The Honorable Dr. Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Student Debt Relief for the William D. Ford Federal Direct Loan Program (Direct Loans), the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program

Agency/Docket No.: ED-2023-OPE-0123

The comments below refer to the proposed regulations to allow the Secretary of Education to waive student loan debt. These proposed regulations are a mistake for the following reasons.

Violates the Requirements for Negotiated Rulemaking

As ED itself acknowledges, "The Department is specifically required by law to use negotiated rulemaking to develop NPRMs for programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV programs) unless the Secretary determines that doing so is impracticable, unnecessary, or contrary to the public interest." They further write that "Under negotiated rulemaking, the Department works to develop an NPRM in collaboration with representatives of the parties who will be affected significantly by the regulations."

In the proposed regulations, the Department notes that there would be "significant effects on borrowers, the Department, and taxpayers." Yet the rulemaking committee did not include anyone representing the views and interests of taxpayers.

The complete absence of a taxpayer perspective violates the requirements of negotiated rulemaking. Negotiated rulemaking requires "representatives of the parties who will be affected significantly by the regulations" and ED acknowledges that these regulations would lead to "significant effects" for taxpayers, and yet taxpayers did not have representation on the negotiating committee.

Ignoring Constraints on the Secretary's Authority to Waive Debt

The Department's claimed statutory authority for these regulations is 20 USC 1082(a), which includes a provision allowing the Secretary to waive debt. However, as Mark Kantrowitz writes, the preamble to that section "limits the scope of the waiver authority to functions, powers and duties authorized by Congress, such as loan cancellation provisions that appear at 20 USC 1087."

The preamble, which reads "In the performance of, and with respect to, the functions, powers, and duties, vested in him by this part, the Secretary may…" What limitations does the Department believe this places on the Secretary's authority to waive debt in part (a)6?

20 USC 1082(a)(4) reads "subject to the specific limitations in this part, consent to modification, with respect to rate of interest, time of payment of any installment of principal and interest or any portion

thereof, or any other provision of any note or other instrument evidencing a loan which has been insured by the Secretary under this part." What limitations does the Department believe this places on the Secretary's authority to waive debt in part (a)6?

Ignoring the Requirement to Waive Debt on a Case-by-case Basis

The HEA requires waivers to be done on a case-by-case basis. And in fact, until this administration, borrowers had to apply individually for relief under many debt relief programs. Yet as Mark Kantrowitz writes, the "stated intent to establish a uniform standard for forgiveness would appear to run contrary to a requirement to exercise waiver authority on a case-by-case basis." Why does the Department believe it has the authority to ignore the requirement to provide waivers only on a case-by-case basis?

Ignores that the Claimed Waiver Authority Does Not Apply to Direct Loans

As Mark Kantrowitz notes, "The waiver authority appears in part B of the Higher Education Act of 1965, which relates to the Federal Family Education Loan Program (FFELP), and not the William D. Ford Federal Direct Loan Program (Direct Loans). The proposed regulations claim that the waiver authority applies to the Direct Loan program because of the parallel terms clause at 20 USC 1087a(b)(2)… But, the parallel terms clause does not refer to the waiver authority in section 1082 of the Higher Education Act of 1965, but to section 1078, and a waiver of a 'right, title, claim, lien, or demand' is not a term, condition or benefit of a loan." Why does the Department believe that parallel clause applies to section 1082?

Ignoring Interest Charges Required by Statute

ED writes that "Effective July 1, 2023, the Department ceased capitalizing interest in all situations where it is not required by statute (87 FR 65904)." In other words, statute requires ED to charge interest on loans in many cases. Yet in these regulations, ED is seeking to waive interest (which is equivalent to not charging it in the first place). How does the Department justify acknowledging statutory requirements that require charging interest, but then ignoring those requirements (by waiving interest charges) with these regulations?

Violates the Federal Claims Collection Standards

Mark Kantrowitz notes that "The proposed regulations also claim that Federal Claims Collection Standards, which appear in 31 CFR parts 900 to 904, do not apply… Despite the changes to 34 CFR 30.70(a), the proposed regulations use similar arguments in favor of the forgiveness proposals, such as 'loans that are unlikely to be otherwise repaid in full in a reasonable period' (in regard to benefits to the U.S. Department of Education from no longer having to service or collect on loans that would be forgiven)." How does the Department justify using the same concepts to address the same issue, yet simply ignoring the existing standards?

Violates the Fiscal Responsibility Act of 2023

The Fiscal Responsibility Act of 2023 (Public Law No: 118-5) required student loan payments to restart. How are these regulations, which would waive billions of dollars in debt, including wiping out all debt for many borrowers, consistent with the requirements of this law?

Violates the Bipartisan Student Loan Certainty Act of 2013

Interest rates on student loans are determined by the Bipartisan Student Loan Certainty Act of 2013 (Public Law No: 113-28). The Department's own FSA website acknowledges that "Interest rates on federal student loans are set by federal law, not the U.S. Department of Education." Yet these regulations would ignore the interest rates set by Congress, and retroactively impose, in effect, variable interest rates based on how much students had paid relative to Congressionally mandated interest on their loans. This not only ignores the interest rates set by Congress, but also effectively charges different interest rates to different students in contradiction to Congressional intent (e.g., a student who has repaid none of the interest on their debt would be given an effective interest rate of 0%, whereas one that repaid half of the interest on their debt would have an effective interest rate equal to one half the Congressionally determined rate on their loans was). How does the Department justify ignoring Congressionally set interest rates?

Violates the Major Questions Doctrine

The Supreme Court overturned this administration's last attempt to provide student loan forgiveness through the regulatory process because it violated the major questions doctrine. Why does the Department think that the major questions doctrine does not apply to these regulations?

Incomplete Cost and Benefit Analysis

When discussing costs and benefits, the Department writes that "The potential debt relief contemplated in this proposed rule could help some borrowers who receive relief to better afford necessities, prepare for retirement, invest in other assets, and safeguard against financial shocks." This is indeed a benefit of the proposed regulations. Yet the equivalent cost is not addressed at all. The taxpayers who will assume the burden of the waived debt will now be less able to "afford necessities, prepare for retirement, invest in other assets, and safeguard against financial shocks."

Waving debt transfers the financial burden from students who took on the debt to taxpayers who did not. Only accounting for the financial benefits to borrowers without taking into account the equivalent costs to taxpayers is astoundingly illogical.

Inconsistent in Capping Only Some Waivers

The proposed regulations are quite arbitrary when it comes to capping waivers. For example, for section § 30.82, ED writes "we do not believe it would be appropriate to provide uncapped relief… The Department is concerned that waiving those excessive amounts of balance growth would provide unnecessary windfall benefits in which there would be significant costs incurred to help a relatively small number of borrowers." Yet many other sections, such as § 30.81 and § 30.83, provide uncapped waivers even though the exact same rationale for capping waivers in § 30.82 applies to them too. Capping some waivers and not others in this manner seems arbitrary.

Inconsistent treatment of differences between undergraduate and graduate borrowers

The regulations have contradictory treatments of undergraduate and graduate borrowers. For example, the proposed regulations for § 30.83 note that "differential treatment for undergraduate versus graduate loans is reasonable because Department data show that undergraduate borrowers go into delinquency or default at significantly higher rates than graduate borrowers." Yet other sections (such as § 30.81 and § 30.82) provide the exact same benefit to undergraduate and graduate borrowers. Why does ED believe that undergraduate and graduate borrowers should be treated differently, except when it wants to treat them the same? This certainly seems like an arbitrary decision.

Inconsistent and inconsistently applied rationales for cutoffs

In Part 682—Federal Family Education Loan (FFEL) Program Subpart D, the regulations propose to waive debt for FFEL borrowers who have been in repayment for 25 or more years. ED writes that "We are proposing 25 years because FFEL borrowers have access to an income driven repayment plan that provides forgiveness after 25 years" referring to the ICL program.

This rationale (of limiting waivers to the terms available to borrowers at the time they took out their loans) is inconsistent with the rest of the proposed regulations, which are seeking to provide entirely new waivers of debt that were not available at the time the loans were taken out.

The rationale is also inconsistently applied. ICL was not created until 1994, so applying the 25 year cutoff to pre-1994 loans isn't consistent with the stated rationale of limiting waivers to the payment cutoffs at the time the debt was taken out.

Mathematical and Logical Errors

Mark Kantrowitz identified a number of mathematical and logical errors in the proposed regulations, including:

- "The proposed regulations state, 'We did this calculation off a dependent undergraduate maximum because those are the more common types of student loan borrowers, and it allows undergraduate loans to make up a smaller share of the total amount borrowed.' But, this isn't accurate… 61% of student loan dollars and 55% of borrowers are independent."
- "The proposed regulations also state, 'Using independent limits would produce an unfair income amount for dependent borrowers, while independent students are not harmed by using the dependent limit.' This is also incorrect. Using the higher aggregate loan limit for independent students would yield a higher income at which the SAVE loan payment exceeds the interest. Independent students are harmed by using the dependent student limit, which yields a lower income threshold and thus excludes some independent students."
- The estimates cost for the Gainful Employment section "there is clearly an error in these figures since it would yield an average forgiveness of $2.7 million per borrower."

Weak Rationale for Waiving Interest

In § 30.81, the Department seeks to waive all unpaid interest for borrowers in an IDR plan that earn less than $120,000 ($240,000 if married). ED "estimated that 70 percent of borrowers on IDR had monthly payments that did not cover the full amount of accumulating interest… significant portions of the amounts being waived under these regulations are likely to be forgiven later in repayment anyway… That said, borrowers still receive a benefit from having these amounts waived now instead of being forgiven later. The Department received numerous public comments from borrowers about the negative effects they experience from seeing their balances grow even while making payments. Those comments evidence the significant psychological effects felt by borrowers in trying to manage their payments. Providing relief from growing balances would address those concerns."

In other words, IDR is so generous that 70% of students don't even pay the interest on their loans. But this massive financial windfall is accompanied by a minor psychological cost of seeing their balance grow even though they are making payments (though again their payments aren't even covering the interest on their loan). To remedy this supposed problem, ED proposes to just wipe away the interest.

This is a very skewed cost benefit analysis, as it ignores that massive financial benefits borrowers obtain by being allowed to make payments that don't even cover the interest on their loans, while focusing on a minor psychological consequence of letting them pay so little.

Sincerely,

Andrew Gillen