May 17, 2024

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The Honorable Dr. Miguel Cardona, Secretary of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue SW
Washington, DC 20202

Re: Docket ID ED-2023-OPE-0123, Proposed Rule for 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

Dear Secretary Cardona:

On behalf of the Center for Responsible Lending,[1] thank you for the opportunity to comment on the notice of proposed rulemaking (Proposed Rule) by the U.S. Department of Education on 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.

The Proposed Rule is critically important to Black, Latino and low to moderate income (LMI) communities because its enactment will substantially reduce or eliminate loan debt and support wealth building and financial stability that has evaded too many borrowers.

Waivers in the Proposed Rule correct long-standing practices of capitalizing interest without explicit statutory mandate, which has harmed and hampered borrowers by unnecessarily inflating their loan balances. The Proposed Rule is fully supported by the Supreme Court's recent decision in *Biden v. Nebraska*[2] because the specific authority to waive, compromise or release debt in any amount is clearly spelled out and authorized by the Higher Education Act.[3]

With nearly 45 million Americans owing 1.7 trillion dollars in student loan debt,[4] the Department's Proposed Rule is critical to increasing fairness and affordability for those who must accrue debt to pursue higher education. The sheer scale of the student loan debt crisis in America—and its disproportionate and, often, inequitable, impact on borrowers of color—compels us to urge the Department to enact the Proposed Rule, which will make repaying federal student loans less onerous, more affordable, and less likely to end up in default.

Though a federal student loan is not an inherently predatory financial product, the use of federal student loans to finance higher education has devolved into a practice that is ripe with potential predation. This is

[1] The Center for Responsible Lending (CRL) is a non-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices, including student loan debt incurred as a result of fraudulent representations by higher learning institutions. CRL's views on student lending are informed by its affiliation with Self-Help, one of the nation's largest nonprofit community development financial institutions. Self-Help has provided $6 billion in financing to 70,000 homebuyers, small businesses and nonprofits and serves more than 80,000 mostly low-income families through 30 retail credit union branches in North Carolina, California, and Chicago.
[2] 600 U.S. 477 (2023)
[3] HIGHER EDUCATION ACT, PUB. L. NO. 89-329, 79 STAT. 1219 (1965), codified as 20 U.S.C. §1082(a).
[4] Zack Friedman, "Student Loan Debt Statistics In 2022: A Record $1.7 Trillion," Forbes (May 16, 2022), available at https://www.forbes.com/sites/zackfriedman/2022/05/16/student-loan-debt-statistics-in-2022-a-record-17-trillion/?sh=7361aa474d5a

especially true for borrowers of color. Since CRL released its 2014 report highlighting the rapid growth of for-profit colleges that charge more money to obtain education with less labor-market value,[5] lax regulatory oversight has allowed the predatory, and often racially-targeted practices of these institutions to disproportionately affect millions more minority borrowers by saddling them with debt that their educations cannot sustain.[6] At the same time, equally lax oversight of the Department's servicers has led to many borrowers of color needlessly being placed in deferment, forbearance, or subsequently defaulting on a student loan, due to their unawareness of income-driven repayment options.[7]

The result is a perfect storm. Far too many borrowers of color not only pay more for an education that has less labor-market value,[8] but also have less access to built-in, relief mechanisms that minimize default and prevent debt escalation through existing interest capitalization policies.[9] These challenges are only multiplied by the pre-existing racial wealth gaps for minority households,[10] which force students of color to borrow more money to pay for their college educations in the first place.[11] Finally, after college, borrowers of color face significant wage disparities when compared to their white counterparts,[12] and endure more income volatility in an economy already plagued by stagnant wages.[13] Given these facts, it is no surprise that minority borrowers are both especially susceptible to default and have found it more difficult to pay off their federal student loan debt.[14] An astounding 40% of Native American and Native Alaskan graduates end up defaulting on their student loan repayment, along with 35 % of Latino graduates, and 30% of African American borrowers.[15] Past racial inequities and continuing, overt discrimination make it difficult, if not impossible, for too many borrowers of color to sustain their federal student debt obligations.

Forcing repayment of unaffordable student debt poses a significant threat to our economy. Student loan delinquency rates have climbed 7.1 percent since the COVID-19 pandemic began, affecting about 3 million Americans.[16] A 2022 CRL and Morning Consult poll found that more than one-third of borrowers

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[5] Peter Smith and Leslie Parrish, "Do Students of Color Profit from For-Profit College: Poor Outcomes and High Debt Hamper Attendees' Futures," Center for Responsible Lending (October 2014), available at https://www.responsiblelending.org/student-loans/research-policy/CRL-For-Profit-Univ-FINAL.pdf.

[6] Suzanne Kahn, Mark Huelsman, Jen Mishory, "Bridging Progressive Policy Debates: How Student Debt and the Racial Wealth Gap Reinforce Each Other," at 10, The Century Foundation, The Roosevelt Institute, Demos (September 2019), available at https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Student-Debt-and-RWG-201909.pdf.

[7] Center for Responsible Lending, Unidos US, NAACP, National Urban League, Leadership Conference Education Fund, "QUICKSAND: Borrowers of Color & the Student Debt Crisis," at 11 (September 2019), available at https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-quicksand-student- debt-crisis-jul2019.pdf.

[8] Smith, Parrish, supra note 5 at 20.

[9] *See*, *e.g*., Meredith Kolodner, "Do income-based repayment plans drive young borrowers of color deeper into debt?," Hechinger Report (January 15, 2021), available at https://hechingerreport.org/do-income-based-repayment-plans-drive-young-borrowers-of-color-deeper-into-debt/.

[10] Kahn, Huelsman, Mishory, *supra* note 6 at 13.

[11] *Id.*

[12] Rachel Louise Ensign and Shane Shifflett, "College Was Supposed to Close the Wealth Gap for Black Americans. The Opposite Happened, " The Wall Street Journal (August 7, 2021), available at https://www.wsj.com/articles/college-was-supposed-to-close-the-wealth-gap-for-black-americans-the-opposite-happened-11628328602

[13] *Id.*

[14] *Id.*

[15] Urvi Neelakantan, Black-White Differences in Student Loan Default Rates Among College Graduates | Richmond Fed (April 2023), available at https://www.richmondfed.org/publications/research/economic_brief/2023/eb_23-12#:~:text=Default%20rates%20differ%20markedly%20by,Black%20and%20White%20college%20graduates.

[16] crl-studentdebt-relief-cra-may2023.pdf (responsiblelending.org)

have struggled to make loan repayments and roughly a quarter report being unable to afford basic necessities like food, gas and/or clothing due to the cost of their student loans.[17] It also found borrowers with older loans are more likely to have $10,000 or more above their original loan amount borrowed.[18]

The end of the payment pause only portends further concern to borrowers – with signs that a significant portion of borrowers are already delinquent in other credit obligations and at risk of declining financial health.[19] Indeed, the Department found that 40% of borrowers failed to make the first payments due.[20] The Consumer Financial Protection Bureau has detailed issues borrowers are facing since repayment restarted – long hold times with servicers, delays in processing income driven repayment plans, and inaccurate and untimely billing statements.[21]

The Department has now engaged in the negotiated rulemaking process to develop specificity as to the Secretary's authority to waive student loan debts under § 432(a) of the Higher Education Act (HEA).

We commend the Proposed Rule's effort to amend regulations to address long-standing issues borrowers have identified. We support the provisions that extend waivers to borrowers who did not apply or successfully apply for forgiveness, which addresses the failures of loan servicers to properly present affordable repayment options and the roadblocks borrowers have in obtaining forgiveness. (§§30.84 and 30.85) We similarly support waivers for borrowers who went to closed or low value institutions or programs (§§30.86, 30.87 and 30.88). Students who did not get the expected value out of their educational investment will have the chance to start fresh.

For the purposes of this comment, we will focus on the following waivers contained in the Proposed Rule which implicate interest capitalization not permitted by statute:

- The full amount by which the current outstanding balance on a loan exceeds the amount owed when the loan entered repayment for loans being repaid on any Income-Driven Repayment (IDR) plan if the borrower's income is at or below $120,000 if the borrower's filing status is single or married filing separately, $180,000 if a borrower files as head of household, or $240,000 if the borrower is married and files a joint Federal tax return or the borrower files as a qualifying surviving spouse (§30.81).
- Up to $20,000 or the amount by which the current outstanding balance on a borrower's loan exceeds the balance owed upon entering repayment (§ 30.82).
- The outstanding balance of a loan taken out to pay for the borrower's undergraduate education, or a Federal Consolidation Loan or a Direct Consolidation Loan that only repaid loans received for a borrower's undergraduate education, that first entered repayment on or before July 1, 2005 (§30.83).

Ultimately, for the borrowers affected by these provisions, interest was capitalized by servicers when it was never specifically required by statute, resulting in balances that go above and beyond their starting point at repayment. We support these waivers and the Rule's effort to eliminate these ill-gotten gains. It is essential that the Secretary act to correct errors in the calculation of borrower balances. The Proposed Rule is fully authorized by law and is consistent with the holding in *Biden v. Nebraska*, as detailed below.

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[17] PowerPoint Presentation (responsiblelending.org)
[18] Id.
[19] Office of Research blog: Update on student loan borrowers during payment suspension | Consumer Financial Protection Bureau (consumerfinance.gov)
[20] A First Look at Student Loan Repayment After the Payment Pause - ED.gov Blog
[21] CFPB Report Identifies Challenges Faced by Borrowers in Resumption of Student Loan Payments | Consumer Financial Protection Bureau (consumerfinance.gov)

In addition, to strengthen the Rule and ensure that borrowers are properly restored to an appropriate position, we suggest that all amounts attributed to capitalized interest should be waived, namely, not only capitalized interest, but interest derived from the resulting overinflated principal. Borrowers should be made whole and put in the position they would have been in without capitalized interest. Even returning a borrower to their original balance may not give enough credit for payments made that were applied to an inflated calculated balance.

A. The Proposed Rule Reflects the Administration's Broad Authority to Compromise, Waive, and Release the Terms of Repayment, as well as to Terminate Collection of, Federal Student Loans under §432(A) of the Higher Education Act, consistent with the Supreme Court's decision in *Biden v. Nebraska.*

The authority of the Secretary to waive student loan debts is abundant and it is imperative that the regulations reflect the same. The Proposed Rule simply provides clarity and greater specificity for existing authority and does not go outside the scope of what Congress intended.

The Proposed Rule describes, clarifies and codifies the Secretary's existing authority to waive debt. Under Section 432(a)(6) of the Higher Education Act of 1965,[22] the Department of Education has authority to "... compromise, waive, or release **any** right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption," of Federal Family Education Loan Program (FFELP) and Perkins student loans.[23] Under Section 432(a)(4), the Department also has authority "to 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 [student loan]."[24] Because 20 U.S.C. §1087 provides that Direct Program "loans…shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers of [FFELP loans]," these three statutory provisions have been recognized as granting the Secretary of Education broad settlement authority of any federal student loan's repayment obligations.[25]

The Secretary has the authority to compromise, or suspend or terminate collection if the debt arises under the Federal Family Education Loan Program, the William D. Ford Federal Direct Loan Program authorized, or the Perkins Loan Program.[26] The Proposed Rule modifies §30.1(c)7 to clarify that Secretary may use, but is not required to use, Federal Claims Collection Standards (FCCS), which allows an agency to compromise a debt if the government cannot collect the full amount of the debt because:

- The debtor is unable to pay the full amount in a reasonable time, based on financial information;
- The government is unable to collect the debt in full within a reasonable time by enforced collection proceedings;
- The cost of collecting the debt does not justify the enforced collection of the full amount; or
- There is significant doubt concerning the government's ability to prove its case in court. [27]

This section is helpful when thinking about the various categories of waiver described in the Rule, but particularly salient to borrowers in IDR plans and whose balances have been subject to unjustified capitalized interest. Amendments to §30.70 make it clear that the Secretary is not bound by these

[22] HIGHER EDUCATION ACT, PUB. L. NO. 89-329, 79 STAT. 1219 (1965), codified as 20 U.S.C. §1082(a).
[23] *Id.* (Emphasis added).
[24] 20 U.S.C. § 1082(a)(4) (emphasis added) (FFELP); id. §1087hh(1) (emphasis added) (Perkins).
[25] *See* Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 BUFFALO L. REV. 281, 296, 395 (2020).
[26] 34 CFR 30.1(c)(6); 34 CFR Part 30; 34 CFR Parts 682 and 685
[27] 31 CFR parts 902 and 903, §902.2(a)

standards and there is no limitation to the amount that can be forgiven.

The Proposed Rule adds §30.80 which specifies that the Secretary may waive debts owed to the Department, either partially or in their entirety, describes the categories of loans eligible and enumerates the ways in which the authority to waive will be used.

Though the Secretary has full authority to do more, the Proposed Rule centers low to middle income borrowers through §30.81 by allowing a waiver of total accrued amounts over and above the amount the borrower owed at repayment. The greater financial benefit in the Proposed Rule goes to those most in need, those on IDR plans, who have already indicated their inability to make standard repayments and save the most on interest. This provision has the ability to transform the circumstances of lower income borrowers and opens the door to greater financial stability for them.

All borrowers who have experienced balance growth would be eligible for some relief under a §30.82 which allows for up to $20,000 over and above the amount owed at repayment, without limitations of income. It should be noted that §30.81 and §30.82 would be mutually exclusive.

Neither of these amendments is a giveaway, rather they are a course correction. This is because interest not required by statute was added to these borrower's balances all the way through July 1, 2023. This is far too long for actions that should never have taken place.

That said, we believe the Secretary could waive the total amount of unjustified capitalized interest for borrowers regardless of income. However, the Proposed Rule represents restraint in the use of authority, guided by prioritization of those most in need.

B. The Proposed Rule Is Consistent With *Biden v. Nebraska*, Which Simply Requires Specific Authority From Congress to Act.

The Proposed Rule is solidly in line with *Biden v. Nebraska*, as only existing, specified authority to waive or compromise debt endowed by Congress through the Higher Education Act is implicated. *Biden v. Nebraska* ruled that the Secretary of Education acted outside of the power of HEROES Act and was not authorized to enact a loan forgiveness program.

Biden notes that waiver "requires that Congress speak clearly before a Department Secretary can unilaterally alter large sections of the American economy."[28] Congress has spoken with the Higher Education Act which has given the Secretary the specific and clear power to waive, compromise or terminate collection of debts related to federal student loans.[29]

The Secretary is simply making right what went wrong somewhere along the way, which was borrowers being charged capitalized interest that Congress never spoke clearly to require via explicit statutory authorization.

C. The Proposed Rule Should Refund Any Interest Recapitalization On All Outstanding Loans If The Recapitalization Was Not Required By Statute.

The Department only very recently finalized regulations eliminating interest capitalization in instances where it is not statutorily required, such as when; (1) a borrower enters repayment, (2) exits forbearance,

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[28] *Biden* at 25.

[29] HIGHER EDUCATION ACT, PUB. L. NO. 89-329, 79 STAT. 1219 (1965), codified as 20 U.S.C. §1082(a).

(3) defaults, (4) after periods of negative amortization under the alternative and ICR plans on an annual basis, and (5) when a borrower who is repaying under either the Pay as You Earn (PAYE) or REPAYE income drive repayment plans fails to recertify income on time or chooses to leave the plan.[30]

There is a potentially exponential harmful effect of interest capitalization on borrowers. Not only is interest added to the principal, but interest accrues on the artificially increased balance.

Indeed, the fruit of the poison tree is a balance greater than the borrower owed when they started repayment. Calculations of the amount of waiver should take this into account. It is not an exaggeration to state that borrowers have been paying hundreds of dollars per month for 10 or 20 years yet owe more than when they started. As the Department has acknowledged, borrowers face the disheartening reality of paying the amount due to a servicer and falling further and further behind.

The Department of Education can and should go further. We suggest the Proposed Rule be amended to clarify that capitalized interest should be forgiven and the borrower should be placed in the position they had been but for the capitalized interest.

Waiver of interest capitalization could be a significant tool to address the existing racial and socio-economic disparities of student loan debt burden. For example, research by the Department,[31] Brookings Institution,[32] and other researchers[33] has shown that borrowers of color—and, specifically African American borrowers—are far more likely to owe more than they originally borrowed four years, and even ten years, after entering repayment. Specifically, Brookings' found that "nearly half (48 percent) of all black graduates owe more on their federal undergraduate loans at this point than they did at graduation, compared to just 17 percent of white graduates." The research went on to find that approximately one quarter of the total debt differences between white and black student loan borrowers could be specifically attributed to "differences in rates of repayment and interest accrual….[because] Black graduates are much more likely to experience negative amortization (interest accumulating faster than payments received)." These findings suggest that retroactive application of the Department's proposed interest capitalization policies could serve as a powerful tool to ameliorate the disproportionately harmful impacts of student debt burden on borrowers of color.

We firmly support the Administration's proposal and believe that these regulatory changes will have a positive impact on making student loan repayment more affordable for millions of borrowers and, as a result, reduce the overall likelihood of student loan defaults.

D. Conclusion

The Center for Responsible Lending applauds the Department of Education for this Proposed Rule. We believe this grant of authority under the HEA allows the agency broad discretion to develop a series of policies and programs that could give individual borrowers access to meaningful default mitigation or debt reduction programs because of their financial distress. Without strong regulations that enable broad access to relief, borrowers and taxpayers will continue to pay the high cost of what has

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[30] eCFR :: 34 CFR 685.202 -- Charges for which Direct Loan Program borrowers are responsible.
[31] 87 Fed. Reg. at 41,952.
[32] Judith Scott-Clayton and Jing Li, "Black-white disparity in student loan debt more than triples after graduation," Brookings (October 20, 2016), available at https://www.brookings.edu/wp-content/uploads/2016/10/ es_20 161020_scott-clayton_evidence_speaks.pdf
[33] Urvi Neelakantan, Black-White Differences in Student Loan Default Rates Among College Graduates | Richmond Fed (April 2023), available at https://www.richmondfed.org/publications/research/economic_brief/2023/eb_23-12#:~:text=Default%20rates%20differ%20markedly%20by,Black%20and%20White%20college%20graduates.

increasingly become an overwhelming, and at times, predatory, student loan market. Thank you for the opportunity to provide our thoughts on how the Department can use its authority to ensure that student loan repayment is both fair and affordable.

Sincerely,

The Center for Responsible Lending