loan resumes collection and grants forbearance of principal and interest for the period during which collection activity was suspended.

* * * * *

(vii) If the holder of the loan determines that a borrower who requests a discharge meets the qualifications for a discharge, the holder of the loan notifies the borrower in writing of that determination and the reasons for the determination.

* * * * *

(9) *Exceptional circumstances*. For purposes of this section, exceptional circumstances include, but are not limited to—

(i) The revocation or withdrawal by an accrediting agency of the school's institutional accreditation;

(ii) The 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;

(iii) The revocation or withdrawal by the State authorization or licensing authority to operate or to award academic credentials in the State;

(iv) The termination by the Department of the school's participation in a title IV, HEA program;

(v) A finding by a State or Federal government agency that the school violated State or Federal law related to education or services to students;

(vi) A State or Federal court judgment that a School violated State or Federal law related to education or services to students;

(vii) The teach-out of the student’s educational program exceeds the 180-day look back period for a closed school discharge;

(viii) The school responsible for the teach-out of the student’s educational program fails to perform the material terms of the teach-out plan or agreement, such

that the student does not have a reasonable opportunity to complete his or her program of study;

(ix) The school discontinued a significant share of its academic programs;

(x) The school permanently closed all or most of its in-person locations while maintaining online programs;

(xi) The Department placed the school on the heightened cash monitoring payment method as defined in § 668.162(d)(2).

14. Section 674.61 is amended by:

a. Revising paragraphs (b)(2) through (6);

b. Removing paragraph (b)(7);

c. Redesignating paragraph (b)(8) as paragraph (b)(7);

d. Revising newly redesignated paragraph (b)(7); and

e. Revising paragraphs (d) and (e).

The revisions read as follows:

§ 674.61 Discharge for death or disability.

* * * * *

(b) * * *

(2) *Discharge application process for borrowers who have a total and permanent disability as defined in §*

674.51(aa)(1). (i) If the borrower notifies the institution that the borrower claims to be totally and permanently disabled as defined in § 674.51(aa)(1), the institution must direct the borrower to notify the Secretary of the borrower's intent to submit an application for total and permanent disability discharge and provide the borrower with the information needed for the borrower to notify the Secretary.

(ii) If the borrower notifies the Secretary of the borrower's intent to apply for a total and permanent disability discharge, the Secretary -

(A) Provides the borrower with information needed for the borrower to apply for a total and permanent disability discharge;

(B) Identifies all title IV loans owed by the borrower and notifies the lenders of the borrower's intent to apply for a total and permanent disability discharge;

(C) Directs the lenders to suspend efforts to collect from the borrower for a period not to exceed 120 days; and

(D) Informs the borrower that the suspension of collection activity described in paragraph (b)(2)(ii)(C) of this section will end after 120 days and the collection will resume on the loans if the borrower does not submit a total and permanent disability discharge application to the Secretary within that time.

(iii) If the borrower fails to submit an application for a total and permanent disability discharge to the Secretary within 120 days, collection resumes on the borrower's title IV loans.

(iv) The borrower must submit to the Secretary an application for total and permanent disability discharge on a form approved by the Secretary. The application must contain -

(A) A certification by a physician, who is a doctor of medicine or osteopathy legally authorized to practice in a State, that the borrower is totally and permanently disabled as defined in § 674.51(aa)(1);

(B) A certification by a nurse practitioner or physician’s assistant licensed by a State or a licensed certified psychologist at the independent practice level, that the borrower is totally and permanently disabled as defined in § 674.51(aa)(1);

(C) A Social Security Administration (SSA) Benefit Planning Query (BPQY) or an SSA notice of award or other documentation deemed acceptable by the Secretary indicating that--

(*1*) The borrower qualifies for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits and the borrower's next scheduled disability review will be within 5 to 7 years;

(*2*) The borrower qualifies for SSDI or SSI benefits and the borrower’s next scheduled disability review will be within 3 years, and that the borrower’s eligibility for disability benefits in the 3-year review category has been renewed at least once;

(3) The borrower has a disability onset date for SSDI or SSI of at least 5 years prior to the application for a disability discharge or has been receiving benefits for a least 5 years prior to the application for a disability discharge;

(*4*) The borrower qualifies for the SSA compassionate allowance program; or

(*5*) For borrowers currently receiving SSA retirement benefits, documentation that, prior to the borrower qualifying for SSA retirement benefits, the borrower met the requirements in paragraph (b)(2)(iv)(C) of this section.

(v) The borrower must submit the application described in paragraph (b)(2)(iv) of this section to the Secretary within 90 days of the date the physician, nurse practitioner, physician’s assistant or psychologist certifies the application, if applicable.

(vi) After the Secretary receives the application described in paragraph (b)(2)(iv) of this section, the Secretary notifies the holders of the borrower's title IV

loans that the Secretary has received a total and permanent disability discharge application from the borrower.

(vii) If the application is incomplete, the Secretary notifies the borrower of the missing information and requests the missing information from the borrower, the borrower's representative, or the physician, nurse practitioner, physician’s assistant or psychologist who provided the certification, as appropriate. The Secretary does not make a determination of eligibility until the application is complete.

(viii) The lender notification described in paragraph (b)(2)(vi) of this section directs the borrower's loan holders to suspend collection activity or maintain the suspension of collection activity on the borrower's title IV loans.

(ix) After the Secretary receives a disability discharge application, the Secretary sends a notice to the borrower that -

(A) States that the application will be reviewed by the Secretary;

(B) Informs the borrower that the borrower's lenders will suspend collection activity or maintain the suspension of collection activity on the borrower's title IV loans while the Secretary reviews the borrower's application for discharge; and

(C) Explains the process for the Secretary's review of total and permanent disability discharge applications.

(3) *Secretary's review of the total and permanent disability discharge application.* (i) If, after reviewing the borrower's completed application, the Secretary determines that the data described in paragraph (b)(2) of this section supports the conclusion that the borrower is totally and permanently disabled as defined in § 674.51(aa)(1), the borrower is considered totally and permanently disabled as of the date -

(A) The physician, nurse practitioner, physician’s assistant, or psychologist certified the borrower's application; or

(B) The Secretary received the SSA data described in paragraph (b)(2)(iv)(C) of this section.

(ii) If the Secretary determines that the borrower's application does not conclusively prove that the borrower is totally and permanently disabled as defined in § 674.51(aa)(1), the Secretary may require the borrower to submit additional medical evidence. As part of the Secretary's review of the borrower's discharge application, the Secretary may require and arrange for an additional review of the borrower's condition by an independent physician or other medical professional identified by the Secretary at no expense to the borrower.

(iii) After determining that the borrower is totally and permanently disabled as defined in § 674.51(aa)(1), the Secretary notifies the borrower and the borrower's lenders that the application for a disability discharge has been approved. With this notification, the Secretary provides the date the physician, nurse practitioner, physician’s assistant, or psychologist certified the borrower's loan discharge application or the date the Secretary received the SSA data described in paragraph (b)(2)(iv)(C) of this section and directs each institution holding a Defense, NDSL, or Perkins Loan made to the borrower to assign the loan to the Secretary.

(iv) The institution must assign the loan to the Secretary within 45 days of the date of the notice described in paragraph (b)(3)(iii) of this section.

(v) After the loan is assigned, the Secretary discharges the borrower's obligation to make further payments on the loan and notifies the borrower and the institution that the loan has been discharged. The notification to the borrower explains the terms and conditions under which the borrower's obligation to repay the loan will be reinstated, as specified in paragraph (b)(6) of this section. Any payments received after the date the physician, nurse practitioner, physician’s assistant, or psychologist certified the borrower's loan discharge application or the date the Secretary received

the SSA data described in paragraph (b)(2)(iv)(C) of this section are returned to the person who made the payments on the loan in accordance with paragraph (b)(7) of this section.

(vi) If the Secretary determines that the physician, nurse practitioner, physician's assistant, or psychologist certification or the SSA data described in paragraph (b)(2)(iv)(C) of this section provided by the borrower does not support the conclusion that the borrower is totally and permanently disabled as defined in § 674.51(aa)(1), the Secretary notifies the borrower and the institution that the application for a disability discharge has been denied. The notification includes -

(A) The reason or reasons for the denial;

(B) A statement that the loan is due and payable to the institution under the terms of the promissory note and that the loan will return to the status that would have existed had the total and permanent disability discharge application not been received;

(C) A statement that the institution will notify the borrower of the date the borrower must resume making payments on the loan;

(D) An explanation that the borrower is not required to submit a new total and permanent disability discharge application if the borrower requests that the Secretary re-

evaluate the application for discharge by providing, within 12 months of the date of the notification, additional information that supports the borrower's eligibility for discharge; and

(E) An explanation that if the borrower does not request re-evaluation of the borrower's prior discharge application within 12 months of the date of the notification, the borrower must submit a new total and permanent disability discharge application to the Secretary if the borrower wishes the Secretary to reevaluate the borrower's eligibility for a total and permanent disability discharge.

(vii) If the borrower requests reevaluation in accordance with paragraph (b)(3)(vi)(D) of this section or submits a new total and permanent disability discharge application in accordance with paragraph (b)(3)(vi)(E) of this section, the request must include new information regarding the borrower's disabling condition that was not provided to the Secretary in connection with the prior application at the time the Secretary reviewed the borrower's initial application for a total and permanent disability discharge.

(4) *Treatment of disbursements made during the period from the certification or the date the Secretary received the SSA data until the date of discharge.* If a borrower received a title IV loan or TEACH Grant before the date the

physician, nurse practitioner, physician’s assistant, or psychologist certified the borrower's discharge application or before the date the Secretary received the SSA data described in paragraph (b)(2)(iv)(C) of this section and a disbursement of that loan or grant is made during the period from the date of the physician, nurse practitioner, physician’s assistant, or psychologist certification or the date the Secretary received the SSA data described in paragraph (b)(2)(iv)(C) of this section until the date the Secretary grants a discharge under this section, the processing of the borrower's loan discharge application will be suspended until the borrower ensures that the full amount of the disbursement has been returned to the loan holder or to the Secretary, as applicable.

(5) *Receipt of new title IV loans or TEACH Grants after the certification or after the date the Secretary received the SSA data.* If a borrower receives a disbursement of a new title IV loan or receives a new TEACH Grant made on or after the date the physician, nurse practitioner, physician’s assistant, or psychologist certified the borrower's discharge application or on or after the date the Secretary received the SSA data described in paragraph (b)(2)(iv)(C) of this section and before the date the Secretary grants a discharge under this section, the Secretary denies the borrower's discharge request and collection resumes on the borrower's loans.

(6) *Conditions for reinstatement of a loan after a total and permanent disability discharge.* (i) The Secretary reinstates the borrower's obligation to repay a loan that was discharged in accordance with paragraph (b)(3)(v) of this section if, within 3 years after the date the Secretary granted the discharge, the borrower receives a new TEACH Grant or new loan under the Perkins or Direct Loan programs, except for a Direct Consolidation Loan that includes loans that were not discharged.

(ii) If the borrower's obligation to repay a loan is reinstated, the Secretary -

(A) Notifies the borrower that the borrower's obligation to repay the loan has been reinstated;

(B) Returns the loan to the status that would have existed had the total and permanent disability discharge application not been received; and

(C) Does not require the borrower to pay interest on the loan for the period from the date the loan was discharged until the date the borrower's obligation to repay the loan was reinstated.

(iii) The Secretary's notification under paragraph (b)(6)(ii)(A) of this section will include -

(A) The reason or reasons for the reinstatement;

(B) An explanation that the first payment due date on the loan following reinstatement will be no earlier than 90 days after the date of the notification of reinstatement; and

(C) Information on how the borrower may contact the Secretary if the borrower has questions about the reinstatement or believes that the obligation to repay the loan was reinstated based on incorrect information.

(7) *Payments received after the certification of total and permanent disability.* (i) If the institution receives any payments from or on behalf of the borrower on or attributable to a loan that has been assigned to the Secretary based on the Secretary's determination of eligibility for a total and permanent disability discharge, the institution must return the payments to the sender.

(ii) At the same time that the institution returns the payments, it must notify the borrower that there is no obligation to make payments on the loan after it has been discharged due to a total and permanent disability unless the loan is reinstated in accordance with § 674.61(b)(6), or the Secretary directs the borrower otherwise.

(iii) When the Secretary discharges the loan, the Secretary returns to the sender any payments received on the loan after the date the borrower became totally and permanently disabled.

* * * * *

(d) *Discharge without an application*. (1) The Secretary will discharge a loan under this section without an application or any additional documentation from the borrower if the Secretary—

(i) Obtains data from the Department of Veterans Affairs (VA) showing that the borrower is unemployable due to a service-connected disability; or

(ii) Obtains data from the Social Security Administration (SSA) described in paragraph (b)(2)(iv)(C) of this section.

(e) *Notifications and return of payments*. (1) After determining that a borrower qualifies for a total and permanent disability discharge under paragraph (d) of this section, the Secretary sends a notification to the borrower informing the borrower that the Secretary will discharge the borrower's title IV loans unless the borrower notifies the Secretary, by a date specified in the Secretary's notification, that the borrower does not wish to receive the loan discharge.

(2) Unless the borrower notifies the Secretary that the borrower does not wish to receive the discharge, the Secretary notifies the borrower’s lenders that the borrower has been approved for a disability discharge.

(3) In the case of a discharge based on a disability determination by VA —

(i) The notification--

(A) Provides the effective date of the disability determination by VA; and

(B) Directs each institution holding a Defense, NDSL, or Perkins Loan made to the borrower to discharge the loan; and

(ii) The institution returns to the person who made the payments any payments received on or after the effective date of the determination by VA that the borrower is unemployable due to a service-connected disability.

(4) In the case of a discharge based on a disability determination by the SSA—

(i) The notification--

(A) Provides the date the Secretary received the SSA data described in paragraph (b)(2)(iv)(C) of this section; and

(B) Directs each institution holding a Defense, NDSL, or Perkins Loan made to the borrower to assign the loan to the Secretary within 45 days of the notice described in paragraph (e)(2) of this section; and

(ii) After the loan is assigned, the Secretary discharges the loan in accordance with paragraph (b)(3)(v) of this section.

(5) If the borrower notifies the Secretary that they do not wish to receive the discharge, the borrower will remain responsible for repayment of the borrower's loans in accordance with the terms and conditions of the promissory notes that the borrower signed.

* * * * *

15. Section 674.65 is added to read as follows:

§ 674.65 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

PART 682--FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

16. The authority citation for part 682 continues to read as follows:

AUTHORITY: 20 U.S.C. 1071-1087-4, unless otherwise noted.

17. Section 682.402 is amended by:

a. Revising paragraphs (c)(2)(iv) through (vii) and (c)(3) through (6);

b. Removing paragraph (c)(7);

c. Redesignating paragraphs (c)(8) through (11) as paragraphs (c)(7) through (10), respectively;

d. Revising newly redesignated paragraphs (c)(7), (9), and (10);

e. Revising paragraphs (d)(1) through (3);

f. In paragraph (d)(6)(ii)(B) introductory text, removing the number “120” and adding in its place the number “180”;

g. In paragraph (d)(6)(ii)(B)(*2*), removing the number “120” and adding in its place the number “180”;

h. In paragraph (d)(6)(ii)(H), removing the number “60” and adding in its place the number “90”;

i. In paragraph (d)(7)(ii), removing the number “60” and adding in its place the number “90”;

j. Revising paragraph (d)(8);

k. Adding paragraph (d)(9);

l. Revising paragraph (e)(1);

m. In paragraph (e)(2)(v) removing the citation “(e)(1)(ii)” and adding in its place the citation “(e)(1)(iii)”;

n. Revising paragraph (e)(3);

o. Removing paragraph (e)(13);

p. Redesignating paragraphs (e)(6) through (12) as (e)(7) through (13), respectively;

q. Adding a new paragraph (e)(6);

r. Revising redesignated paragraphs (e)(7) through (13) and paragraphs (e)(14) and (15); and

s. Adding paragraph (e)(16).

The revisions and additions read as follows:

§ 682.402 Death, disability, closed school, false certification, unpaid refunds, and bankruptcy payments.

* * * * *

(c) * * *

(2) * * *

(iv) The borrower must submit to the Secretary an application for a total and permanent disability discharge on a form approved by the Secretary. The application must contain -

(A) A certification by a physician, who is a doctor of medicine or osteopathy legally authorized to practice in a State, that the borrower is totally and permanently disabled as described in paragraph (1) of the definition of that term in § 682.200(b);

(B) A certification by a nurse practitioner or physician’s assistant licensed by a State, or a licensed or certified psychologist at the independent practice level, that the borrower is totally and permanently disabled as described in paragraph (1) of the definition of that term in § 682.200(b); or

(C) An SSA Benefit Planning Query (BPQY) or an SSA notice of award or other documentation deemed acceptable by the Secretary, indicating that—

(*1*) The borrower qualifies for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits and the borrower's next scheduled disability review will be within 5 to 7 years;

(*2*) The borrower qualifies for SSDI or SSI benefits and the borrower’s next scheduled disability review will be within 3 years, and that the borrower’s eligibility for disability benefits in the 3-year review category has been renewed at least once;

(*3*) The borrower has a disability onset date for SSDI or SSI of at least 5 years prior or has been receiving benefits for a least 5 years prior to the application for a disability discharge;

(*4*) The borrower qualifies for the SSA compassionate allowance program; or

(5) For a borrower who is currently receiving SSA retirement benefits, documentation that, prior to the borrower qualifying for SSA retirement benefits, the borrower met any of the requirements in paragraph (c)(2)(iv)(C) of this section.

(v) The borrower must submit the application described in paragraph (c)(2)(iv) of this section to the Secretary within 90 days of the date the physician, nurse practitioner, physician’s assistant, or psychologist certifies the application, if applicable.

(vi) After the Secretary receives the application described in paragraph (c)(2)(iv) of this section, the Secretary notifies the holders of the borrower's title IV loans that the Secretary has received a total and permanent disability discharge application from the borrower. The holders of the loans must notify the applicable guaranty agency that the total and permanent disability discharge application has been received.

(vii) If the application is incomplete, the Secretary notifies the borrower of the missing information and requests the missing information from the borrower or the physician, nurse practitioner, physician’s assistant or psychologist who provided the certification, as appropriate. The Secretary does not make a determination of eligibility until the application is complete.

* * * * *

(3) *Secretary's review of total and permanent disability discharge application.* (i) If, after reviewing the borrower's completed application, the Secretary determines that the data described in paragraph (c)(2)(iv) of this section supports the conclusion that the borrower is totally and permanently disabled, as described in paragraph (1) of the definition of that term in § 682.200(b), the borrower is considered totally and permanently disabled -

(A) As of the date the physician, nurse practitioner, physician’s assistant or psychologist certified the borrower's application; or

(B) As of the date the Secretary received the SSA data described in paragraph (c)(2)(iv)(C) of this section.

(ii) If the Secretary determines that the borrower's application does not conclusively prove that the borrower is totally and permanently disabled as described in paragraph (1) of the definition of that term in § 682.200(b) the Secretary may require the borrower to submit additional medical evidence. As part of the Secretary's review of the borrower's discharge application, the Secretary may require and arrange for an additional review of the borrower's condition by an independent physician or

other medical professional identified by the Secretary at no expense to the borrower.

(iii) After determining that the borrower is totally and permanently disabled as described in paragraph (1) of the definition of that term in § 682.200(b), the Secretary notifies the borrower and the borrower's lenders that the application for a disability discharge has been approved. With this notification, the Secretary provides the date the physician, nurse practitioner, physician’s assistant, or psychologist certified the borrower's loan discharge application or the date the Secretary received the SSA data described in paragraph (c)(2)(iv)(C) of this section and directs each lender to submit a disability claim to the guaranty agency so the loan can be assigned to the Secretary. The Secretary returns any payment received by the Secretary after the date the physician, nurse practitioner, physician’s assistant, or psychologist certified the borrower's loan discharge application or received the SSA data described in paragraph (c)(2)(iv)(C) of this section to the person who made the payment.

(iv) After the loan is assigned, the Secretary discharges the borrower's obligation to make further payments on the loan and notifies the borrower and the lender that the loan has been discharged. The notification to the borrower explains the terms and conditions under which the borrower's obligation to repay the loan will be

reinstated, as specified in paragraph (c)(6)(i) of this section.

(v) If the Secretary determines that the physician, nurse practitioner, physician's assistant, or psychologist certification or SSA data described in paragraph (c)(2)(iv)(C) of this section does not support the conclusion that the borrower is totally and permanently disabled as described in paragraph (1) of the definition of that term in § 682.200(b), the Secretary notifies the borrower and the lender that the application for a disability discharge has been denied. The notification includes -

(A) The reason or reasons for the denial;

(B) A statement that the loan is due and payable to the lender under the terms of the promissory note and that the loan will return to the status that would have existed had the total and permanent disability discharge application not been received;

(C) A statement that the lender will notify the borrower of the date the borrower must resume making payments on the loan;

(D) An explanation that the borrower is not required to submit a new total and permanent disability discharge application if the borrower requests that the Secretary re-evaluate the application for discharge by providing, within

12 months of the date of the notification, additional information that supports the borrower's eligibility for discharge; and

(E) An explanation that if the borrower does not request re-evaluation of the borrower's prior discharge application within 12 months of the date of the notification, the borrower must submit a new total and permanent disability discharge application to the Secretary if the borrower wishes the Secretary to re-evaluate the borrower's eligibility for a total and permanent disability discharge.

(vi) If the borrower requests re-evaluation in accordance with paragraph (c)(3)(v)(D) of this section or submits a new total and permanent disability discharge application in accordance with paragraph (c)(3)(v)(E) of this section, the request must include new information regarding the borrower’s disabling condition that was not provided to the Secretary in connection with the prior application at the time the Secretary reviewed the borrower's initial application for a total and permanent disability discharge.

(4) *Treatment of disbursements made during the period from the date of the physician, nurse practitioner, physician’s assistant or psychologist certification or the date the Secretary received the SSA data described in paragraph (c)(2)(iv)(C) of this section until the date of*

discharge. If a borrower received a title IV loan or TEACH Grant before the date the physician, nurse practitioner, physician’s assistant, or psychologist certified the borrower's discharge application or before the date the Secretary received the SSA data described in paragraph (c)(2)(iv)(C) of this section and a disbursement of that loan or grant is made during the period from the date of the physician, nurse practitioner, physician’s assistant, or psychologist certification or the Secretary's receipt of the SSA data described in paragraph (c)(2)(iv)(C) of this section until the date the Secretary grants a discharge under this section, the processing of the borrower’s loan discharge request will be suspended until the borrower ensures that the full amount of the disbursement has been returned to the loan holder or to the Secretary, as applicable.

(5) *Receipt of new title IV loans or TEACH Grants after the date of the physician, nurse practitioner, physician’s assistant, or psychologist certification or after the date the Secretary received the SSA data described in paragraph (c)(2)(iv)(C) of this section.* If a borrower receives a disbursement of a new title IV loan or receives a new TEACH Grant made on or after the date the physician, nurse practitioner, physician’s assistant or psychologist certified the borrower's discharge application or the date the Secretary received the SSA data described

in paragraph (c)(2)(iv)(C) of this section and before the date the Secretary grants a discharge under this section, the Secretary denies the borrower's discharge request and collection resumes on the borrower's loans.

(6) *Conditions for reinstatement of a loan after a total and permanent disability discharge.* (i) The Secretary reinstates the borrower's obligation to repay a loan that was discharged in accordance with (c)(3)(iii) of this section if, within 3 years after the date the Secretary granted the discharge, the borrower receives a new TEACH Grant or a new loan under the Perkins or Direct Loan programs, except for a Direct Consolidation Loan that includes loans that were not discharged.

(ii) If the borrower's obligation to repay a loan is reinstated, the Secretary -

(A) Notifies the borrower that the borrower's obligation to repay the loan has been reinstated;

(B) Returns the loan to the status that would have existed if the total and permanent disability discharge application had not been received; and

(C) Does not require the borrower to pay interest on the loan for the period from the date the loan was discharged until the date the borrower's obligation to repay the loan was reinstated.

(iii) The Secretary's notification under paragraph (c)(6)(ii)(A) of this section will include -

(A) The reason or reasons for the reinstatement;

(B) An explanation that the first payment due date on the loan following reinstatement will be no earlier than 90 days after the date of the notification of reinstatement; and

(C) Information on how the borrower may contact the Secretary if the borrower has questions about the reinstatement or believes that the obligation to repay the loan was reinstated based on incorrect information.

(7) *Lender and guaranty agency actions.* (i) If the Secretary approves the borrower's total and permanent disability discharge application -

(A) The lender must submit a disability claim to the guaranty agency, in accordance with paragraph (g)(1) of this section;

(B) If the claim satisfies the requirements of paragraph (g)(1) of this section and § 682.406, the guaranty agency must pay the claim submitted by the lender;

(C) After receiving a claim payment from the guaranty agency, the lender must return to the sender any payments received by the lender after the date the physician, nurse practitioner, physician’s assistant, or psychologist

certified the borrower's loan discharge application or after the date the Secretary received the SSA data described in paragraph (c)(2)(iv)(C) of this section as well as any payments received after claim payment from or on behalf of the borrower;

(D) The Secretary reimburses the guaranty agency for a disability claim paid to the lender after the agency pays the claim to the lender; and

(E) The guaranty agency must assign the loan to the Secretary within 45 days of the date the guaranty agency pays the disability claim and receives the reimbursement payment, or within 45 days of the date the guaranty agency receives the notice described in paragraph (c)(3)(iii) of this section if a guaranty agency is the lender.

(ii) If the Secretary does not approve the borrower's total and permanent disability discharge request, the lender must resume collection of the loan and is deemed to have exercised forbearance of payment of both principal and interest from the date collection activity was suspended. The lender may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period, except if the lender is a guaranty agency it may not capitalize accrued interest.

* * * * *

(9) *Discharge without an application.* The Secretary will discharge a loan under this section without an application or any additional documentation from the borrower if the Secretary—

(i) Obtains data from the Department of Veterans Affairs (VA) showing that the borrower is unemployable due to a service-connected disability; or

(ii) Obtains data from the Social Security Administration (SSA) described in paragraph (c)(2)(iv)(C) of this section.

(10) *Notifications and return of payments.* (i) After determining that a borrower qualifies for a total and permanent disability discharge under paragraph (c)(9) of this section, the Secretary sends a notification to the borrower informing the borrower that the Secretary will discharge the borrower's title IV loans unless the borrower notifies the Secretary, by a date specified in the Secretary's notification, that the borrower does not wish to receive the loan discharge.

(ii) Unless the borrower notifies the Secretary that the borrower does not wish to receive the discharge, the Secretary notifies the borrower’s loan holders that the borrower has been approved for a disability discharge. With this notification the Secretary provides the effective date of the determination by VA or the date the Secretary received the SSA data described in paragraph (c)(2)(iv)(C)

of this section and directs the holder of each FFEL Program loan made to the borrower to submit a disability claim to the guaranty agency in accordance with paragraph (g)(1) of this section.

(iii) If the claim meets the requirements of paragraph (g)(1) of this section and § 682.406, the guaranty agency pays the claim and must—

(A) Discharge the loan, in the case of a discharge based on data from VA; or

(B) Assign the loan to the Secretary, in the case of a discharge based on data from the SSA.

(iv) The Secretary reimburses the guaranty agency for a disability claim after the agency pays the claim to the lender.

(v) Upon receipt of the claim payment from the guaranty agency, the loan holder returns to the person who made the payments any payments received on or after—

(A) The effective date of the determination by VA that the borrower is unemployable due to a service-connected disability; or

(B) The date the Secretary received the SSA data described in paragraph (c)(2)(iv)(C) of this section.

(vi) For a loan that is assigned to the Secretary for discharge based on data from the SSA, the Secretary

discharges the loan in accordance with paragraph (c)(3)(iv) of this section.

(vii) If the borrower notifies the Secretary that they do not wish to receive the discharge, the borrower will remain responsible for repayment of the borrower's loans in accordance with the terms and conditions of the promissory notes that the borrower signed.

* * * * *

(d) * * *

(1) *General.* (i) The Secretary reimburses the holder of a loan received by a borrower on or after January 1, 1986, and discharges the borrower's obligation with respect to the loan in accordance with the provisions of paragraph (d) of this section, if the borrower (or the student for whom a parent received a PLUS loan) could not complete the program of study for which the loan was intended because the school at which the borrower (or student) was enrolled closed, or the borrower (or student) withdrew from the school not more than 180 days prior to the date the school closed. The Secretary may extend the 180-day period if the Secretary determines that exceptional circumstances, as described in paragraph (d)(9) of this section, justify an extension.

(ii) For purposes of the closed school discharge authorized by this section –

(A) A school's closure date is the earlier of the date that the school ceases to provide educational instruction in most programs, as determined by the Secretary, or a date chosen by the Secretary that reflects when the school had ceased to provide educational instruction for most of its students;

(B) The term “borrower” includes all endorsers on a loan;

(C) A “school” means a school’s main campus or any location or branch of the main campus, regardless of whether the school or its location or branch is considered title IV eligible, and

(D) “Program” means the credential defined by the level and Classification of Instructional Program code in which a student is enrolled, except that the Secretary may define a borrower’s program as multiple levels or Classification of Instructional Program codes if -

(*1*) The enrollment occurred at the same school in closely proximate periods;

(*2*) The school granted a credential in a program while the student was enrolled in a different program; or

(*3*) The programs must be taken in a set order or were presented as necessary for borrowers to complete in order to succeed in the relevant field of employment

(2) *Relief available pursuant to discharge.* (i) Discharge under this paragraph (d) relieves the borrower of any existing or past obligation to repay the loan and any charges imposed or costs incurred by the holder with respect to the loan that the borrower is, or was otherwise obligated to pay.

(ii) A discharge of a loan under this paragraph (d) qualifies the borrower for reimbursement of amounts paid voluntarily or through enforced collection on a loan obligation discharged under this paragraph (d).

(iii) A borrower who has defaulted on a loan discharged under this paragraph (d) is not regarded as in default on the loan after discharge, and is eligible to receive assistance under the title IV, HEA programs.

(iv) A discharge of a loan under this paragraph (d) must be reported by the loan holder to all consumer reporting agencies to which the holder previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan.

(3) *Borrower qualification for discharge.* Except as provided in paragraph (d)(8) of this section, to qualify for a discharge of a loan under this paragraph (d), a borrower must submit a completed closed school discharge application on a form approved by the Secretary and the factual assertions in the application must be true and must

be made under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to state that the borrower (or the student on whose behalf a parent borrowed)—

(i) Received the proceeds of a loan, in whole or in part, on or after January 1, 1986, to attend a school;

(ii) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 180 calendar days before the school closed. The Secretary may extend the 180-day period if the Secretary determines that exceptional circumstances, as described in paragraph (d)(9) of this section, justify an extension;

(iii) On or after July 1, 2023, state that the borrower did not complete an institutional teach-out plan performed by the school or a teach-out agreement at another school, approved by the school's accrediting agency and, if applicable, the school's State authorizing agency; and

(iv) State that the borrower (or student)—

(A) Agrees to provide to the Secretary or the Secretary's designee upon request other documentation reasonably available to the borrower that demonstrates that the borrower meets the qualifications for discharge under this section; and

(B) Agrees to cooperate with the Secretary or the Secretary’s designee in enforcement actions in accordance with paragraph (d)(4) of this section and to transfer any right to recovery against a third party to the Secretary in accordance with paragraph (d)(5) of this section.

* * * * *

(8) *Discharge without an application.* (i) A borrower's obligation to repay a FFEL Program loan may be discharged without an application from the borrower if the –

(A) Borrower received a discharge on a loan pursuant to § 674.33(g) of this chapter under the Federal Perkins Loan Program, or § 685.214 of this chapter under the William D. Ford Federal Direct Loan Program; or

(B) Secretary or the guaranty agency, with the Secretary's permission, determines that the borrower qualifies for a discharge based on information in the Secretary or guaranty agency's possession. The Secretary or guaranty agency discharges the loan without an application from the borrower if the borrower did not complete an institutional teach-out plan performed by the school or a teach-out agreement at another school, approved by the school’s accrediting agency and, if applicable, the school’s State authorizing agency.

(ii) If the borrower accepts but does not complete an institutional teach-out plan performed by the school or a teach-out agreement at another school, approved by the school’s accrediting agency and, if applicable, the school’s State authorizing agency, then the Secretary or guaranty agency discharges the loan within 1 year of the borrower’s last date of attendance in the teach-out program.

(9) *Exceptional circumstances*. For purposes of this section, exceptional circumstances include, but are not limited to—

(i) The revocation or withdrawal by an accrediting agency of the school's institutional accreditation;

(ii) The school is or was placed on probation or issued a show-cause order, or placed on an accreditation status that poses an equivalent or greater risk to its accreditation, by its accrediting agency for failing to meet one or more of the agency's standards;

(iii) The revocation or withdrawal by the State authorization or licensing authority to operate or to award academic credentials in the State;

(iv) The termination by the Department of the school's participation in a title IV, HEA program;

(v) A finding by a State or Federal government agency that the school violated State or Federal law related to education or services to students;

(vi) A State or Federal court judgment that a School violated State or Federal law related to education or services to students;

(vii) The teach-out of the student's educational program exceeds the 180-day look back period for a closed school discharge;

(viii) The school responsible for the teach-out of the student's educational program fails to perform the material terms of the teach-out plan or agreement, such that the student does not have a reasonable opportunity to complete his or her program of study;

(ix) The school discontinued a significant share of its academic programs.

(x) The school permanently closed all or most of its ground-based or in -person locations while maintaining online programs.

(xi) The school was placed on the heightened cash monitoring payment method as defined in § 668.162(d)(2).

(e) * * *

(1) *General.* (i) The Secretary reimburses the holder of a loan received by a borrower on or after January 1,

1986, and discharges a current or former borrower's obligation with respect to the loan in accordance with the provisions of this paragraph (e), if the borrower's (or the student for whom a parent received a PLUS loan) eligibility to receive the loan was falsely certified by an eligible school. On or after July 1, 2006, the Secretary reimburses the holder of a loan, and discharges a borrower's obligation with respect to the loan in accordance with the provisions of this paragraph (e), if the borrower's eligibility to receive the loan was falsely certified as a result of a crime of identity theft. For purposes of a false certification discharge, the term "borrower" includes all endorsers on a loan.

(ii) A student's or other individual's eligibility to borrow will be considered to have been falsely certified by the school if the school -

(A) Certified the eligibility for a FFEL Program loan of a student who—

(*1*) Reported not having a high school diploma or its equivalent; and

(*2*) Did not satisfy the alternative to graduation from high school requirements in 34 CFR 668.32(e) and section 484(d) of the Act that were in effect at the time the loan was certified, as applicable.

(B) Certified the eligibility of a student who is not a high school graduate based on—

(*1*) A high school graduation status falsified by the school; or

(*2*) A high school diploma falsified by the school or a third party to which the school referred the borrower;

(C) Certified the eligibility of the student who, because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary, would not meet State requirements for employment (in the student's State of residence when the loan was certified) in the occupation for which the training program supported by the loan was intended;

(D) Signed the borrower's name without authorization by the borrower on the loan application or promissory note; or

(E) Certified the eligibility of an individual for a FFEL Program loan as a result of the crime of identity theft committed against the individual, as that crime is defined in paragraph (e)(14) of this section.

(iii) The Secretary discharges the obligation of a borrower with respect to a loan disbursement for which the school, without the borrower's authorization, endorsed the borrower's loan check or authorization for electronic funds transfer, unless the student for whom the loan was made

received the proceeds of the loan either by actual delivery of the loan funds or by a credit in the amount of the contested disbursement applied to charges owed to the school for that portion of the educational program completed by the student. However, the Secretary does not reimburse the lender with respect to any amount disbursed by means of a check bearing an unauthorized endorsement unless the school also executed the application or promissory note for that loan for the named borrower without that individual's consent.

(iv) If a loan was made as a result of the crime of identity theft that was committed by an employee or agent of the lender, or if at the time the loan was made, an employee or agent of the lender knew of the identity theft of the individual named as the borrower -

(A) The Secretary does not pay reinsurance, and does not reimburse the holder, for any amount disbursed on the loan; and

(B) Any amounts received by a holder as interest benefits and special allowance payments with respect to the loan must be refunded to the Secretary, as provided in paragraphs (e)(8)(ii)(B)(*4*) and (e)(10)(ii)(D) of this section.

* * * * *

(3) *Borrower qualification for discharge.* Except as provided in paragraph (e)(15) of this section, to qualify for a discharge of a loan under this paragraph (e), the borrower must submit to the holder of the loan an application for discharge on a form approved by the Secretary. The application need not be notarized, but must be made by the borrower under penalty of perjury, and, in the application, the borrower must -

(i) State whether the student has made a claim with respect to the school's false certification with any third party, such as the holder of a performance bond or a tuition recovery program, and if so, the amount of any payment received by the borrower (or student) or credited to the borrower's loan obligation;

(ii) In the case of a borrower requesting a discharge based on not having had a high school diploma and not having met the alternative to graduation from high school eligibility requirements in 34 CFR 668.32(e) and under section 484(d) of the Act applicable when the loan was certified, and the school or a third party to which the school referred the borrower falsified the student's high school diploma, the borrower must state in the application that the borrower (or the student for whom a parent received a PLUS loan) -

(A) Received, on or after January 1, 1986, the proceeds of any disbursement of a loan disbursed, in whole

or in part, on or after January 1, 1986, to attend a school;

(B) Reported not having a valid high school diploma or its equivalent when the loan was certified; and

(C) Did not satisfy the alternative to graduation from high school statutory or regulatory eligibility requirements identified on the application form and applicable when the loan was certified.

(iii) In the case of a borrower requesting a discharge based on a condition that would disqualify the borrower from employment in the occupation that the training program for which the borrower received the loan was intended, the borrower must state in the application that the borrower (or student for whom a parent received a PLUS loan) did not meet State requirements for employment in the student's State of residence in the occupation that the training program for which the borrower received the loan was intended because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary.

(iv) In the case of a borrower requesting a discharge because the school signed the borrower's name on the loan application or promissory note without the borrower’s authorization state that he or she did not sign the document in question or authorize the school to do so.

(v) In the case of a borrower requesting a discharge because the school, without authorization of the borrower, endorsed the borrower's name on the loan check or signed the authorization for electronic funds transfer or master check, the borrower must -

(A) State that he or she did not endorse the loan check or sign the authorization for electronic funds transfer or master check, or authorize the school to do so; and

(B) State that the proceeds of the contested disbursement were not received either through actual delivery of the loan funds or by a credit in the amount of the contested disbursement applied to charges owed to the school for that portion of the educational program completed by the student.

(vi) In the case of an individual whose eligibility to borrow was falsely certified because he or she was a victim of the crime of identity theft and is requesting a discharge -

(A) Certify that the individual did not sign the promissory note, or that any other means of identification used to obtain the loan was used without the authorization of the individual claiming relief;

(B) Certify that the individual did not receive or benefit from the proceeds of the loan with knowledge that

the loan had been made without the authorization of the individual; and

(C) Provide a statement of facts and supporting evidence that demonstrate, to the satisfaction of the Secretary, that the individual's eligibility for the loan in question was falsely certified as a result of identity theft committed against that individual. Supporting evidence may include—

(*1*) A judicial determination of identity theft relating to the individual;

(*2*) A Federal Trade Commission identity theft affidavit;

(*3*) A police report alleging identity theft relating to the individual;

(*4*) Documentation of a dispute of the validity of the loan due to identity theft filed with at least three major consumer reporting agencies; and

(*5*) Other evidence acceptable to the Secretary.

(vii) That the borrower agrees to provide upon request by the Secretary or the Secretary's designee, other documentation reasonably available to the borrower, that demonstrates, to the satisfaction of the Secretary or the Secretary's designee, that the student meets the qualifications in this paragraph (e); and

(viii) That the borrower agrees to cooperate with the Secretary or the Secretary's designee in enforcement actions in accordance with paragraph (e)(4) of this section, and to transfer any right to recovery against a third party in accordance with paragraph (e)(5) of this section.

* * * * *

(6) *Discharge procedures - general*. (i) If the holder of the borrower’s loan determines that a borrower's FFEL Program loan may be eligible for a discharge under this section, the holder provides the borrower the application described in paragraph (e)(3) of this section and an explanation of the qualifications and procedures for obtaining a discharge. The holder also promptly suspends any efforts to collect from the borrower on any affected loan. The holder may continue to receive borrower payments.

(ii) If the borrower fails to submit the application for discharge and supporting information described in paragraph (e)(3) of this section within 60 days of the holder providing the application, the holder resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended.

(iii) If the borrower submits an application for discharge that the holder determines is incomplete, the

holder notifies the borrower of that determination and allows the borrower an additional 30-days to amend their application and provide supplemental information. If the borrower does not amend their application within 30 days of receiving the notification from the holder the borrower’s application is closed as incomplete and the holder resumes collection of the loan and grants forbearance of principal and interest for the period in which collection activity was suspended.

(iv) If the borrower submits a complete application described in paragraph (e)(3) of this section, the holder files a claim with the guaranty agency no later than 60 days after the holder receives the borrower's complete application.

(v) The guaranty agency determines whether the available evidence supports the claim for discharge. Available evidence includes evidence provided by the borrower and any other relevant information from the guaranty agency’s records or gathered by the guaranty agency from other sources, including the Secretary, other guaranty agencies, Federal agencies, State authorities, test publishers, independent test administrators, school records, and cognizant accrediting associations.

(vi) The guaranty agency issues a decision that explains the reasons for any adverse determination on the application, describes the evidence on which the decision

was made, and provides the borrower, upon request, copies of the evidence. The guaranty agency considers any response from the borrower and any additional information from the borrower and notifies the borrower whether the determination is changed.

(vii) If the guaranty agency determines that the borrower meets the applicable requirements for a discharge under this paragraph (e), the guaranty agency notifies the borrower in writing of that determination.

(viii) If the guaranty agency determines that the borrower does not qualify for a discharge, the guaranty agency notifies the borrower in writing of that determination and the reasons for the determination.

(ix) If the guaranty agency determines that the borrower does not qualify for a discharge, the borrower may request that the Secretary review the guaranty agency's decision.

(x) A borrower is not precluded from re-applying for a discharge under this paragraph (e) if the discharge request is closed as incomplete, or if the guaranty agency or Secretary determines that the borrower does not qualify for a discharge if the borrower provides additional supporting evidence.

(7) *Guaranty agency responsibilities - general.* (i) A guaranty agency shall notify the Secretary immediately

whenever it becomes aware of reliable information indicating that a school may have falsely certified a student's eligibility or caused an unauthorized disbursement of loan proceeds, as described in paragraph (e)(3) of this section. The designated guaranty agency in the State in which the school is located shall promptly investigate whether the school has falsely certified a student's eligibility and, within 30 days after receiving information indicating that the school may have done so, report the results of its preliminary investigation to the Secretary.

(ii) If the guaranty agency receives information it believes to be reliable indicating that a borrower whose loan is held by the agency may be eligible for a discharge under this paragraph (e), the agency shall immediately suspend any efforts to collect from the borrower on any loan received for the program of study for which the loan was made (but may continue to receive borrower payments), and inform the borrower of the procedures for requesting a discharge.

(iii) If the borrower fails to submit the Secretary’s approved application described in paragraph (e)(3) of this section within 60 days of being notified of that option, the guaranty agency shall resume collection and shall be deemed to have exercised forbearance of payment of

principal and interest from the date it suspended collection activity.

(iv) If the borrower submits an application for discharge that the guaranty agency determines is incomplete, the guaranty agency notifies the borrower of that determination and allows the borrower an additional 30-days to amend their application and provide supplemental information. If the borrower does not amend their application within 30 days of receiving the notification from the guaranty agency the borrower’s application is closed as incomplete and the guaranty agency resumes collection of the loan and grants forbearance of principal and interest for the period in which collection activity was suspended.

(v) Upon receipt of a discharge claim filed by a lender or a complete application submitted by a borrower with respect to a loan held by the guaranty agency, the agency shall have up to 90 days to determine whether the discharge should be granted. The agency shall review the borrower's application in light of information available from the records of the agency and from other sources, including other guaranty agencies, State authorities, and cognizant accrediting associations.

(vi) A borrower's application for discharge may not be denied solely on the basis of failing to meet any time

limits set by the lender, the Secretary or the guaranty agency.

(8) *Guaranty agency responsibilities with respect to a claim filed by a lender.* (i) The agency shall evaluate the borrower's application request and consider relevant information it possesses and information available from other sources, and follow the procedures described in this paragraph (e)(8).

(ii) If the agency determines that the borrower satisfies the requirements for discharge under this paragraph (e), it shall, not later than 30 days after the agency makes that determination, pay the claim in accordance with paragraph (h) of this section and -

(A) Notify the borrower that his or her liability with respect to the amount of the loan has been discharged, and that the lender has been informed of the actions required under paragraph (e)(8)(ii)(C) of this section;

(B) Refund to the borrower all amounts paid by the borrower to the lender or the agency with respect to the discharged loan amount, including any late fees or collection charges imposed by the lender or agency related to the discharged loan amount; and

(C) Notify the lender that the borrower's liability with respect to the amount of the loan has been discharged, and that the lender must -

(*1*) Immediately terminate any collection efforts against the borrower with respect to the discharged loan amount and any charges imposed or costs incurred by the lender related to the discharged loan amount that the borrower is, or was, otherwise obligated to pay; and

(*2*) Within 30 days, report to all credit reporting agencies to which the lender previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan; and

(D) Within 30 days, demand payment in full from the perpetrator of the identity theft committed against the individual, and if payment is not received, pursue collection action thereafter against the perpetrator.

(iii) If the agency determines that the borrower does not qualify for a discharge, it shall, within 30 days after making that determination -

(A) Notify the lender that the borrower's liability on the loan is not discharged and that, depending on the borrower's decision under paragraph (e)(8)(iii)(B) of this section, the loan shall either be returned to the lender or paid as a default claim; and

(B) Notify the borrower that the borrower does not qualify for discharge and state the reasons for that conclusion. The agency shall advise the borrower that he or she remains obligated to repay the loan and warn the

borrower of the consequences of default, and explain that the borrower will be considered to be in default on the loan unless the borrower submits a written statement to the agency within 30 days stating that the borrower -

(*1*) Acknowledges the debt and, if payments are due, will begin or resume making those payments to the lender; or

(*2*) Requests the Secretary to review the agency's decision.

(iv) Within 30 days after receiving the borrower's written statement described in paragraph (e)(8)(iii)(B)(*1*) of this section, the agency shall return the claim file to the lender and notify the lender to resume collection efforts if payments are due.

(v) Within 30 days after receiving the borrower's request for review by the Secretary, the agency shall forward the claim file to the Secretary for his review and take the actions required under paragraph (e)(12) of this section.

(vi) The agency shall pay a default claim to the lender within 30 days after the borrower fails to return either of the written statements described in paragraph (e)(8)(iii)(B) of this section.

(9) *Guaranty agency responsibilities with respect to a claim filed by a lender based only on the borrower's*

assertion that he or she did not sign the loan check or the authorization for the release of loan funds via electronic funds transfer or master check. (i) The agency shall evaluate the borrower's request and consider relevant information it possesses and information available from other sources, and follow the procedures described in this paragraph (e)(9).

(ii) If the agency determines that a borrower who asserts that he or she did not endorse the loan check satisfies the requirements for discharge under paragraph (e)(3)(v) of this section, it shall, within 30 days after making that determination -

(A) Notify the borrower that his or her liability with respect to the amount of the contested disbursement of the loan has been discharged, and that the lender has been informed of the actions required under paragraph (e)(9)(ii)(B) of this section;

(B) Notify the lender that the borrower's liability with respect to the amount of the contested disbursement of the loan has been discharged, and that the lender must -

(*1*) Immediately terminate any collection efforts against the borrower with respect to the discharged loan amount and any charges imposed or costs incurred by the lender related to the discharged loan amount that the borrower is, or was, otherwise obligated to pay;

(*2*) Within 30 days, report to all credit reporting agencies to which the lender previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan;

(*3*) Refund to the borrower, within 30 days, all amounts paid by the borrower with respect to the loan disbursement that was discharged, including any charges imposed or costs incurred by the lender related to the discharged loan amount;

(*4*) Refund to the Secretary, within 30 days, all interest benefits and special allowance payments received from the Secretary with respect to the loan disbursement that was discharged; and

(C) Transfer to the lender the borrower's written assignment of any rights the borrower may have against third parties with respect to a loan disbursement that was discharged because the borrower did not sign the loan check.

(iii) If the agency determines that a borrower who asserts that he or she did not sign the electronic funds transfer or master check authorization satisfies the requirements for discharge under paragraph (e)(3)(v) of this section, it shall, within 30 days after making that determination, pay the claim in accordance with paragraph (h) of this section and -

(A) Notify the borrower that his or her liability with respect to the amount of the contested disbursement of the loan has been discharged, and that the lender has been informed of the actions required under paragraph (e)(9)(iii)(C) of this section;

(B) Refund to the borrower all amounts paid by the borrower to the lender or the agency with respect to the discharged loan amount, including any late fees or collection charges imposed by the lender or agency related to the discharged loan amount; and

(C) Notify the lender that the borrower's liability with respect to the contested disbursement of the loan has been discharged, and that the lender must -

(*1*) Immediately terminate any collection efforts against the borrower with respect to the discharged loan amount and any charges imposed or costs incurred by the lender related to the discharged loan amount that the borrower is, or was, otherwise obligated to pay; and

(*2*) Within 30 days, report to all credit reporting agencies to which the lender previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan.

(iv) If the agency determines that the borrower does not qualify for a discharge, it shall, within 30 days after making that determination -

(A) Notify the lender that the borrower's liability on the loan is not discharged and that, depending on the borrower's decision under paragraph (e)(9)(iv)(B) of this section, the loan shall either be returned to the lender or paid as a default claim; and

(B) Notify the borrower that the borrower does not qualify for discharge and state the reasons for that conclusion. The agency shall advise the borrower that he or she remains obligated to repay the loan and warn the borrower of the consequences of default, and explain that the borrower will be considered to be in default on the loan unless the borrower submits a written statement to the agency within 30 days stating that the borrower -

(*1*) Acknowledges the debt and, if payments are due, will begin or resume making those payments to the lender; or

(*2*) Requests the Secretary to review the agency's decision.

(v) Within 30 days after receiving the borrower's written statement described in paragraph (e)(9)(iv)(B)(*1*) of this section, the agency shall return the claim file to the lender and notify the lender to resume collection efforts if payments are due.

(vi) Within 30 days after receiving the borrower's request for review by the Secretary, the agency shall

forward the claim file to the Secretary for his review and take the actions required under paragraph (e)(12) of this section.

(vii) The agency shall pay a default claim to the lender within 30 days after the borrower fails to return either of the written statements described in paragraph (e)(9)(iv)(B) of this section.

(10) *Guaranty agency responsibilities in the case of a loan held by the agency for which a discharge request is submitted by a borrower.* (i) The agency shall evaluate the borrower's application and consider relevant information it possesses and information available from other sources, and follow the procedures described in this paragraph (e)(10).

(ii) If the agency determines that the borrower satisfies the requirements for discharge under paragraph (e)(3) of this section, it shall immediately terminate any collection efforts against the borrower with respect to the discharged loan amount and any charges imposed or costs incurred by the agency related to the discharged loan amount that the borrower is, or was otherwise obligated to pay and, not later than 30 days after the agency makes the determination that the borrower satisfies the requirements for discharge -

(A) Notify the borrower that his or her liability with respect to the amount of the loan has been discharged;

(B) Report to all credit reporting agencies to which the agency previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan;

(C) Refund to the borrower all amounts paid by the borrower to the lender or the agency with respect to the discharged loan amount, including any late fees or collection charges imposed by the lender or agency related to the discharged loan amount; and

(D) Within 30 days, demand payment in full from the perpetrator of the identity theft committed against the individual, and if payment is not received, pursue collection action thereafter against the perpetrator.

(iii) If the agency determines that the borrower does not qualify for a discharge, it shall, within 30 days after making that determination, notify the borrower that the borrower's liability with respect to the amount of the loan is not discharged, state the reasons for that conclusion, and if the borrower is not then making payments in accordance with a repayment arrangement with the agency on the loan, advise the borrower of the consequences of continued failure to reach such an arrangement, and that collection action will resume on the loan unless within 30 days the borrower -

(A) Acknowledges the debt and, if payments are due, reaches a satisfactory arrangement to repay the loan or resumes making payments under such an arrangement to the agency; or

(B) Requests the Secretary to review the agency's decision.

(iv) Within 30 days after receiving the borrower's request for review by the Secretary, the agency shall forward the borrower's discharge request and all relevant documentation to the Secretary for his review and take the actions required under paragraph (e)(12) of this section.

(v) The agency shall resume collection action if within 30 days of giving notice of its determination the borrower fails to seek review by the Secretary or agree to repay the loan.

(11) *Guaranty agency responsibilities in the case of a loan held by the agency for which a discharge request is submitted by a borrower based only on the borrower's assertion that he or she did not sign the loan check or the authorization for the release of loan proceeds via electronic funds transfer or master check.* (i) The agency shall evaluate the borrower's application request and consider relevant information it possesses and information available from other sources, and follow the procedures described in this paragraph (e)(11).

(ii) If the agency determines that a borrower who asserts that he or she did not endorse the loan check satisfies the requirements for discharge under paragraph (e)(3)(v) of this section, it shall refund to the Secretary the amount of reinsurance payment received with respect to the amount discharged on that loan less any repayments made by the lender under paragraph (e)(11)(ii)(D)(*2)* of this section, and within 30 days after making that determination -

(A) Notify the borrower that his or her liability with respect to the amount of the contested disbursement of the loan has been discharged;

(B) Report to all credit reporting agencies to which the agency previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan;

(C) Refund to the borrower all amounts paid by the borrower to the lender or the agency with respect to the discharged loan amount, including any late fees or collection charges imposed by the lender or agency related to the discharged loan amount;

(D) Notify the lender to whom a claim payment was made that the lender must refund to the Secretary, within 30 days -

(*1*) All interest benefits and special allowance payments received from the Secretary with respect to the loan disbursement that was discharged; and

(*2*) The amount of the borrower's payments that were refunded to the borrower by the guaranty agency under paragraph (e)(11)(ii)(C) of this section that represent borrower payments previously paid to the lender with respect to the loan disbursement that was discharged;

(E) Notify the lender to whom a claim payment was made that the lender must, within 30 days, reimburse the agency for the amount of the loan that was discharged, minus the amount of borrower payments made to the lender that were refunded to the borrower by the guaranty agency under paragraph (e)(11)(ii)(C) of this section; and

(F) Transfer to the lender the borrower's written assignment of any rights the borrower may have against third parties with respect to the loan disbursement that was discharged.

(iii) In the case of a borrower who requests a discharge because he or she did not sign the electronic funds transfer or master check authorization, if the agency determines that the borrower meets the conditions for discharge, it shall immediately terminate any collection efforts against the borrower with respect to the discharged loan amount and any charges imposed or costs incurred by

the agency related to the discharged loan amount that the borrower is, or was, otherwise obligated to pay, and within 30 days after making that determination -

(A) Notify the borrower that his or her liability with respect to the amount of the contested disbursement of the loan has been discharged;

(B) Refund to the borrower all amounts paid by the borrower to the lender or the agency with respect to the discharged loan amount, including any late fees or collection charges imposed by the lender or agency related to the discharged loan amount; and

(C) Report to all credit reporting agencies to which the lender previously reported the status of the loan, so as to delete all adverse credit history assigned to the loan.

(iv) The agency shall take the actions required under paragraphs (e)(10)(iii) through (v) of this section if the agency determines that the borrower does not qualify for a discharge.

(12) *Guaranty agency responsibilities if a borrower requests a review by the Secretary.* (i) Within 30 days after receiving the borrower's request for review under paragraph (e)(8)(iii)(B)(*2*), (e)(9)(iv)(B)(*2*), (e)(10)(iii)(B), or (e)(11)(iv) of this section, the agency

shall forward the borrower's discharge application request and all relevant documentation to the Secretary for review.

(ii) The Secretary notifies the agency and the borrower of a determination on review. If the Secretary determines that the borrower is not eligible for a discharge under this paragraph (e)n, within 30 days after being so informed, the agency shall take the actions described in paragraphs (e)(9)(iv) through (vii) or (e)(10)(iii) through (v) of this section, as applicable.

(iii) If the Secretary determines that the borrower meets the requirements for a discharge under paragraph (e) of this section, the agency shall, within 30 days after being so informed, take the actions required under paragraph (e)(8)(ii), (e)(9)(ii) or (iii), (e)(10)(ii), or (e)(11)(ii) or (iii) of this section, as applicable.

(13) *Lender responsibilities.* (i) If the lender is notified by a guaranty agency or the Secretary, or receives information it believes to be reliable from another source indicating that a current or former borrower may be eligible for a discharge under this paragraph (e), the lender shall immediately suspend any efforts to collect from the borrower on any loan received for the program of study for which the loan was made (but may continue to receive borrower payments) and, within 30 days of receiving the information or notification, inform the borrower of the procedures for requesting a discharge.

(ii) If the borrower fails to submit the Secretary's approved application within 60 days of being notified of that option, the lender shall resume collection and shall be deemed to have exercised forbearance of payment of principal and interest from the date the lender suspended collection activity on the loan. The lender may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

(iii) If the borrower submits an application for discharge that the lender determines is incomplete, the lender notifies the borrower of that determination and allows the borrower an additional 30-days to amend their application and provide supplemental information. If the borrower does not amend their application within 30 days of receiving the notification from the lender the borrower's application is closed as incomplete and the lender resumes collection of the loan and grants forbearance of principal and interest for the period in which collection activity was suspended.

(iv) The lender shall file a claim with the guaranty agency in accordance with paragraph (g) of this section no later than 60 days after the lender receives the borrower's complete application described in paragraph (e)(3) of this section. If a lender receives a payment made by or on behalf of the borrower on the loan after the lender files a claim on the loan with the guaranty agency, the lender

shall forward the payment to the guaranty agency within 30 days of its receipt. The lender shall assist the guaranty agency and the borrower in determining whether the borrower is eligible for discharge of the loan.

(v) The lender shall comply with all instructions received from the Secretary or a guaranty agency with respect to loan discharges under this paragraph (e).

(vi) The lender shall review a claim that the borrower did not endorse and did not receive the proceeds of a loan check. The lender shall take the actions required under paragraphs (e)(9)(ii)(A) and (B) of this section if it determines that the borrower did not endorse the loan check, unless the lender secures persuasive evidence that the proceeds of the loan were received by the borrower or the student for whom the loan was made, as provided in paragraph (e)(1)(iii) of this section. If the lender determines that the loan check was properly endorsed or the proceeds were received by the borrower or student, the lender may consider the borrower's objection to repayment as a statement of intention not to repay the loan and may file a claim with the guaranty agency for reimbursement on that ground but shall not report the loan to consumer reporting agencies as in default until the guaranty agency, or, as applicable, the Secretary, reviews the claim for relief. By filing such a claim, the lender shall be deemed to have agreed to the following -

(A) If the guarantor or the Secretary determines that the borrower endorsed the loan check or the proceeds of the loan were received by the borrower or the student, any failure to satisfy due diligence requirements by the lender prior to the filing of the claim that would have resulted in the loss of reinsurance on the loan in the event of default will be waived by the Secretary; and

(B) If the guarantor or the Secretary determines that the borrower did not endorse the loan check and that the proceeds of the loan were not received by the borrower or the student, the lender will comply with the requirements specified in paragraph (e)(9)(ii)(B) of this section.

(vii) Within 30 days after being notified by the guaranty agency that the borrower's request for a discharge has been denied, the lender shall notify the borrower of the reasons for the denial and, if payments are due, resume collection against the borrower. The lender shall be deemed to have exercised forbearance of payment of principal and interest from the date the lender suspended collection activity, and may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

(14) *Definition of Identity theft.* (i) For purposes of this section, identity theft is defined as the unauthorized use of the identifying information of another individual that is punishable under 18 U.S.C. 1028, 1028A,

1029, or 1030, or substantially comparable State or local law.

(ii) Identifying information includes, but is not limited to -

(A) Name, Social Security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, and employer or taxpayer identification number;

(B) Unique biometric data, such as fingerprints, voiceprint, retina or iris image, or unique physical representation;

(C) Unique electronic identification number, address, or routing code; or

(D) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).

(15) *Discharge without an application.* A borrower's obligation to repay all or a portion of an FFEL Program loan may be discharged without an application from the borrower if the Secretary, or the guaranty agency with the Secretary's permission, determines based on information in the Secretary’s or the guaranty agency’s possession that the borrower qualifies for a discharge. Such information includes, but is not limited to, evidence that the school

has falsified the Satisfactory Academic Progress of its students, as described in § 668.34 of this chapter.

(16) *Application for a group discharge from a State Attorney General or non profit legal services representative.* A State Attorney General or nonprofit legal services representative may submit to the Secretary an application for a group discharge under this section.

* * * * *

18. Section 682.414 is amended by revising paragraph (b)(4) to read as follows:

§ 682.414 Reports.

* * * * *

(b) * * *

(4) A report to the Secretary of the borrower's enrollment and loan status information, details related to the loans or borrower’s deferments, forbearances, repayment plans, delinquency and contact information, or any title IV loan-related data required by the Secretary, by the deadline date established by the Secretary.

* * * * *

19. Section 682.424 is added to subpart D to read as follows:

§ 682.424 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

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20. The authority citation for part 685 is revised to read as follows:

AUTHORITY: 20 U.S.C. 1070g, 1087a, et seq., unless otherwise noted.

21. Section 685.103 is amended by revising paragraph (d) to read as follows:

§ 685.103 Applicability of subparts.

* * * * *

(d) Subpart D of this part contains provisions regarding borrower defense to repayment in the Direct Loan Program.

22. Section 685.109 is added to subpart A to read as follows:

§ 685.109 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

23. Section 685.202 is amended by:

a. Removing paragraphs (b)(2), (4), and (5);

b. Redesignating paragraph (b)(3) as paragraph (b)(2) and revising it.

The revision reads as follows:

§ 685.202 Charges for which Direct Loan Program borrowers are responsible.

* * * * *

(b) * * *

(2) Notwithstanding § 685.208(l)(5), for a Direct Loan not eligible for interest subsidies during periods of deferment, the Secretary capitalizes the unpaid interest that has accrued on the loan upon the expiration of the deferment.

* * * * *

24. Section 685.205 is amended by revising paragraph (b)(6) to read as follows:

§ 685.205 Forbearance.

* * *

* * * * *

(b) * * *

(6) Periods necessary for the Secretary to determine the borrower's eligibility for discharge -

(i) Under § 685.206(c) through (e);

(ii) Under § 685.214;

(iii) Under § 685.215;

(iv) Under § 685.216;

(v) Under § 685.217;

(vi) Under § 685.222;

(vii) Under subpart D of this part; or

(viii) Due to the borrower's or endorser's (if applicable) bankruptcy;

* * * * *

25. Section 685.206 is amended by revising paragraph (e) to read as follows:

§ 685.206 Borrower Responsibilities and Defenses.

* * * * *

(e) *Borrower defense to repayment for loans first disbursed on or after July 1, 2020, and before July 1, 2023*. This paragraph (e) applies to borrower defense to repayment for loans first disbursed on or after July 1, 2020, and before July 1, 2023.

(1) *Definitions*. For the purposes of this paragraph (e), the following definitions apply:

(i) A “Direct Loan” under this paragraph (e) means a Direct Subsidized Loan, a Direct Unsubsidized Loan, or a Direct PLUS Loan.

(ii) “Borrower” means:

(A) The borrower; and

(B) In the case of a Direct PLUS Loan, any endorsers, and for a Direct PLUS Loan made to a parent, the student on whose behalf the parent borrowed.

(iii) A “borrower defense to repayment” under this paragraph (e) includes—

(A) A defense to repayment of amounts owed to the Secretary on a Direct Loan, or a Direct Consolidation Loan that was used to repay a Direct Loan, FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act, Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act; and

(B) Any accompanying request for reimbursement of payments previously made to the Secretary on the Direct Loan or on a loan repaid by the Direct Consolidation Loan.

(iv) The term “provision of educational services” under this paragraph (e) refers to the educational resources provided by the institution that are required by

an accreditation agency or a State licensing or authorizing agency for the completion of the student's educational program.

(v) The terms "school" and "institution" under this paragraph (e) may be used interchangeably and include an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services.

(2) *Federal standard for loans first disbursed on or after July 1, 2020, and before July 1, 2023.* For a Direct Loan or Direct Consolidation Loan first disbursed on or after July 1, 2020, and before July 1, 2023, a borrower may assert a defense to repayment under this paragraph (e), if the borrower establishes by a preponderance of the evidence that—

(i) The institution at which the borrower enrolled made a misrepresentation, as defined in § 685.206(e)(3), of material fact upon which the borrower reasonably relied in deciding to obtain a Direct Loan, or a loan repaid by a Direct Consolidation Loan, and that directly and clearly relates to:

(A) Enrollment or continuing enrollment at the institution or

(B) The provision of educational services for which the loan was made; and

(ii) The borrower was financially harmed by the misrepresentation.

(3) *Misrepresentation*. A "misrepresentation," for purposes of this paragraph (e), is a statement, act, or omission by an eligible school to a borrower that is false, misleading, or deceptive; that was made with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth; and that directly and clearly relates to enrollment or continuing enrollment at the institution or the provision of educational services for which the loan was made. Evidence that a misrepresentation defined in this paragraph (e) may have occurred includes, but is not limited to:

(i) Actual licensure passage rates materially different from those included in the institution's marketing materials, website, or other communications made to the student;

(ii) Actual employment rates materially different from those included in the institution's marketing materials, website, or other communications made to the student;

(iii) Actual institutional selectivity rates or rankings, student admission profiles, or institutional

rankings that are materially different from those included in the institution's marketing materials, website, or other communications made to the student or provided by the institution to national ranking organizations;

(iv) The inclusion in the institution's marketing materials, website, or other communication made to the student of specialized, programmatic, or institutional certifications, accreditation, or approvals not actually obtained, or the failure to remove within a reasonable period of time such certifications or approvals from marketing materials, website, or other communication when revoked or withdrawn;

(v) The inclusion in the institution's marketing materials, website, or other communication made to the student of representations regarding the widespread or general transferability of credits that are only transferrable to limited types of programs or institutions or the transferability of credits to a specific program or institution when no reciprocal agreement exists with another institution, or such agreement is materially different than what was represented;

(vi) A representation regarding the employability or specific earnings of graduates without an agreement between the institution and another entity for such employment or sufficient evidence of past employment or earnings to justify such a representation or without citing appropriate

national, State, or regional data for earnings in the same field as provided by an appropriate Federal agency that provides such data. (In the event that national data are used, institutions should include a written, plain language disclaimer that national averages may not accurately reflect the earnings of workers in particular parts of the country and may include earners at all stages of their career and not just entry level wages for recent graduates.);

(vii) A representation regarding the availability, amount, or nature of any financial assistance available to students from the institution or any other entity to pay the costs of attendance at the institution that is materially different in availability, amount, or nature from the actual financial assistance available to the borrower from the institution or any other entity to pay the costs of attendance at the institution after enrollment;

(viii) A representation regarding the amount, method, or timing of payment of tuition and fees that the student would be charged for the program that is materially different in amount, method, or timing of payment from the actual tuition and fees charged to the student;

(ix) A representation that the institution, its courses, or programs are endorsed by vocational counselors, high schools, colleges, educational organizations,

employment agencies, members of a particular industry, students, former students, governmental officials, Federal or State agencies, the United States Armed Forces, or other individuals or entities when the institution has no permission or is not otherwise authorized to make or use such an endorsement;

(x) A representation regarding the educational resources provided by the institution that are required for the completion of the student's educational program that are materially different from the institution's actual circumstances at the time the representation is made, such as representations regarding the institution's size; location; facilities; training equipment; or the number, availability, or qualifications of its personnel; and

(xi) A representation regarding the nature or extent of prerequisites for enrollment in a course or program offered by the institution that are materially different from the institution's actual circumstances at the time the representation is made, or that the institution knows will be materially different during the student's anticipated enrollment at the institution.

(4) *Financial harm*. Under this paragraph (e), financial harm is the amount of monetary loss that a borrower incurs as a consequence of a misrepresentation, as defined in paragraph (e)(3) of this section. Financial harm does not include damages for nonmonetary loss, such as

personal injury, inconvenience, aggravation, emotional distress, pain and suffering, punitive damages, or opportunity costs. The Department does not consider the act of taking out a Direct Loan or a loan repaid by a Direct Consolidation Loan, alone, as evidence of financial harm to the borrower. Financial harm is such monetary loss 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. Financial harm cannot arise from the borrower's voluntary decision to pursue less than full-time work or not to work or result from a voluntary change in occupation. Evidence of financial harm may include, but is not limited to, the following circumstances:

(i) Periods of unemployment upon graduating from the school's programs that are unrelated to national or local economic recessions;

(ii) A significant difference between the amount or nature of the tuition and fees that the institution represented to the borrower that the institution would charge or was charging, and the actual amount or nature of the tuition and fees charged by the institution for which the Direct Loan was disbursed or for which a loan repaid by the Direct Consolidation Loan was disbursed;

(iii) The borrower's inability to secure employment in the field of study for which the institution expressly guaranteed employment; and

(iv) The borrower's inability to complete the program because the institution no longer offers a requirement necessary for completion of the program in which the borrower enrolled and the institution did not provide for an acceptable alternative requirement to enable completion of the program.

(5) *Exclusions*. The Secretary will not accept the following as a basis for a borrower defense to repayment under this paragraph (e)—

(i) A violation by the institution of a requirement of the Act or the Department's regulations for a borrower defense to repayment under paragraph (c) or (d) of this section or under § 685.222, unless the violation would otherwise constitute the basis for a successful borrower defense to repayment under this paragraph (e); or

(ii) A claim that does not directly and clearly relate to enrollment or continuing enrollment at the institution or the provision of educational services for which the loan was made, including, but not limited to—

(A) Personal injury;

(B) Sexual harassment;

(C) A violation of civil rights;

(D) Slander or defamation;

(E) Property damage;

(F) The general quality of the student's education or the reasonableness of an educator's conduct in providing educational services;

(G) Informal communication from other students;

(H) Academic disputes and disciplinary matters; and

(I) Breach of contract unless the school's act or omission would otherwise constitute the basis for a successful defense to repayment under this paragraph (e).

(6) *Limitations period*. A borrower must assert a defense to repayment under this paragraph (e) within 3 years from the date the student is no longer enrolled at the institution. A borrower may only assert a defense to repayment under this paragraph (e) within the timeframes set forth in this paragraph (e)(6) and paragraph (e)(7) of this section.

(7) *Extension of limitation periods and reopening of applications*. For loans first disbursed on or after July 1, 2020, and before July 1, 2023, the Secretary may extend the time period when a borrower may assert a defense to repayment under § 685.206(e)(6) or may reopen a borrower's

defense to repayment application to consider evidence that was not previously considered only if there is:

(i) A final, non-default judgment on the merits by a State or Federal Court that has not been appealed or that is not subject to further appeal and that establishes the institution made a misrepresentation, as defined in paragraph (e)(3) of this section; or

(ii) A final decision by a duly appointed arbitrator or arbitration panel that establishes that the institution made a misrepresentation, as defined in paragraph (e)(3) of this section.

(8) *Application and forbearance*. To assert a defense to repayment under this paragraph (e), a borrower must submit an application under penalty of perjury on a form approved by the Secretary and sign a waiver permitting the institution to provide the Department with items from the borrower's education record relevant to the defense to repayment claim. The form will note that pursuant to § 685.205(b)(6)(i), if the borrower is not in default on the loan for which a borrower defense has been asserted, the Secretary will grant forbearance and notify the borrower of the option to decline forbearance. The application requires the borrower to—

(i) Certify that the borrower received the proceeds of a loan, in whole or in part, to attend the named institution;

(ii) Provide evidence that supports the borrower defense to repayment application;

(iii) State whether the borrower has made a claim with any other third party, such as the holder of a performance bond, a public fund, or a tuition recovery program, based on the same act or omission of the institution on which the borrower defense to repayment is based;

(iv) State the amount of any payment received by the borrower or credited to the borrower's loan obligation through the third party, in connection with a borrower defense to repayment described in paragraph (e)(2) of this section;

(v) State the financial harm, as defined in paragraph (e)(4) of this section, that the borrower alleges to have been caused and provide any information relevant to assessing whether the borrower incurred financial harm, including providing documentation that the borrower actively pursued employment in the field for which the borrower's education prepared the borrower if the borrower is a recent graduate (failure to provide such information results in a presumption that the borrower failed to

actively pursue employment in the field); whether the borrower was terminated or removed for performance reasons from a position in the field for which the borrower's education prepared the borrower, or in a related field; and whether the borrower failed to meet other requirements of or qualifications for employment in such field for reasons unrelated to the school's misrepresentation underlying the borrower defense to repayment, such as the borrower's ability to pass a drug test, satisfy driving record requirements, and meet any health qualifications; and

(vi) State that the borrower understands that in the event that the borrower receives a 100 percent discharge of the balance of the loan for which the defense to repayment application has been submitted, the institution may, if allowed or not prohibited by other applicable law, refuse to verify or to provide an official transcript that verifies the borrower's completion of credits or a credential associated with the discharged loan.

(9) *Consideration of order of objections and of evidence in possession of the Secretary under this paragraph (e)*. (i) If the borrower asserts both a borrower defense to repayment and any other objection to an action of the Secretary with regard to a Direct Loan or a loan repaid by a Direct Consolidation Loan under this paragraph (e), the order in which the Secretary will consider objections, including a borrower defense to

repayment under this paragraph (e), will be determined as appropriate under the circumstances.

(ii) With respect to the borrower defense to repayment application submitted under this paragraph (e), the Secretary may consider evidence otherwise in the possession of the Secretary, including from the Department's internal records or other relevant evidence obtained by the Secretary, as practicable, provided that the Secretary permits the institution and the borrower to review and respond to this evidence and to submit additional evidence.

(10) *School response and borrower reply under this paragraph (e)*. (i) Upon receipt of a borrower defense to repayment application under this paragraph (e), the Department will notify the school of the pending application and provide a copy of the borrower's request and any supporting documents, a copy of any evidence otherwise in the possession of the Secretary, and a waiver signed by the student permitting the institution to provide the Department with items from the student's education record relevant to the defense to repayment claim to the school, and invite the school to respond and to submit evidence, within the specified timeframe included in the notice, which shall be no less than 60 days.

(ii) Upon receipt of the school's response, the Department will provide the borrower a copy of the school's

submission as well as any evidence otherwise in possession of the Secretary, which was provided to the school, and will give the borrower an opportunity to submit a reply within a specified timeframe, which shall be no less than 60 days. The borrower's reply must be limited to issues and evidence raised in the school's submission and any evidence otherwise in the possession of the Secretary.

(iii) The Department will provide the school a copy of the borrower's reply.

(iv) There will be no other submissions by the borrower or the school to the Secretary unless the Secretary requests further clarifying information.

(11) *Written decision under this paragraph (e)*. (i) After considering the borrower's application and all applicable evidence under this paragraph (e), the Secretary issues a written decision—

(A) Notifying the borrower and the school of the decision on the borrower defense to repayment under this paragraph (e);

(B) Providing the reasons for the decision; and

(C) Informing the borrower and the school of the relief, if any, that the borrower will receive, consistent with paragraph (e)(12) of this section and specifying the relief determination.

(ii) If the Department receives a borrower defense to repayment application that is incomplete and is within the limitations period in paragraph (e)(6) or (7) of this section, the Department will not issue a written decision on the application and instead will notify the borrower in writing that the application is incomplete and will return the application to the borrower.

(12) *Borrower defense to repayment relief under this paragraph (e)*. (i) If the Secretary grants the borrower's request for relief based on a borrower defense to repayment under this paragraph (e), the Secretary notifies the borrower and the school that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay or will be reimbursed for amounts paid toward the loan voluntarily or through enforced collection. The amount of relief that a borrower receives under this paragraph (e) may exceed the amount of financial harm, as defined in paragraph (e)(4) of this section, that the borrower alleges in the application pursuant to paragraph (e)(8)(v) of this section. The Secretary determines the amount of relief and awards relief limited to the monetary loss that a borrower incurred as a consequence of a misrepresentation, as defined in paragraph (e)(3) of this section. The amount of relief cannot exceed the amount of the loan and any associated costs and fees and will be

reduced by the amount of refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation, compromise, or any other financial benefit received by, or on behalf of, the borrower that was related to the borrower defense to repayment under this paragraph (e). In awarding relief under this paragraph (e), the Secretary considers the borrower's application, as described in paragraph (e)(8) of this section, which includes information about any payments received by the borrower and the financial harm alleged by the borrower. In awarding relief under this paragraph (e), the Secretary also considers the school's response, the borrower's reply, and any evidence otherwise in the possession of the Secretary, which was previously provided to the borrower and the school, as described in paragraph (e)(10) of this section. The Secretary also updates reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan or loans repaid by the borrower's Direct Consolidation Loan under this paragraph (e).

(ii) The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(13) *Finality of borrower defense to repayment decisions under this paragraph (e).* The determination of a borrower's defense to repayment by the Department included in the written decision referenced in paragraph (e)(11) of this section is the final decision of the Department and is not subject to appeal within the Department.

(14) *Cooperation by the borrower under this paragraph (e).* The Secretary may revoke any relief granted to a borrower under this section who refuses to cooperate with the Secretary in any proceeding under this paragraph (e) or under part 668, subpart G. Such cooperation includes, but is not limited to—

(i) Providing testimony regarding any representation made by the borrower to support a successful borrower defense to repayment under this paragraph (e); and

(ii) Producing, within timeframes established by the Secretary, any documentation reasonably available to the borrower with respect to those representations and any sworn statement required by the Secretary with respect to those representations and documents.

(15) *Transfer to the Secretary of the borrower's right of recovery against third parties under this paragraph (e).* (i) Upon the grant of any relief under this paragraph (e), the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a

loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the provision of educational services for which the loan was received, against the school, its principals, its affiliates and their successors, or its sureties, and any private fund, including the portion of a public fund that represents funds received from a private party. If the borrower asserts a claim to, and recovers from, a public fund, the Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense to repayment and for the same loan for which the discharge was granted under this section.

(ii) The provisions of this paragraph (e)(15) apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(iii) Nothing in this paragraph (e)(15) limits or forecloses the borrower's right to pursue legal and equitable relief arising under applicable law against a party described in this paragraph (e)(15) for recovery of

any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

(16) *Recovery from the school under this paragraph (e)*. (i) The Secretary may initiate an appropriate proceeding to require the school whose misrepresentation resulted in the borrower's successful borrower defense to repayment under this paragraph (e) to pay to the Secretary the amount of the loan to which the defense applies in accordance with part 668, subpart G. This paragraph (e)(16) would also be applicable for provisionally certified institutions.

(ii) Under this paragraph (e), the Secretary will not initiate such a proceeding more than 5 years after the date of the final determination included in the written decision referenced in paragraph (e)(11) of this section. The Department will notify the school of the borrower defense to repayment application within 60 days of the date of the Department's receipt of the borrower's application.

26. Section 685.209 is amended by:

a. Revising paragraph (a)(2)(iv);

b. In paragraph (b)(1)(vii), removing the parenthetical phrase "(including amount capitalized)";

c. Removing and reserving paragraph (b)(3)(iv);

d. Removing paragraph (c)(2)(iv);

e. Redesignating paragraphs (c)(2)(v) and (vi) as paragraphs (c)(2)(iv) and (v), respectively.

f. In paragraph (c)(4)(iii)(B), removing the words "paragraphs (c)(2)(iv) and", and adding in their place "paragraph".

The revision reads as follows:

§ 685.209 Income-contingent repayment plans.

(a) * * *

(2) * * *

(iv) Except as provided in paragraph (a)(2)(iii) of this section, accrued interest is capitalized when a borrower is determined to no longer have a partial financial hardship.

* * * * *

27. Section 685.212 is amended by adding paragraph (k)(4) to read as follows:

§ 685.212 Discharge of a loan obligation.

* * * * *

(k) * * *

(4) If a borrower's application for a discharge of a loan based on a borrower defense is approved under 34 CFR part 685, subpart D, the Secretary discharges the

obligation of the borrower, in whole or in part, in accordance with the procedures described in subpart D of this part.

28. Section 685.213 is amended by:

a. Revising paragraphs (b)(2) through (7);

b. Removing paragraph (b)(8); and

c. Revising paragraphs (d) and (e).

The revisions read as follows:

§ 685.213 Total and permanent disability discharge.

* * * * *

(b) * * *

(2) *Disability certification or Social Security Administration (SSA) disability determination.* The application must contain—

(i) A certification by a physician, who is a doctor of medicine or osteopathy legally authorized to practice in a State, that the borrower is totally and permanently disabled as described in paragraph (1) of the definition of that term in § 685.102(b);

(ii) A certification by a nurse practitioner or physician's assistant licensed by a State, or a licensed certified psychologist at the independent practice level, that the borrower is totally and permanently disabled as

described in paragraph (1) of the definition of that term in § 685.102(b);

(iii) An SSA Benefit Planning Query (BPQY) or an SSA notice of award, or other documentation deemed acceptable by the Secretary, indicating that—

(A) The borrower qualifies for Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits and the borrower's next scheduled disability review will be within 5 to 7 years;

(B) The borrower qualifies for SSDI or SSI benefits and the borrower’s next scheduled disability review will be within 3 years, and that the borrower’s eligibility for disability benefits in the 3-year review category has been renewed at least once;

(C) The borrower has a disability onset date for SSDI or SSI of at least 5 years prior to the application for a disability discharge or has been receiving benefits for at least 5 years prior to the application for a TPD discharge;

(D) The borrower qualifies for the SSA compassionate allowance program; or

(E) For borrowers currently receiving SSA retirement benefits, documentation that, prior to the borrower qualifying for SSA retirement benefits, the borrower met the requirements in paragraphs (b)(2)(iii)(A) through (D) of this section.

(3) *Deadline for application submission.* The borrower must submit the application described in paragraph (b)(1) of this section to the Secretary within 90 days of the date the physician, nurse practitioner, physician's assistant, or psychologist certifies the application, if applicable. Upon receipt of the borrower's application, the Secretary—

(i) Identifies all title IV loans owed by the borrower, notifies the lenders that the Secretary has received a total and permanent disability discharge application from the borrower and directs the lenders to suspend collection activity or maintain the suspension of collection activity on the borrower's title IV loans;

(ii) If the application is incomplete, notifies the borrower of the missing information and requests the missing information from the borrower or the physician, nurse practitioner, physician's assistant, or psychologist who certified the application, as appropriate, and does not make a determination of eligibility for discharge until the application is complete;

(iii) Notifies the borrower that no payments are due on the loan while the Secretary determines the borrower's eligibility for discharge; and

(iv) Explains the process for the Secretary's review of total and permanent disability discharge applications.

(4) *Determination of eligibility.* (i) If, after reviewing the borrower's completed application, the Secretary determines that the data described in paragraph (b)(2) of this section supports the conclusion that the borrower meets the criteria for a total and permanent disability discharge, as described in paragraph (1) of the definition of that term in § 685.102(b), the borrower is considered totally and permanently disabled—

(A) As of the date the physician, nurse practitioner, physician’s assistant, or psychologist certified the borrower's application; or

(B) As of the date the Secretary received the SSA data described in paragraph (b)(2)(iii) of this section.

(ii) If the Secretary determines that the borrower's application does not conclusively prove that the borrower is totally and permanently disabled as described in paragraph (1) of the definition of that term in § 685.102(b), the Secretary may require the borrower to submit additional medical evidence. As part of the Secretary's review of the borrower's discharge application, the Secretary may require and arrange for an additional review of the borrower's condition by an independent physician or other medical professional identified by the Secretary at no expense to the borrower.

(iii) After determining that the borrower is totally and permanently disabled, as described in paragraph (1) of the definition of that term in § 685.102(b), the Secretary discharges the borrower's obligation to make any further payments on the loan, notifies the borrower that the loan has been discharged, and returns to the person who made the payments on the loan any payments received after the date the physician, nurse practitioner, physician’s assistant, or psychologist certified the borrower's loan discharge application or the date the Secretary received the SSA data described in paragraph (b)(2)(iii) of this section. The notification to the borrower explains the terms and conditions under which the borrower's obligation to repay the loan will be reinstated, as specified in paragraph (b)(7)(i) of this section.

(iv) If the Secretary determines that the physician, nurse practitioner, physician’s assistant, or psychologist certification or the SSA data described in paragraph (b)(2)(iii) of this section provided by the borrower does not support the conclusion that the borrower is totally and permanently disabled, as described in paragraph (1) of the definition of that term in § 685.102(b), the Secretary notifies the borrower that the application for a disability discharge has been denied. The notification to the borrower includes—

(A) The reason or reasons for the denial;

(B) A statement that the loan is due and payable to the Secretary under the terms of the promissory note and that the loan will return to the status that would have existed if the total and permanent disability discharge application had not been received;

(C) The date that the borrower must resume making payments;

(D) An explanation that the borrower is not required to submit a new total and permanent disability discharge application if the borrower requests that the Secretary re-evaluate the borrower's application for discharge by providing, within 12 months of the date of the notification, additional information that supports the borrower's eligibility for discharge; and

(E) An explanation that if the borrower does not request re-evaluation of the borrower's prior discharge application within 12 months of the date of the notification, the borrower must submit a new total and permanent disability discharge application to the Secretary if the borrower wishes the Secretary to re-evaluate the borrower's eligibility for a total and permanent disability discharge.

(v) If the borrower requests re-evaluation in accordance with paragraph (b)(4)(iv)(D) of this section or submits a new total and permanent disability discharge

application in accordance with paragraph (b)(4)(iv)(E) of this section, the request must include new information regarding the borrower's disabling condition that was not provided to the Secretary in connection with the prior application at the time the Secretary reviewed the borrower's initial application for total and permanent disability discharge.

(5) *Treatment of disbursements made during the period from the date of the certification or the date the Secretary received the SSA data until the date of discharge.* If a borrower received a title IV loan or TEACH Grant before the date the physician, nurse practitioner, physician’s assistant, or psychologist certified the borrower's discharge application or before the date the Secretary received the SSA data described in paragraph (b)(2)(iii) of this section and a disbursement of that loan or grant is made during the period from the date of the physician, nurse practitioner, physician’s assistant, or psychologist certification or the receipt of the SSA data described in paragraph (b)(2)(iii) of this section until the date the Secretary grants a discharge under this section, the processing of the borrower's loan discharge request will be suspended until the borrower ensures that the full amount of the disbursement has been returned to the loan holder or to the Secretary, as applicable.

(6) *Receipt of new title IV loans or TEACH Grants certification, or after the date the Secretary received the SSA data.* If a borrower receives a disbursement of a new title IV loan or receives a new TEACH Grant made on or after the date the physician, nurse practitioner, physician’s assistant, or psychologist certified the borrower's discharge application or on or after the date the Secretary received the SSA data described in paragraph (b)(2)(iii) of this section and before the date the Secretary grants a discharge under this section, the Secretary denies the borrower's discharge request and resumes collection on the borrower's loan.

(7) *Conditions for reinstatement of a loan after a total and permanent disability discharge.* (i) The Secretary reinstates a borrower's obligation to repay a loan that was discharged in accordance with paragraph (b)(4)(iii) of this section if, within 3 years after the date the Secretary granted the discharge, the borrower receives a new TEACH Grant or a new loan under the Direct Loan programs, except for a Direct Consolidation Loan that includes loans that were not discharged.

(ii) If the borrower's obligation to repay the loan is reinstated, the Secretary—

(A) Notifies the borrower that the borrower's obligation to repay the loan has been reinstated;

(B) Returns the loan to the status that would have existed if the total and permanent disability discharge application had not been received; and

(C) Does not require the borrower to pay interest on the loan for the period from the date the loan was discharged until the date the borrower's obligation to repay the loan was reinstated.

(iii) The Secretary's notification under paragraph (b)(7)(ii)(A) of this section will include—

(A) The reason or reasons for the reinstatement;

(B) An explanation that the first payment due date on the loan following reinstatement will be no earlier than 90 days after the date of the notification of reinstatement; and

(C) Information on how the borrower may contact the Secretary if the borrower has questions about the reinstatement or believes that the obligation to repay the loan was reinstated based on incorrect information.

* * * * *

(d) *Discharge without an application.* (1) The Secretary will discharge a loan under this section without an application or any additional documentation from the borrower if the Secretary:

(i) Obtains data from the Department of Veterans Affairs showing that the borrower is unemployable due to a service-connected disability; or

(ii) Obtains data from the Social Security Administration (SSA) described in paragraph (b)(2)(iii) of this section

(2) [Reserved].

(e) *Notification to the borrower*. (1) After determining that a borrower qualifies for a total and permanent disability discharge under paragraph (d) of this section, the Secretary sends a notification to the borrower informing the borrower that the Secretary will discharge the borrower's title IV loans unless the borrower notifies the Secretary, by a date specified in the Secretary's notification, that the borrower does not wish to receive the loan discharge.

(2) Unless the borrower notifies the Secretary that the borrower does not wish to receive the discharge the Secretary discharges the loan:

(i) In accordance with paragraph (b)(4)(iii) of this section for a discharge based on data from the SSA; or

(ii) In accordance with paragraph (c)(2)(i) of this section for a discharge based on data from VA.

(3) If the borrower notifies the Secretary that they do not wish to receive the discharge, the borrower will remain responsible for repayment of the borrower's loans in accordance with the terms and conditions of the promissory notes that the borrower signed.

29. Section 685.214 is amended by:

a. Revising paragraph (a)(2);

b. Removing paragraph (g);

c. Redesignating paragraphs (c) through (f) as paragraphs (d) through (g), respectively;

d. Adding a new paragraph (c);

e. Revising redesignated paragraphs (d) through (g); and

f. Adding a new paragraph (h).

The revisions and additions read as follows:

§ 685.214 Closed school discharge.

(a) * * *

(2) For purposes of this section—

(i) A school's closure date is the earlier of the date that the school ceases to provide educational instruction in most programs, as determined by the Secretary, or a date chosen by the Secretary that reflects

when the school had ceased to provide educational instruction for most of its students;

(ii) “School” means a school's main campus or any location or branch of the main campus, regardless of whether the school or its location or branch is considered title IV eligible;

(iii) “Program” means the credential defined by the level and Classification of Instructional Program code in which a student is enrolled, except that the Secretary may define a borrower’s program as multiple levels or Classification of Instructional Program codes if:

(A) The enrollment occurred at the same institution in closely proximate periods;

(B) The school granted a credential in a program while the student was enrolled in a different program; or

(C) The programs must be taken in a set order or were presented as necessary for borrowers to complete in order to succeed in the relevant field of employment;

* * * * *

(c) *Discharge without an application.* (1) If the Secretary determines based on information in the Secretary’s possession that the borrower qualifies for the discharge of a loan under this section, the Secretary discharges the loan without an application from the

borrower, if the borrower did not complete an institutional teach-out plan performed by the school or a teach-out agreement at another school, approved by the school's accrediting agency and, if applicable, the school's State authorizing agency.

(2) If a borrower accepts but does not complete an institutional teach-out plan performed by the school or a teach-out agreement at another school, approved by the school's accrediting agency and, if applicable, the school's State authorizing agency, then the Secretary discharges the loan within 1 year of the borrower's last date of attendance in the teach-out program.

(d) *Borrower qualification for discharge.* (1) Except as provided in paragraph (h) of this section, to qualify for discharge of a loan under this section, a borrower must submit to the Secretary a completed application and the factual assertions in the application must be true and must be made by the borrower under penalty of perjury. The application explains the procedures and eligibility criteria for obtaining a discharge and requires the borrower to—

(i) State that the borrower (or the student on whose behalf a parent borrowed)—

(A) Received the proceeds of a loan, in whole or in part, on or after January 1, 1986, to attend a school;

(B) Did not complete the program of study at that school because the school closed while the student was enrolled, or the student withdrew from the school not more than 180 calendar days before the school closed. The Secretary may extend the 180-day period if the Secretary determines that exceptional circumstances, as described in paragraph (i) of this section, justify an extension; and

(C) On or after July 1, 2023, state that the borrower did not complete an institutional teach-out plan performed by the school or a teach-out agreement at another school, approved by the school’s accrediting agency and, if applicable, the school’s State authorizing agency.

(ii) State whether the borrower (or student) has made a claim with respect to the school's closing with any third party, such as the holder of a performance bond or a tuition recovery program, and, if so, the amount of any payment received by the borrower (or student) or credited to the borrower's loan obligation; and

(iii) State that the borrower (or student)—

(A) Agrees to provide to the Secretary upon request other documentation reasonably available to the borrower that demonstrates that the borrower meets the qualifications for discharge under this section; and

(B) Agrees to cooperate with the Secretary in enforcement actions in accordance with paragraph (d) of

this section and to transfer any right to recovery against a third party to the Secretary in accordance with paragraph (e) of this section.

(2) [Reserved]

(e) *Cooperation by borrower in enforcement actions.* (1) To obtain a discharge under this section, a borrower must cooperate with the Secretary in any judicial or administrative proceeding brought by the Secretary to recover amounts discharged or to take other enforcement action with respect to the conduct on which the discharge was based. At the request of the Secretary and upon the Secretary's tendering to the borrower the fees and costs that are customarily provided in litigation to reimburse witnesses, the borrower must—

(i) Provide testimony regarding any representation made by the borrower to support a request for discharge;

(ii) Produce any documents reasonably available to the borrower with respect to those representations; and

(iii) If required by the Secretary, provide a sworn statement regarding those documents and representations.

(2) The Secretary denies the request for a discharge or revokes the discharge of a borrower who—

(i) Fails to provide the testimony, documents, or a sworn statement required under paragraph (d)(1) of this section; or

(ii) Provides testimony, documents, or a sworn statement that does not support the material representations made by the borrower to obtain the discharge.

(f) *Transfer to the Secretary of borrower's right of recovery against third parties.* (1) Upon discharge under this section, the borrower is deemed to have assigned to and relinquished in favor of the Secretary any right to a loan refund (up to the amount discharged) that the borrower (or student) may have by contract or applicable law with respect to the loan or the enrollment agreement for the program for which the loan was received, against the school, its principals, its affiliates and their successors, its sureties, and any private fund, including the portion of a public fund that represents funds received from a private party.

(2) The provisions of this section apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower (or student), limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(3) Nothing in this section limits or forecloses the borrower's (or student's) right to pursue legal and equitable relief regarding disputes arising from matters unrelated to the discharged Direct Loan.

(g) *Discharge procedures.* (1) After confirming the date of a school's closure, the Secretary identifies any Direct Loan borrower (or student on whose behalf a parent borrowed) who appears to have been enrolled at the school on the school closure date or to have withdrawn not more than 180 days prior to the closure date.

(2) If the borrower's current address is known, the Secretary mails the borrower a discharge application and an explanation of the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends any efforts to collect from the borrower on any affected loan. The Secretary may continue to receive borrower payments.

(3) If the borrower's current address is unknown, the Secretary attempts to locate the borrower and determines the borrower's potential eligibility for a discharge under this section by consulting with representatives of the closed school, the school's licensing agency, the school's accrediting agency, and other appropriate parties. If the Secretary learns the new address of a borrower, the Secretary mails to the borrower a discharge application and

explanation and suspends collection, as described in paragraph (g)(2) of this section.

(4) If a borrower fails to submit the application described in paragraph (d) of this section within 90 days of the Secretary's providing the discharge application, the Secretary resumes collection and grants forbearance of principal and interest for the period in which collection activity was suspended.

(5) Upon resuming collection on any affected loan, the Secretary provides the borrower another discharge application and an explanation of the requirements and procedures for obtaining a discharge.

(6) If the Secretary determines that a borrower who requests a discharge meets the qualifications for a discharge, the Secretary notifies the borrower in writing of that determination.

(7) If the Secretary determines that a borrower who requests a discharge does not meet the qualifications for a discharge, the Secretary notifies that borrower in writing of that determination and the reasons for the determination.

(h) *Exceptional circumstances*. For purposes of this section, exceptional circumstances include, but are not limited to—

(1) The revocation or withdrawal by an accrediting agency of the school's institutional accreditation;

(2) The school is or was placed on probation or issued a show-cause order, or was placed on an equivalent accreditation status, by its accrediting agency for failing to meet one or more of the agency's standards;

(3) The revocation or withdrawal by the State authorization or licensing authority to operate or to award academic credentials in the State;

(4) The termination by the Department of the school's participation in a title IV, HEA program;

(5) A finding by a State or Federal government agency that the school violated State or Federal law related to education or services to students;

(6) A State or Federal court judgment that a School violated State or Federal law related to education or services to students;

(7) The teach-out of the student’s educational program exceeds the 180-day look-back period for a closed school discharge;

(8) The school responsible for the teach-out of the student’s educational program fails to perform the material terms of the teach-out plan or agreement, such that the

student does not have a reasonable opportunity to complete his or her program of study;

(9) The school discontinued a significant share of its academic programs;

(10) The school permanently closed all or most of its in-person locations while maintaining online programs; and

(11) The school was placed on the heightened cash monitoring payment method as defined in § 668.162(d)(2) of this chapter.

30. Section 685.215 is amended by:

a. Revising paragraph (a)(1);

b. Adding paragraph (a)(3);

c. Revising paragraphs (c) introductory text and (c)(1) through (5);

d. Redesignating paragraphs (c)(6) through (8) as paragraphs (c)(7) through (9), respectively;

e. Adding a new paragraph (c)(6);

f. Adding paragraph (c)(10);

g. Revising paragraph (d); and

h. Removing paragraphs (e) and (f).

The revisions and additions read as follows:

§ 685.215 Discharge for false certification of student eligibility or unauthorized payment.

(a) *Basis for discharge* - (1) *False certification.* The Secretary discharges a borrower's (and any endorser's) obligation to repay a Direct Loan in accordance with the provisions of this section if a school falsely certifies the eligibility of the borrower (or the student on whose behalf a parent borrowed) to receive the proceeds of a Direct Loan. The Secretary considers a student's eligibility to borrow to have been falsely certified by the school if the school -

(i) Certified the eligibility of a student who -

(A) Reported not having a high school diploma or its equivalent; and

(B) Did not satisfy the alternative to graduation from high school requirements under section 484(d) of the Act and 34 CFR 668.32(e) of this chapter that were in effect when the loan was originated;

(ii) Certified the eligibility of a student who is not a high school graduate based on -

(A) A high school graduation status falsified by the school; or

(B) A high school diploma falsified by the school or a third party to which the school referred the borrower;

(iii) Signed the borrower's name on the loan application or promissory note without the borrower's authorization;

(iv) Certified the eligibility of the student who, because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary, would not meet State requirements for employment (in the student's State of residence when the loan was originated) in the occupation for which the training program supported by the loan was intended; or

(v) Certified the eligibility of a student for a Direct Loan as a result of the crime of identity theft committed against the individual, as that crime is defined in paragraph (c)(6) of this section.

* * * * *

(3) *Loan origination.* For purposes of this section, a loan is originated when the school submits the loan record to the Department’s Common Origination and Disbursement (COD) System. Before originating a Direct Loan, a school must determine the student’s or parent’s eligibility for the loan. For each Direct Loan that a school disburses to a student or parent, the school must first submit a loan award record to the COD system and receive an accepted response.

* * * * *

(c) *Borrower qualification for discharge.* To qualify for discharge under this paragraph, the borrower must submit to the Secretary an application for discharge on a form approved by the Secretary. The application need not be notarized but must be made by the borrower under penalty of perjury; and in the application, the borrower's responses must demonstrate to the satisfaction of the Secretary that the requirements in paragraphs (c)(1) through (7) of this section have been met. If the Secretary determines the application does not meet the requirements, the Secretary notifies the applicant and explains why the application does not meet the requirements.

(1) *High school diploma or equivalent.* In the case of a borrower requesting a discharge based on not having a high school diploma and not having met the alternative to graduation from high school eligibility requirements under section 484(d) of the Act and 34 CFR 668.32(e) of this chapter applicable when the loan was originated, and the school or a third party to which the school referred the borrower falsified the student's high school diploma, the borrower must state in the application that the borrower (or the student on whose behalf a parent received a PLUS loan) -

(i) Reported not having a valid high school diploma or its equivalent when the loan was originated; and

(ii) Did not satisfy the alternative to graduation from high school statutory or regulatory eligibility requirements identified on the application form and applicable when the loan was originated.

(2) *Disqualifying condition.* In the case of a borrower requesting a discharge based on a condition that would disqualify the borrower from employment in the occupation that the training program for which the borrower received the loan was intended, the borrower must state in the application that the borrower (or student for whom a parent received a PLUS loan) did not meet State requirements for employment in the student's State of residence in the occupation that the training program for which the borrower received the loan was intended because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary.

(3) *Unauthorized loan.* In the case of a borrower requesting a discharge because the school signed the borrower's name on the loan application or promissory note without the borrower's authorization, the borrower must state that he or she did not sign the document in question or authorize the school to do so.

(4) *Unauthorized payment.* In the case of a borrower requesting a discharge because the school, without the borrower's authorization, endorsed the borrower's loan

check or signed the borrower's authorization for electronic funds transfer, the borrower must -

(i) State that he or she did not endorse the loan check or sign the authorization for electronic funds transfer or authorize the school to do so; and

(ii) State that the proceeds of the contested disbursement were not delivered to the student or applied to charges owed by the student to the school.

(5) *Identity theft.* In the case of an individual whose eligibility to borrow was falsely certified because he or she was a victim of the crime of identity theft and is requesting a discharge, the individual must -

(i) Certify that the individual did not sign the promissory note, or that any other means of identification used to obtain the loan was used without the authorization of the individual claiming relief;

(ii) Certify that the individual did not receive or benefit from the proceeds of the loan with knowledge that the loan had been made without the authorization of the individual; and

(iii) Provide a statement of facts and supporting evidence that demonstrate, to the satisfaction of the Secretary, that eligibility for the loan in question was falsely certified as a result of identity theft committed against that individual. Supporting evidence may include—

(A) A judicial determination of identity theft relating to the individual;

(B) A Federal Trade Commission identity theft affidavit;

(C) A police report alleging identity theft relating to the individual;

(D) Documentation of a dispute of the validity of the loan due to identity theft filed with at least three major consumer reporting agencies; and

(E) Other evidence acceptable to the Secretary.

(6) *Definition of identity theft.* (i) For purposes of this section, identity theft is defined as the unauthorized use of the identifying information of another individual that is punishable under 18 U.S.C. 1028, 1028A, 1029, or 1030, or substantially comparable State or local law.

(ii) Identifying information includes, but is not limited to -

(A) Name, Social Security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, and employer or taxpayer identification number;

(B) Unique biometric data, such as fingerprints, voiceprint, retina or iris image, or unique physical representation;

(C) Unique electronic identification number, address, or routing code; or

(D) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).

* * * * *

(10) *Application for group discharge.* A State Attorney General or nonprofit legal services representative may submit to the Secretary an application for a group discharge under this section.

(d) *Discharge procedures.* (1) If the Secretary determines that a borrower's Direct Loan may be eligible for a discharge under this section, the Secretary provides the borrower an application and an explanation of the qualifications and procedures for obtaining a discharge. The Secretary also promptly suspends any efforts to collect from the borrower on any affected loan. The Secretary may continue to receive borrower payments.

(2) If the borrower fails to submit the application for discharge and supporting information described in paragraph (c) of this section within 60 days of the Secretary's providing the application, the Secretary resumes collection and grants forbearance of principal and

interest for the period in which collection activity was suspended.

(3) If the borrower submits an application for discharge that the Secretary determines is incomplete, the Secretary notifies the borrower of that determination and allows the borrower an additional 30-days to amend their application and provide supplemental information. If the borrower does not amend their application within 30 days of receiving the notification from the Secretary the borrower’s application is closed as incomplete and the Secretary resumes collection of the loan and grants forbearance of principal and interest for the period in which collection activity was suspended.

(4) If the borrower submits a completed application described in paragraph (c) of this section, the Secretary determines whether the available evidence supports the claim for discharge. Available evidence includes evidence provided by the borrower and any other relevant information from the Secretary's records and gathered by the Secretary from other sources, including guaranty agencies, other Federal agencies, State authorities, test publishers, independent test administrators, school records, and cognizant accrediting associations. The Secretary issues a decision that explains the reasons for any adverse determination on the application, describes the evidence on which the decision was made, and provides the borrower,

upon request, copies of the evidence. The Secretary considers any response from the borrower and any additional information from the borrower and notifies the borrower whether the determination is changed.

(5) If the Secretary determines that the borrower meets the applicable requirements for a discharge under paragraph (c) of this section, the Secretary notifies the borrower in writing of that determination.

(6) If the Secretary determines that the borrower does not qualify for a discharge, the Secretary notifies the borrower in writing of that determination and the reasons for the determination.

(7) A borrower is not precluded from re-applying for a discharge under paragraph (c) of this section if the discharge request is closed as incomplete, or if the Secretary determines that the borrower does not qualify for a discharge if the borrower provides additional supporting evidence.

31. Section 685.219 is revised to read as follows:

§ 685.219 Public Service Loan Forgiveness Program (PSLF).

(a) *Purpose*. The Public Service Loan Forgiveness Program is intended to encourage individuals to enter and continue in full-time public service employment by forgiving the remaining balance of their Direct loans

after they satisfy the public service and loan payment requirements of this section.

(b) *Definitions*. The following definitions apply to this section:

AmeriCorps service means service in a position approved by the Corporation for National and Community Service under section 123 of the National and Community Service Act of 1990 (42 U.S.C. 12573).

Civilian service to the military means providing services to or on behalf of members, veterans, or the families or survivors of deceased members of the U.S. Armed Forces or the National Guard that is provided to a person because of the person's status in one of those groups.

Early childhood education program means an early childhood education program as defined in section 103(8) of the Act (20 U.S.C. 1003).

Eligible Direct Loan means a Direct Subsidized Loan, a Direct Unsubsidized Loan, a Direct PLUS Loan, or a Direct Consolidation Loan.

Emergency management services mean services that help remediate, lessen, or eliminate the effects or potential effects of emergencies that threaten human life or health, or real property.

Employee or employed means an individual--

(i) To whom an organization issues an IRS Form W-2;

(ii) Who receives an IRS Form W-2 from an organization that has contracted with a qualifying employer to provide payroll or similar services for the qualifying employer, and which provides the Form W-2 under that contract;

Full-time means:

(i)_ Working in qualifying employment in one or more jobs —

(A) A minimum average of 30 hours per week during the period being certified,

(B) A minimum of 30 hours per week throughout a contractual or employment period of at least 8 months in a 12-month period, such as elementary and secondary school teachers, in which case the borrower is deemed to have worked full time; or

(C) The equivalent of 30 hours per week as determined by multiplying each credit or contact hour taught per week by at least 3.35 in non-tenure track employment at an institution of higher education.

(ii) Routine paid vacation or paid leave time provided by the employer, and leave taken under the Family and Medical Leave Act of 1993 (29 U.S.C. 2612(a)(1)) will be considered when determining if the borrower is working full-time.

Law enforcement means service that is publicly funded and whose principal activities pertain to crime prevention, control or reduction of crime, or the enforcement of criminal law.

Military service means "active duty" service or "full-time National Guard duty" as defined in section 101(d)(1) and (d)(5) of title 10 in the United States Code, does not include active duty for training or attendance at a service school.

Non-governmental public service means services provided directly by employees of a non-governmental qualified employer where the employer has devoted a majority of its full-time equivalent employees to working in at least one of the following areas (as defined above): emergency management, civilian service to military personnel military service, public safety, law enforcement, public interest law services, early childhood education, public service for individuals with disabilities and/or the elderly, public health, public education, public library services, school library, or other school-based services. Service as a member of the U.S. Congress is not qualifying public service employment for purposes of this section.

Non-tenure track employment means work performed by adjunct, contingent or part time faculty, teachers, or lecturers who are paid solely for the credit hours they teach at institutions of higher education.

Other school-based service means the provision of services to schools or students in a school or a school-like setting that are not public education services, such as school health services and school nurse services, social work services in schools, and parent counseling and training.

Peace Corps position means a full-time assignment under the Peace Corps Act as provided for under 22 U.S.C. 2504.

Public education service means the provision of educational enrichment and/or support to students in a public school or a school-like setting, including teaching.

Public health means physicians, nurse practitioners, and nurses in a clinical setting; and those engaged in health care practitioner occupations, health care support occupations, and counselors, social workers, and other community and social service specialist occupations, as those terms are defined by the Bureau of Labor Statistics.

Public interest law is legal services that are funded in whole or in part by a local, State, Federal, or Tribal government.

Public library service means the operation of public libraries or services that support their operation.

Public safety service means services that seek to prevent the need for emergency management services.

Public service for individuals with disabilities means services performed for or to assist individuals with disabilities (as defined in the Americans with Disabilities Act (42 U.S.C. 12102)) that is provided to a person because of the person's status as an individual with a disability.

Public service for the elderly means services that are provided to individuals who are aged 62 years or older and that are provided to a person because of the person's status as an individual of that age.

Qualifying employer means:

(i) A United States-based Federal, State, local, or Tribal government organization, agency, or entity, including the U.S. Armed Forces or the National Guard;

(ii) A public child or family service agency;

(iii) An organization under section 501(c)(3) of the Internal Revenue Code of 1986 that is exempt from taxation under section 501(a) of the Internal Revenue Code;

(iv) A Tribal college or university; or

(v) A nonprofit organization that—

(A) Provides a non-governmental public service as defined in this section, attested to by the employer on a form approved by the Secretary; and

(B) Is not a business organized for profit, a labor union, or a partisan political organization.

Qualifying repayment plan means:

(i) An income-contingent repayment plan under §685.209 or an income-based repayment plan under § 685.221;

(ii) The 10-year standard repayment plan under § 685.208(b) or the consolidation loan standard repayment plan with a 10-year repayment term under § 685.208(b); or

(iii) Except for the alternative repayment plan, any other repayment plan if the monthly payment amount is not less than what would have been paid under the 10-year standard repayment plan under § 685.208(b).

School library services means the operations of school libraries or services that support their operation.

(c) *Borrower eligibility*. (1) A borrower may obtain loan forgiveness under this program if the borrower—

(i) Is not in default on the loan at the time forgiveness is requested;

(ii) Is employed full-time by a qualifying employer or serving in a full-time AmeriCorps or Peace Corps position—

(A) When the borrower satisfied the 120 monthly payments described under paragraph (c)(1)(iii) of this section; and

(B) At the time the borrower applies for forgiveness under paragraph (e) of this section; and

(iii) Satisfies the equivalent of 120 monthly payments after October 1, 2007, as described in paragraph (c)(2) of this section, on eligible Direct loans.

(2) A borrower will be considered to have made monthly payments under paragraph (c)(1)(iii) of this section by—

(i) Paying at least the full scheduled amount due for a monthly payment under the qualifying repayment plan;

(ii) Paying in multiple installments that equal the full scheduled amount due for a monthly payment under the qualifying repayment plan;

(iii) For a borrower on an income-contingent repayment plan under § 685.209 or an income-based repayment plan under § 685.221, paying a lump sum or monthly payment amount that is equal to or greater than the full scheduled amount in advance of the borrower's scheduled payment due date for a period of months not to exceed the period from the Secretary's receipt of the payment until the borrower's next annual repayment plan recertification date under the qualifying repayment plan in which the borrower is enrolled;

(iv) For a borrower on the 10-year standard repayment plan under § 685.208(b) or the consolidation loan standard repayment plan with a 10-year repayment term under § 685.208(b), paying a lump sum or monthly payment amount

that is equal to or greater than the full scheduled amount in advance of the borrower's scheduled payment due date for a period of months not to exceed the period from the Secretary's receipt of the payment until the lesser of 12 months from that date or the date upon which the Secretary receives the borrower's next submission under subsection (e).

(v) Receiving one of the following deferments or forbearances for the month:

(A) Cancer treatment deferment under section 455(f)(3) of the Act;

(B) Economic hardship deferment under § 685.204(g);

(C) Military service deferment under § 685.204(h);

(D) Post-active-duty student deferment under § 685.204(i);

(E) AmeriCorps forbearance under § 685.205(a)(4);

(F) National Guard Duty forbearance under § 685.205(a)(7);

(G) U.S. Department of Defense Student Loan Repayment Program forbearance under § 685.205(a)(9);

(H) Administrative forbearance or mandatory administrative forbearance under § 685.205(b)(8) or (9); and

(vi) Being employed full-time with a qualifying employer, as defined in this section, at any point during the month for which the payment is credited.

(3) If a borrower consolidates one or more Direct Loans into a Direct Consolidation Loan, including a Direct PLUS Loan made to a parent borrower, the payments the borrower made on the Direct Loans prior to consolidating and that met the criteria in paragraphs (c)(2)(i) through (vi) of this section will count as qualifying payments on the Direct Consolidation Loan.

(d) *Forgiveness amount*. The Secretary forgives the principal and accrued interest that remains on all loans for which the borrower meets the requirements of paragraph (c) of this section as of the date the borrower satisfied the last required monthly payment obligation.

(e) *Application process*. (1) Notwithstanding paragraph (f) of this section, after making the 120 monthly qualifying payments on the eligible loans for which loan forgiveness is requested, a borrower may request loan forgiveness by filing an application approved by the Secretary.

(2) If the Secretary has sufficient information to determine the borrower's qualifying employer and length of employment, the Secretary informs the borrower if the borrower is eligible for forgiveness.

(3) If the Secretary does not have sufficient information to make a determination of the borrower's eligibility for forgiveness, the borrower must provide additional information about the borrower's employment and employer on a form approved by the Secretary.

(4) If the borrower is unable to secure a certification of employment from a qualifying employer, the Secretary may determine the borrower's qualifying employment or payments based on other documentation provided by the borrower at the Secretary's request.

(5) The Secretary may request reasonable additional documentation pertaining to the borrower's employer or employment before providing a determination.

(6) The Secretary may substantiate an employer's attestation of information provided on the form in paragraph (e)(3) of this section based on a review of information about the employer.

(7) If the Secretary determines that the borrower meets the eligibility requirements for loan forgiveness under this section, the Secretary -

(i) Notifies the borrower of this determination; and

(ii) Forgives the outstanding balance of the eligible loans.

(8) If the Secretary determines that the borrower does not meet the eligibility requirements for loan forgiveness under this section, grants forbearance of payment on both principal and interest for the period in which collection activity was suspended. The Secretary notifies the borrower that the application has been denied, provides the basis for the denial, and informs the borrower that the Secretary will resume collection of the loan. The Secretary does not capitalize any interest accrued and not paid during this period.

(f) *Application not required*. The Secretary forgives a loan under this section without an application from the borrower if the Secretary has sufficient information in the Secretary's possession to determine the borrower has satisfied the requirements for forgiveness under this section.

(g) *Reconsideration process*. (1) Within 90 days of the date the Secretary sent the notice of denial of forgiveness under paragraph (e)(8) of this section to the borrower, the borrower may request that the Secretary reconsider whether the borrower's employer or any payment meets the requirements for credit toward forgiveness by requesting reconsideration on a form approved by the Secretary. Borrowers who were denied loan forgiveness under this section after October 1, 2017, and prior to

[EFFECTIVE DATE OF FINAL RULE], have 180 days from that date to request reconsideration.

(2) To evaluate a reconsideration request, the Secretary considers--

(i) Any relevant evidence that is obtained by the Secretary; and

(ii) Additional supporting documentation not previously provided by the borrower or employer.

(3) The Secretary notifies the borrower of the reconsideration decision and the reason for the Secretary's determination.

(4) If the Secretary determines that the borrower qualifies for forgiveness, the Secretary adjusts the borrower's number of qualifying payments or forgives the loan, as appropriate.

(5) After the Secretary makes a decision on the borrower's reconsideration request, the Secretary's decision is final, and the borrower will not receive additional reconsideration unless the borrower presents additional evidence.

(6) For any months in which a borrower postponed monthly payments under a deferment or forbearance and was employed full-time at a qualifying employer as defined in this section but was in a deferment or forbearance status besides those listed in paragraph (c)(2)(v) of this

section, the borrower may obtain credit toward forgiveness for those months, as defined in paragraph (d) of this section, for any months in which the borrower—

(i) Makes an additional payment equal to or greater than the amount they would have paid at that time on a qualifying repayment plan or

(ii) Otherwise qualified for a $0 payment on an income-driven repayment plan under § 685.209 and income-based repayment plan under § 685.221.

32. Section 685.300 is amended by:

a. Revising paragraphs (b)(7) and (10);

b. Redesignating paragraphs (b)(11) and (12) as paragraphs (b)(12) and (13), respectively;

c. Adding new paragraph (b)(11);

d. Revising newly redesignated paragraph (b)(13); and

e. Adding paragraphs (d) through (i).

The revisions and additions read as follows:

§ 685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.

* * * * *

(b) * * *

(7) Provide assurances that the school will comply with loan information requirements established by the

Secretary with respect to loans made under the Direct Loan Program;

* * * * *

(10) Provide that the school will not charge any fees of any kind, however described, to student or parent borrowers for origination activities or for the provision of information necessary for a student or parent to receive a loan under part D of the Act or for any benefits associated with such a loan;

(11) Comply with the provisions of paragraphs (d) through (i) of this section regarding student claims and disputes;

* * * * *

(13) Accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts discharged by the Secretary pursuant to §§ 685.206, 685.214, 685.215, 685.216, 685.222, and subpart D of this part.

* * * * *

(d) *Borrower defense claims in an internal dispute process.* The school will not compel any student to pursue a complaint based on allegations that would provide a basis for a borrower defense claim through an internal dispute process before the student presents the complaint to an

accrediting agency or government agency authorized to hear the complaint.

(e) *Class action bans*. (1) The school will not seek to rely in any way on a pre-dispute arbitration agreement or on any other pre-dispute agreement with a student who has obtained or benefited from a Direct Loan, with respect to any aspect of a class action that is related to a borrower defense claim, unless and until the presiding court has ruled that the case may not proceed as a class action and, if that ruling may be subject to appellate review on an interlocutory basis, the time to seek such review has elapsed or the review has been resolved.

(2) Reliance on a pre-dispute arbitration agreement, or on any other pre-dispute agreement, with a student, with respect to any aspect of a class action includes, but is not limited to, any of the following:

(i) Seeking dismissal, deferral, or stay of any aspect of a class action;

(ii) Seeking to exclude a person or persons from a class in a class action;

(iii) Objecting to or seeking a protective order intended to avoid responding to discovery in a class action;

(iv) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action;

(v) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action after the trial court has denied a motion to certify the class but before an appellate court has ruled on an interlocutory appeal of that motion, if the time to seek such an appeal has not elapsed or the appeal has not been resolved; and

(vi) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action, after the trial court in that class action has granted a motion to dismiss the claim and noted that the consumer has leave to refile the claim on a class basis, if the time to refile the claim has not elapsed.

(3) Required provisions and notices: (i) After [EFFECTIVE DATE OF FINAL RULE], the school must include the following provision in any agreements with a student recipient of a Direct Loan for attendance at the school, or a student for whom the PLUS loan was obtained, that include pre-dispute arbitration or any other pre-dispute agreement addressing class actions: "We agree that this agreement cannot be used to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Direct Loan or our

provision of educational services for which the Direct Loan was obtained. We agree that the court has exclusive jurisdiction to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

(ii) When a pre-dispute arbitration agreement or any other pre-dispute agreement addressing class actions has been entered into before [EFFECTIVE DATE OF FINAL RULE], and does not contain the provision described in paragraph (e)(3)(i) of this section, the school must either ensure the agreement is amended to contain that provision or provide the student to whom the agreement applies with written notice of that provision.

(iii) The school must ensure the agreement described in paragraph (e)(3)(ii) of this section is amended to contain the provision set forth in paragraph (e)(3)(i) or must provide the notice to students specified in that paragraph no later than the exit counseling required under § 685.304(b), or the date on which the school files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment, whichever is earlier.

(A) *Agreement provision*. "We agree that neither we, nor anyone else who later becomes a party to this agreement, will use it to stop you from being part of a

class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit in court even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. We agree that the court has exclusive jurisdiction to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

(B) *Notice provision*. "We agree not to use any pre-dispute agreement to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. We agree that the court has exclusive jurisdiction to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

(f) *Pre-dispute arbitration agreements*. (1)(i) The school will not enter into a pre-dispute agreement to

arbitrate a borrower defense claim or rely in any way on a pre-dispute arbitration agreement with respect to any aspect of a borrower defense claim.

(ii) A student may enter into a voluntary post-dispute arbitration agreement with a school to arbitrate a borrower defense claim.

(2) Reliance on a pre-dispute arbitration agreement with a student with respect to any aspect of a borrower defense claim includes, but is not limited to, any of the following:

(i) Seeking dismissal, deferral, or stay of any aspect of a judicial action filed by the student, including joinder with others in an action;

(ii) Objecting to or seeking a protective order intended to avoid responding to discovery in a judicial action filed by the student; and

(iii) Filing a claim in arbitration against a student who has filed a suit on the same claim.

(3) Required provisions and notices: (i) The school must include the following provision in any pre-dispute arbitration agreements with a student recipient of a Direct Loan for attendance at the school, or, with respect to a Parent PLUS Loan, a student for whom the PLUS loan was obtained, that include any agreement regarding arbitration and that are entered into after [EFFECTIVE DATE OF FINAL

RULE]: "We agree that neither we nor anyone else will use this agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit for such a claim, or you may be a member of a class action lawsuit for such a claim even if you do not file it. This provision does not apply to lawsuits concerning other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

(ii) When a pre-dispute arbitration agreement has been entered into before [EFFECTIVE DATE OF FINAL RULE], that did not contain the provision specified in paragraph (f)(3)(i) of this section, the school must either ensure the agreement is amended to contain the provision specified in paragraph (f)(3)(iii)(A) of this section or provide the student to whom the agreement applies with the written notice specified in paragraph (f)(3)(iii)(B) of this section.

(iii) The school must ensure the agreement described in paragraph (f)(3)(ii) of this section is amended to contain the provision specified in paragraph (f)(3)(iii)(A) of this section or must provide the notice specified in

paragraph (f)(3)(iii)(B) of this section to students no later than the exit counseling required under § 685.304(b), or the date on which the school files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment, whichever is earlier.

(A) *Agreement provision*. "We agree that neither we, nor anyone else who later becomes a party to this pre-dispute arbitration agreement, will use it to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit for such a claim or you may be a member of a class action lawsuit for such a claim even if you do not file it. This provision does not apply to other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

(B) *Notice provision*. "We agree not to use any pre-dispute arbitration agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit regarding such a claim or

you may be a member of a class action lawsuit regarding such a claim even if you do not file it. This provision does not apply to any other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Direct Loan or the provision of educational services for which the loan was obtained."

(g) *Submission of arbitral records.* (1) A school must submit a copy of the following records to the Secretary, in the form and manner specified by the Secretary, in connection with any borrower defense claim filed in arbitration by or against the school:

(i) The initial claim and any counterclaim;

(ii) The arbitration agreement filed with the arbitrator or arbitration administrator;

(iii) The judgment or award, if any, issued by the arbitrator or arbitration administrator;

(iv) If an arbitrator or arbitration administrator refuses to administer or dismisses a claim due to the school's failure to pay required filing or administrative fees, any communication the school receives from the arbitrator or arbitration administrator related to such a refusal; and

(v) Any communication the school receives from an arbitrator or an arbitration administrator related to a

determination that a pre-dispute arbitration agreement regarding educational services provided by the school does not comply with the administrator's fairness principles, rules, or similar requirements, if such a determination occurs;

(2) A school must submit any record required pursuant to paragraph (g)(1) of this section within 60 days of filing by the school of any such record with the arbitrator or arbitration administrator and within 60 days of receipt by the school of any such record filed or sent by someone other than the school, such as the arbitrator, the arbitration administrator, or the student.

(3) The Secretary shall publish the records submitted by schools in paragraph (g)(1) of this section in a centralized database accessible to the public.

(h) *Submission of judicial records*. (1) A school must submit a copy of the following records to the Secretary, in the form and manner specified by the Secretary, in connection with any borrower defense claim filed in a lawsuit by the school against the student or by any party, including a government agency, against the school:

(i) The complaint and any counterclaim;

(ii) Any dispositive motion filed by a party to the suit; and

(iii) The ruling on any dispositive motion and the judgment issued by the court;

(2) A school must submit any record required pursuant to paragraph (h)(1) of this section within 30 days of filing or receipt, as applicable, of the complaint, answer, or dispositive motion, and within 30 days of receipt of any ruling on a dispositive motion or a final judgment;

(3) The Secretary shall publish the records submitted by schools in paragraph (h)(1) in a centralized database accessible to the public.

(i) *Definitions*. For the purposes of paragraphs (d) through (h) of this section, the term -

(1) *Borrower defense claim* means an act or omission that is or could be asserted as a borrower defense as defined in:

(i) § 685.206(c)(1);

(ii) § 685.222(a)(5);

(iii) § 685.206(e)(1)(iii); or

(iv) § 685.401(a);

(2) *Class action* means a lawsuit in which one or more parties seek class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23;

(3) *Dispositive motion* means a motion asking for a court order that entirely disposes of one or more claims in favor of the party who files the motion without need for further court proceedings;

(4) *Pre-dispute arbitration agreement* means any agreement, regardless of its form or structure, between a school or a party acting on behalf of a school and a student that provides for arbitration of any future dispute between the parties.

§ 685.304 [Amended]

33. Section 685.304 is amended:

a. In paragraph (a)(6)(xi), by adding "and" after "records;";

b. In paragraph (a)(6)(xii), by removing the semicolon after "loan" and adding a period in its place; and

c. Removing paragraphs (a)(6)(xiii) through (xv).

34. Section 685.308 is amended by revising paragraph (a)(3) to read as follows:

§ 685.308 Remedial actions.

(a) * * *

(3) The school's actions that gave rise to a successful claim for which the Secretary discharged a loan,

in whole or in part, pursuant to §§ 685.206, 685.214, 685.216, 685.222, or subpart D of this part.

* * * * *

35. Subpart D is added to read as follows:

Subpart D—Borrower Defense to Repayment

Sec.

685.400 Scope and purpose.

685.401 Borrower defense-general.

685.402 Group process for borrower defense.

685.403 Individual process for borrower defense.

685.404 Group process based on prior Secretarial final actions.

685.405 Institutional response.

685.406 Adjudication of borrower defense applications.

685.407 Reconsideration.

685.408 Discharge.

685.409 Recovery from institutions.

685.410 Cooperation by the borrower.

685.411 Transfer to the Secretary of the borrower's right of recovery against third parties.

685.499 Severability.

Subpart D—Borrower Defense to Repayment

§ 685.400 Scope and purpose.

This subpart sets forth the provisions under which a borrower defense to repayment may be asserted and applies to borrower defense applications pending with the Secretary on July 1, 2023, or received by the Secretary on or after July 1, 2023.

§ 685.401 Borrower defense-general.

(a) *Definitions*. For the purposes of this subpart, the following definitions apply:

Borrower means

(i) The borrower; and

(ii) In the case of a Direct PLUS Loan, any endorsers, and for a Direct PLUS Loan made to a parent, the student on whose behalf the parent borrowed.

Borrower defense to repayment means an act or omission of the school attended by the student that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided, and includes the following:

(i) A defense to repayment of amounts owed to the Secretary on a Direct Loan including a Direct Consolidation Loan that was used to repay a Direct Loan, a FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act, Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act; and

(ii) Any accompanying request for reimbursement of payments previously made to the Secretary on the Direct Loan or on a loan repaid by the Direct Consolidation Loan.

Department official means the employee of the Department who administers the group process described in § 685.402, the individual process as described in § 685.403, and the institutional response process in § 685.405.

Direct Loan means a Direct Subsidized Loan, a Direct Unsubsidized Loan, a Direct PLUS Loan, or a Direct Consolidation Loan.

School and *institution* may be used interchangeably and include an eligible institution as defined in 34 CFR 600.2, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs or to provide marketing, advertising, recruiting, or admissions services. *School* or *institution* also includes persons affiliated with the institution as described in § 668.174(b) of this chapter.

State requestor means a State as defined in 34 CFR 600.2, a State attorney general, a State oversight or regulatory agency with the authority from that State.

(b) *Federal standard for borrower defense applications received on or after July 1, 2023, and for applications pending with the Secretary on July 1, 2023.* A borrower with a balance due on a Direct Loan or other Federal student loan that is consolidated into a Federal Direct Consolidation Loan will be determined to have a

defense to repayment of a Direct Loan under this subpart, if at any time the borrower establishes by a preponderance of the evidence that--

(1) The institution made a substantial misrepresentation as defined in 34 CFR part 668, subpart F, in connection with the borrower's decision to attend, or to continue attending, the institution or the borrower's decision to take out a Direct Loan or other Federal student loan that is consolidated into a Federal Direct Consolidation Loan;

(2) The institution made a substantial omission of fact, as defined in 34 CFR part 668, subpart F, in connection with the borrower's decision to attend, or to continue attending, the institution or the borrower's decision to take out a Direct Loan or other Federal student loan that is consolidated into a Federal Direct Consolidation Loan;

(3) The institution failed to perform its obligations under the terms of a contract with the student and such failure was in connection with the borrower's decision to attend, or to continue attending, the institution or the borrower's decision to take out a Direct Loan or other Federal student loan that is consolidated into a Federal Direct Consolidation Loan;

(4) The institution engaged in aggressive and deceptive recruitment conduct or tactics as defined in 34 CFR part 668, subpart R, in connection with the borrower's decision to attend, or to continue attending, the institution or the borrower's decision to take out a Direct Loan or other Federal student loan that is consolidated into a Federal Direct Consolidation Loan; or,

(5)(i) The borrower, whether as an individual or as a member of a class, or a governmental agency has obtained against the institution a favorable judgment based on State or Federal law in a court or administrative tribunal of competent jurisdiction in connection with the borrower's decision to attend, or to continue attending, the institution or the borrower's decision to take out a Direct Loan or other Federal student loan that is consolidated into a Federal Direct Consolidation Loan; or,

(ii) The Secretary sanctioned or otherwise took adverse action against the institution at which the borrower enrolled under 34 CFR part 668, subpart G, for reasons that could give rise to a borrower defense claim under paragraphs (b)(1) through (4) of this section.

(c) *Violation of State law.* A borrower has a borrower defense to repayment under this subpart if the Secretary identifies an act or omission of the school attended by the student that relates to the making of the loan for enrollment at the school or the provision of educational

services for which the loan was provided that would give rise to a cause of action against the school under applicable State law.

(d) *Exclusions*. An institution's violation of an eligibility or compliance requirement in the Act or its implementing regulations is not a basis for a borrower defense under this subpart unless the violation would otherwise constitute a basis for a borrower defense under this subpart.

§ 685.402 Group process for borrower defense.

(a) *Group process, generally*. Upon consideration of factors including, but not limited to, common facts and claims by borrowers, and the promotion of compliance by an institution or other title IV, HEA program participant, the Secretary may initiate a process to determine whether a group of borrowers from one institution or commonly owned institutions identified by the Secretary has a borrower defense under this subpart.

(b) *Secretary initiated group process*. The Secretary may create a group based upon information from sources that include but are not limited to--

(1) Actions by the Federal Government, State attorneys general, other State agencies or officials, or other law enforcement activity;

(2) Lawsuits related to educational programs filed against the institutions which are the subject of the claims or judgments rendered against the institutions; or,

(3) Individual borrower defense claims pursuant to § 685.403.

(c) *State requestor-initiated group process*. The Secretary shall consider a request to form a group from a State requestor in which the requestor-

(1) Submits an application to the Secretary, on a form approved by the Secretary that—

(i) Identifies the requested group, including at minimum:

(A) The name of the institution or commonly owned institutions;

(B) The campuses or programs which are the subject of the claim, if applicable;

(C) A description of the conduct that forms the basis for the borrower defense claim under the Federal standard in § 685.401(b);

(D) An analysis of why the requestor believes the conduct should result in an approved borrower defense claim under the Federal standard in § 685.401(b); and,

(E) The period during which the activity in (c)(1)(i)(C) of this section occurred;

(ii) Provides evidence beyond sworn borrower statements that supports each element of the claim made in this paragraph (c)(1); and

(iii) Provides the names and other identifying information of borrowers in the group to the extent available; and,

(2) Provides any other information or supporting documentation reasonably requested by the Secretary within 90 days of the Secretary's request.

(3) The Secretary may consolidate multiple group applications related to the same institution or institutions.

(4) The Secretary shall provide a response to any materially complete State requestor group request under this paragraph (c) within 365 days of receipt. That response shall include:

(i) Whether the Secretary will choose to form a group and a definition of the group formed;

(ii) If the Secretary chooses not to form a group, the reasons for not doing so; and

(iii) Any additional information needed from the Sate requestor to continue the State requested group process.

(5)(i) If the Secretary denies in whole or in part a State request to form a group under the process described

in this paragraph (c), for reasons other than that the Secretary already has formed a group that includes the members of the proposed group or has findings that cover the members of the proposed group, the State requestor submitting the group claim may request that the Secretary reconsider the decision upon the identification of new evidence that was not previously available to the Secretary in forming the group.

(ii) The State requestor submitting the group claim under this paragraph (c) must request reconsideration of the group formation no later than 90 days from the date of the Secretary's initial decision regarding formation of the group.

(iii) The Secretary shall provide a response to the State requestor that requested reconsideration of the group's formation within 90 days of receipt of the reconsideration request.

(d) *Process after group formation*. Upon formation of a group of borrowers under this section, the Secretary—

(1) Designates a Department official to present the group's claim in the institutional response process described in § 685.405;

(2) For borrowers who have an application pending with the Secretary prior to the formation of the group, notifies those borrowers that they are an identified member

of the group formed under this section and follows § 685.403(d) or (e) as appropriate;

(3) For borrowers whose names were submitted by the State requestor and that can be identified by the Secretary, or that can otherwise be identified by the Secretary, if the borrower is not in default and does not have a separate application pending with the Secretary, follows the procedures under § 685.403(d) except that interest on the loan shall stop accumulating immediately;

(4) For borrowers whose names were submitted by the State requestor and that can be identified by the Secretary, or that can otherwise be identified by the Secretary, if the borrower is in default and does not have a separate application pending with the Secretary, follows the procedures under § 685.403(e) except that the interest on the loan shall stop accumulating immediately;

(5) For possible group members that the Secretary cannot identify, the Secretary will take reasonable steps to identify and notify potential members of the group, and if the Secretary ultimately is able to identify any additional members, then it shall follow the process under paragraphs (d)(3) and (4) of this section to allow those additional members to opt-in the group formed; and,

(6) If the Secretary later identifies a borrower that should have received the benefits as described under

paragraph (d)(3) or (4) of this section, either prior to the adjudication of the group or after an adjudication that results in the approval of a group borrower defense, the Secretary shall retrospectively apply the benefits available to the borrower under those subparagraphs and no other consequences shall apply.

§ 685.403 Individual process for borrower defense.

(a) *Individual process, generally.* (1) If § 685.402 does not apply to an individual borrower who has submitted a borrower defense application, the Secretary shall initiate a process to determine whether the individual borrower has a borrower defense under this subpart.

(2) If § 685.402 applies to an individual borrower who is covered under a group borrower defense application being considered by the Secretary, that group borrower defense application shall toll the timelines under § 685.406 on adjudicating the individual borrower application.

(3) Paragraph (a)(1) of this section shall not apply to claims covered by a group claim under § 685.402, including claims submitted prior to the formation of such a group, until after the Secretary makes a decision on that group claim.

(b) *Individual process*. (1) The Secretary shall consider a borrower defense claim from an individual borrower in which the borrower—

(i) Submits an application to the Secretary, on a form approved by the Secretary; and,

(ii) Provides additional supporting evidence for the claims made under subparagraph (b)(1)(i) of this section, if any;

(2) The individual must provide any other information or supporting documentation reasonably requested by the Secretary.

(c) *Individual borrower status*. Upon receipt of a materially complete application under this section, the Secretary—

(1) Designates a Department official to present the individual's claim in the institutional response process described in § 685.405;

(2) Notifies the borrower that it will adjudicate the claim under § 685.406(c); and

(3) Places all the borrower's loans in forbearance in accordance with paragraph (d) of this section or stopped enforcement collections in accordance with paragraph (e) of this section, as applicable.

(d) *Forbearance.* The Secretary grants forbearance on all of the borrower's title IV loans that are not in default in accordance with § 685.205 and—

(1) Notifies the borrower of the option to decline forbearance and to continue making payments on the borrower's loans, and the availability of income-contingent repayment plans under § 685.209 and the income-based repayment plan under § 685.221; and,

(2) Does not charge interest on the borrower's loans beginning 180 days from the date the borrower was initially granted forbearance under this paragraph (d) if the Department official has failed to make a determination on the borrower's claim by that date and continuing until the Department notifies the borrower of the decision.

(e) *Loan collection activities during adjudication of borrower defense claim.* The Secretary—

(1) Suspends collection activity on all defaulted title IV loans until the Secretary issues a decision on the borrower defense claim;

(2) Does not charge interest on the borrower's loans beginning 180 days from the date the Secretary initially suspended collection activity under subparagraph (e)(1) of this section if the Secretary has not made a determination on the borrower's claim by that date and continuing until the Department notifies the borrower of the decision;

(3) Notifies the borrower of the suspension of collection activity and explains that collection activity will resume no earlier than 90 days following final adjudication of the borrower defense claim if the Secretary determines that the borrower does not qualify for a full discharge; and

(4) Notifies the borrower of the option to begin or continue making payments under a rehabilitation agreement or other repayment agreement on the defaulted loan.

§ 685.404 Group process based on prior Secretarial final actions.

(a) For purposes of forming a Secretary-initiated group process in accordance with § 685.402(b), the Department official may consider final actions as described in § 685.401(b)(5)(ii). Such final actions include but are not limited to:

(1) Actions arising from a final audit determination or final program review determination regarding the relevant institution;

(2) An institution's failure to meet the administrative capability requirements that relate to the provision of educational services provided by the institution, in accordance with § 668.16 of this chapter;

(3) An institution's loss of eligibility due to its cohort default rates, in accordance with part 668, subpart N;

(4) Fines, limitations, suspension, termination, or emergency actions against the institution taken by the Secretary in accordance with 34 CFR part 668, subpart G; and,

(5) Other final actions as determined by the Secretary.

(b) For groups based on prior Secretarial final actions in accordance with this section, § 685.405 shall not apply to the affected institutions.

§ 685.405 Institutional response.

(a) For purposes of adjudicating a borrower defense claim, the Department official notifies the institution of the group claim under § 685.402 or individual claim under § 685.403, and requests a response from the school. Such notification also may include, but is not limited to, requests for documentation to substantiate the school's response.

(b)(1) The notification in paragraph (a) of this section tolls any limitation period by which the Secretary may recover from the institution under § 685.409.

(2) The Department official requests a response from the institution within 90 days of the Department official's notification.

(c) With its response, the institution must submit an affidavit, on a form approved by the Secretary, certifying under penalty of perjury that the information submitted to the Department official is true and correct.

(d) If the institution does not respond to the Department official's information request within 90 days, the Department official shall presume that the institution does not contest the borrower defense to repayment claim.

§ 685.406 Adjudication of borrower defense applications.

(a) *Adjudication.* The Department official adjudicates a borrower defense claim in accordance with this section.

(b) *Group process, adjudication*. (1) For a group formed under § 685.402, the Department official considers any evidence related to the claim, including materials submitted as part of the group application, individual claims that are part of the group, evidence in the Secretary's possession, evidence provided by the institution during the institutional response process described in § 685.405, and any other relevant information.

(2) For a group of borrowers under § 685.402 for which the Department official determines there may be a borrower defense under § 685.401(b), there is a rebuttable

presumption that each member of the group relied on the act or omission giving rise to the borrower defense in deciding to attend, or continue attending, the institution, and that such reliance was reasonable.

(c) *Individual process, adjudication.* For an individual process under § 685.403, the Department official adjudicates the borrower defense using the information available to it. The Department official considers any evidence related to the claim, including materials submitted as part of the individual application, evidence in the Secretary's possession, evidence provided by the institution during the institutional response process described in § 685.405, and any other relevant information.

(d) *Additional information needed from the school.* If the Department official requires additional information from the school, the school must respond to the Department official's information request within 90 days. If the Department official requires additional information from the individual, the individual must respond within a reasonable timeframe.

(e) *Written decision.* The Department official issues a written decision as follows:

(1) *Full or partial approval.* If the Department official approves the borrower defense claim in full or in part--

(i) The written decision states that Secretary's determination and any discharge provided under § 685.408 on the basis of that claim.

(ii) The Secretary places a borrower's Direct Loans associated with a group borrower defense claim into forbearance until the Secretary discharges the loan obligations under § 685.212(k). If any balance remains on the Direct Loans not associated with the borrower defense claim or for loans that were not fully discharged, those loans will return to their status prior to the claim process. The Secretary resumes collection activities on those Direct Loans not associated with the borrower defense claim or for loans that were not fully discharged no earlier than 90 days from the date the Department official issues a written decision. No interest will be charged on the loans during the forbearance period.

(2) *Full denial*—(i) *Full denial, group*. If the Department official denies the borrower defense in full, the written decision states the reasons for the denial, the evidence upon which the decision was based, and the portion of the loans that is due and payable to the Secretary. The Department official informs the borrowers that for the Direct Loans associated with the group borrower defense claim, those loans will return to their status prior to the group claim process. The Secretary resumes collection activities on the Direct Loans associated with the group

borrower defense claim no earlier than 90 days from the date the Department official issues a written decision. The Department official also informs individual borrower from the group claim initially adjudicated under § 685.406(b)(1) the option to file a new borrower defense application under an individual process in accordance with § 685.403.

(ii) *Full denial, individual.* If the Department official denies the borrower defense in full, the written decision states the reasons for the denial, the evidence upon which the decision was based, and the portion of the loans that is due and payable to the Secretary. The Department official informs the borrowers that if any balance remains on the Direct Loans associated with the borrower defense claim, those loans will return to their status prior to the claim process. The Secretary resumes collection activities on the loans under which a forbearance or stopped collection was granted during adjudication of the claim in accordance with §§ 685.403(d) and (e) and 685.402(d)(2) through (4), no earlier than 90 days from the date the Department official issues a written decision. The Department official also informs the borrower of the opportunity to request reconsideration of the claim pursuant to § 685.407.

(3) *Copies of written decisions.* The Secretary provides copies of the written decision in this subsection to:

(i) An individual whose claim was adjudicated under § 685.406(c), as applicable;

(ii) The members of the group whose claims were adjudicated under § 685.406(b)(1), as applicable;

(iii) The school, to the extent practicable; and,

(iv) The State requestor who requested the group claims process, as applicable.

(f) *Adjudication, timelines.* (1) The Secretary shall adjudicate a group or individual borrower defense claim under the following timelines:

(2) For a group claim under § 685.402(c), within 2 years of the date the Department official notified the State requestor under § 685.402(c)(4).

(3) For an individual claim under § 685.403, within 3 years of the date the Department determines the borrower submitted a materially complete application.

(4) The timelines in paragraph (f)(2) or (3) of this section shall not apply for additional adjudications carried out as part of the reconsideration process in § 685.407.

(5) An individual claim under § 685.403 that is included in a group claim under § 685.402 shall be subject to the adjudication timeline for that group under paragraph (f)(2) of this section, and any timelines associated with individual adjudication in paragraph (f)(3) of this section shall be tolled until the Department official renders a decision on the claim under § 685.402.

(6) The Secretary shall provide an interim update to the individual borrower submitting a claim under § 685.403 or to the State requestor requesting a group process under § 685.402 no later than 1 year after the dates in paragraphs (f)(2) and (3) of this section. Such notification shall-

(i) Indicate the Secretary's progress in adjudicating the claim or claims; and,

(ii) Provide an expected timeline for rendering a decision on the claim.

(7) Only those loans covered by claims on which the Secretary has not yet issued the written decision under paragraph (e) of this section by the dates identified in paragraph (f)(2) or (3) of this section shall be deemed unenforceable.

§ 685.407 Reconsideration.

(a) The decision of the Department official is final as to the merits of the borrower defense and any discharge

that may be granted on the claim. Notwithstanding the foregoing—

(1) If the borrower defense is denied in full or in part, an individual may request that the Secretary reconsider their individual borrower defense claim on the following grounds for:

(i) Administrative or technical errors;

(ii) Consideration under an otherwise applicable State law standard under § 685.401(c) in lieu of the Federal standard; or,

(iii) Identification of evidence that was not previously provided by the borrower and that was not identified in the final decision as a basis for the Department official's determination;

(2)(i) If the borrower defense is denied in full or in part for a group claim adjudicated under § 685.406(b)(1), any of the State requestors that requested to form a group under § 685.402(c) may request that the Secretary reconsider the borrower defense for the reasons provided under (a)(1)(i) through (iii) of this section. A State entity's reconsideration request made in accordance with subparagraph (a)(1)(ii) of this section must provide:

(A) The applicable State law standard;

(B) Why the State requestor requests use of such State law standard;

(C) Why application of the State law standard would result in a different outcome for the group than adjudication under the Federal standard; and

(D) Why the applicable State law standard would lead to a borrower defense.

(ii) An individual borrower from a group claim initially adjudicated under § 685.406(b)(1) may not file a reconsideration request under this section.

(3) The borrower or State requestor that requested to form a group under § 685.402(c) must request reconsideration under this section no later than 90 days from the date of the Department official's written decision, for any decisions issued on or after the effective date of these regulations.

(4)(i) The Secretary shall consider a reconsideration request under paragraph (a)(1) or (a)(2)(i) of this section in which the individual or State requestor—

(A) Submits an application to the Secretary, on a form approved by the Secretary; and,

(B) Provides additional supporting evidence for the reconsideration claims made in this paragraph (a)(4)(i), if any;

(ii) The borrower or State requestor entity submitting the reconsideration request must provide any other information or supporting documentation reasonably requested by the Secretary regarding the reconsideration request.

(b) The Secretary designates a different Department official for the reconsideration process than the one who conducted the initial adjudication.

(c) If accepted for reconsideration by the Secretary, the Department official follows the procedures in § 685.405 to notify the institution of the claim and the basis for the group's borrower defense under § 685.402 or individual’s borrower defense under § 685.403 for purposes of adjudicating reconsideration of the borrower defense claim and to request a response from the school to the reconsideration request.

(d) If accepted for reconsideration by the Secretary, the Department official follows the procedures in § 685.403(d) for granting forbearance and § 685.403(e) for defaulted loans, as applicable.

(e) The Department official adjudicates the borrower’s reconsideration request under § 685.406 and provides notice of the final decision upon reconsideration in accordance with § 685.406(e).

(f)(1) The Secretary may reopen at any time a borrower defense application that was partially or fully denied. If a borrower defense application is reopened by the Secretary, the Secretary follows the procedures in § 685.403(d) for granting forbearance and for § 685.403(e) for defaulted loans, as applicable.

(2) Upon reopening a borrower defense application under (f) of this section, the Department official adjudicates the claim under § 685.406 and provides notice of the final decision on the reopened case in accordance with § 685.406(e).

§ 685.408 Discharge.

(a)(1) There is a presumption that a borrower with an approved borrower discharge claim adjudicated under § 685.406(b) or (c) is eligible for full discharge of the Federal student loans associated with the approved claim unless the Department official is presented with a preponderance of evidence to the contrary.

(2) The Secretary does not limit the period on a borrower's ability to receive a reimbursement of payments previously made that are associated with a fully or partially approved claim.

(b) The Department official may rebut the presumption that the borrower or borrowers are eligible for full discharge if—

(1) The conduct that resulted in the approved borrower defense claim relates to an easily quantifiable sum that is related to books, supplies and materials, or other charges that are not direct academic expenses, in which case the discharge amount is equal to that sum;

(2) The conduct that resulted in the approved borrower defense claim relates to a substantial misrepresentation, substantial omissions of fact, breaches of contract, or aggressive or deceptive recruitment tactics or conduct, that did not involve the educational services provided. In that case, the amount of the discharge is tied to the full amount of harm experienced by the borrower as a result of the act or omission, but in no case shall be greater than the full amount of the loan; or,

(3) The conduct that resulted in the approved borrower defense claim relates to a substantial misrepresentation, substantial omissions of fact, breaches of contract, or aggressive or deceptive recruitment tactics or conduct, that did not involve the outcomes of the borrower's education. In that case, the amount of the discharge is tied to the full amount of harm experienced by the borrower as a result of the act or omission, but in no case shall be greater than the full amount of the loan.

(c)(1) If the Department official determines that the presumption of full discharge has been rebutted, the official recommends an appropriate discharge amount to the

Secretary. The discharge amount shall be an easily quantifiable amount that is less than the full amount of the loan or loans related to the claim, or 50 percent of the disbursed balance of the loan if the amount is not easily quantifiable.

(2) For a group process under § 685.406(b), the Department official shall recommend the same discharge amount to the Secretary for all members of the group, either in dollars or as a percentage of the loan amount.

(d) In determining whether an amount is easily quantifiable, the Department official--

(1) May consider factors such as the amount of debt taken on by borrowers at that program compared to the median debt level at all programs of the same level and classification of instructional program (CIP) code offered by all other institutions of higher education;

(2) May consider publicly available information on the price of books, supplies, or other materials; and

(3) May not base the determination upon individual or group measurements of the borrower's earnings or employment.

(e) The Department official recommends an appropriate amount of discharge to the Secretary, which may include a discharge of all amounts owed to the Secretary on the loan at issue and the reimbursement of amounts previously

collected by the Secretary on the loan, an easily quantifiable amount that is less than the full amount of the loan or loans related to the claim, or 50 percent of the disbursed balance of the loan if the amount is not easily quantifiable.

(f) The Secretary makes a final decision after taking into account the Department official's recommendation and the record compiled under §§ 685.402, 685.403, 685.404, 685.405, and 685.407, as applicable.

(g) The Secretary issues a written decision setting forth the amount of the discharge granted, after which the designated Department official deciding the claim notifies the borrower of the discharge provided and—

(1) Specifies the amount of the discharge;

(2) Advises that there may be State tax implications; and

(3) If the borrower does not receive a full discharge of all loans covered by the claim, advises the borrower of the option to file a request for reconsideration in accordance with § 685.407.

(h) Consistent with the discharge amount determined under this section, the Secretary discharges the borrower's obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay and, if applicable, reimburses the

borrower for amounts paid toward the loan voluntarily or through enforced collection.

(i) The Secretary affords the borrower such further relief as appropriate under the circumstances. Such further relief includes, but is not limited to, one or both of the following:

(1) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(2) Updating or deleting adverse reports the Secretary previously made to consumer reporting agencies regarding the borrower's Direct Loan.

(j) The total amount of discharge granted with respect to a borrower defense cannot exceed the amount of the loan and any associated costs and fees and will be reduced by the amount of any refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation, compromise, or any other financial benefit received by, or on behalf of, the borrower that was related to the borrower defense. The relief to the borrower may not include non-pecuniary damages such as inconvenience, aggravation, emotional distress, or punitive damages.

§ 685.409 Recovery from institutions.

(a) For loans first disbursed on or after July 1, 2023, the Secretary shall collect from the school, or in the case of a closed school, a person affiliated with the school as described in § 668.174(b) of this chapter, any liability to the Secretary for any amounts discharged or reimbursed to borrowers under the discharge process described in § 685.408.

(b) Notwithstanding the paragraph (a) of this section, the Secretary may choose not to collect from the school, or in the case of a closed school, a person affiliated with the school as described in § 668.174(b) of this chapter, any liability to the Secretary for any amounts discharged or reimbursed to borrowers under the discharge process described in § 685.408, under the following conditions, such as:

(1) The cost of collecting would exceed the amounts received; or

(2) The claims were approved outside of the limitations period in paragraph (c) of this section;

(c)(1) The Secretary shall initiate a proceeding to collect from the school the amount of discharge or reimbursement resulting from a borrower defense under § 685.408 no later than 6 years after the borrower’s last date of attendance at the institution;

(2) The limitations period described in paragraph (c)(1) of this section shall not apply if at any time prior to the end of the limitations period--

(i) The Department official notifies the school of the borrower's claim in accordance with § 685.405(b);

(ii) The institution receives a class action complaint asserting relief for a class that may include the borrower for underlying facts that may form the basis of a claim in accordance with this subpart; or

(iii) The institution receives written notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower, for underlying facts that may form the basis of a claim under this subpart.

(3) For a borrower defense under § 685.401(b)(5), the Secretary may initiate a proceeding to collect at any time.

§ 685.410 Cooperation by the borrower.

To obtain a discharge under this subpart, a borrower must reasonably cooperate with the Secretary in any proceeding under this subpart.

§ 685.411 Transfer to the Secretary of the borrower's right of recovery against third parties.

(a) Upon the granting of any discharge under this subpart, the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the contract for educational services for which the loan was received, against the school, its principals, its affiliates, and their successors, its sureties, and any private fund.

(b) The provisions of this section apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(c) Nothing in this section limits or forecloses the borrower's right to pursue legal and equitable relief against a party described in this section for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

§ 685.499 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder

of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[FR Doc. 2022-14631 Filed: 7/12/2022 8:45 am; Publication Date: 7/13/2022]