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Public Interest Comment¹ on

The Department of Education's Proposed Rule

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

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The George Washington University Regulatory Studies Center

The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Department of Education's (ED) proposal to amend the regulations governing the Direct Loan Program does not represent the views of any particular affected party or special interest, but is designed to evaluate the effect of ED's proposal on overall consumer welfare.

Introduction

The Department published a final rule on November 1, 2016 which made substantive changes to its treatment of borrower defenses and other loan discharges (i.e., loan forgiveness for borrowers) related to its Federal Direct Loan Program. The final rule also broadened the agency's ability to recover losses directly from institutions resulting from approved borrower defenses. Finally, it expanded the conditions under which postsecondary schools would have to satisfy additional requirements to continue being eligible to be paid by borrowers using federal funds appropriated

¹ This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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under title IV of the Higher Education Act (HEA). This rule had an original effective date of July 1, 2017.

However, in response to the California Association of Private Postsecondary Schools (CAPP) court challenge to the 2016 final rule, ED issued both a final rule on June 16, 2017 delaying its implementation until further notice and a proposed rule to establish negotiated rulemaking committees to inform changes to its Federal Direct Loan Program.³ Additional regulatory actions taken by ED have further delayed the effective date until July 1, 2019.⁴

ED's current proposed rule would rescind a majority of the changes made by the 2016 rule which have not yet taken effect. Additionally, the proposed rule would make several new amendments to the regulations governing ED's Federal Direct Loan Program—with which schools have had to comply since 1992 to be eligible to be paid by student borrowers using federal funds appropriated under title IV of the Higher Education Act (HEA).⁵

ED estimates its proposed rule would have annual federal budget savings of \$1.27 billion over 10 years compared to changes from the 2016 rule that would otherwise go into effect on July 1, 2019 (i.e., in the absence of the proposed rule). That makes it a deregulatory action under Executive Order 13771 (E.O. 13771).⁶ The Department specifically requests comments on “complying with...Executive Orders 12866 and 13563 and their overall requirement of reducing regulatory burden that might result from these proposed regulations.”

³ Here, ED cited its authority under section 705 of the Administrative Procedure Act (APA) to postpone the effective date of its regulatory actions “[w]hen an agency finds that justice so requires...pending judicial review.” 82 FR 27621. Available at: <https://www.federalregister.gov/documents/2017/06/16/2017-12562/student-assistance-general-provisions-federal-perkins-loan-program-federal-family-education-loan>

⁴ Subsequent to the June 2017 final rule and proposed rule, ED issued an interim final rule (IFR) on October 24, 2017—citing its requirement under the Master calendar—which further delayed the effective date of the 2016 rule to July 1, 2018; on the same date it issued its IFR, ED also issued a notice of proposed rulemaking (NPRM) which further delayed the effective date until July 1, 2019 (citing the agency's inability to finalize negotiated rulemaking before November 1st of that year—i.e., the master calendar requirement). 82 FR 49114 Available at: <https://www.federalregister.gov/documents/2017/10/24/2017-22851/student-assistance-general-provisions-federal-perkins-loan-program-federal-family-education-loan>; 82 FR 49155. Available at: <https://www.federalregister.gov/documents/2017/10/24/2017-22850/student-assistance-general-provisions-federal-perkins-loan-program-federal-family-education-loan>. It is worth noting here the relevance of section 482 of the HEA, since its criteria set the effective date of regulatory changes affecting any programs under title IV of the HEA. According to 20 U.S.C. 1089, Master calendar: “any regulatory changes initiated by the Secretary...that have not been published in final form by November 1 prior to the start of the award year...shall not become effective until the beginning of the second award year after such November 1 date.” 20 U.S.C. 1089(c)(1).

⁵ Federal Student Aid, “A History of Direct Loans.” https://ifap.ed.gov/dlfsheets/doc0006_bodyoftext.htm

⁶ Executive Order 13771 of January 30, 2017 “Reducing Regulation and Controlling Regulatory Costs.” Available at: <https://www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02451.pdf>

Borrower Defense Regulations

Section 455(h) of the Higher Education Act of 1965 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” (i.e., conditions under which ED will provide partial or complete forgiveness of a borrower’s student loan debt).⁷ Section 487 of HEA provides “that the Secretary can take enforcement action against an institution participating in the Title IV, HEA programs that substantially misrepresents the nature of the institution’s education program, its financial charges, or the employability of its graduates.”⁸ According to ED:

The purpose of [its] borrower defense regulations is to protect student loan borrowers from misleading, deceitful, and predatory practices of, and failures to fulfill contractual promises by, institutions participating in the Department’s student aid programs.⁹

Currently, borrowers are able to assert borrower defense “if a cause of action would have arisen under applicable State law.”¹⁰ Both the 2016 final rule and the current proposed rule by ED contain criteria establishing a single federal standard under which the agency will process borrower defense claims. In both rules, the agency recognizes three categories of borrower defense claims: 1) false certification, 2) closed school discharge, and 3) substantial misrepresentation. False certification involves a school falsely certifying to ED that a borrower is eligible for federal aid; this also includes cases of identity theft.¹¹ Closed school discharge is available for borrowers who attended a school that closed while they were enrolled or who withdrew 120 days before the school closed.¹² The final category involves cases where institutions substantially misrepresent “the nature of [their] educational programs...financial charges...or the employability of its graduates.”¹³

The 2016 final rule codified two policy approaches with regards to processing borrower defense claims: 1) a group discharge process, and 2) automatic enrollment of borrowers. Group discharge involves ED grouping similar borrower defense claims (e.g., by school, year in attendance, etc.) and making a single decision which would apply across all cases. Automatic enrollment is an

⁷ Available at: http://legcounsel.house.gov/Comps/HEA65_CMD.pdf

⁸ *Ibid.*

⁹ “Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program.” Federal Register, Nov. 01, 2016: <https://www.federalregister.gov/d/2016-25448/p-8>

¹⁰ *Ibid.*, at page 12: <https://www.federalregister.gov/d/2016-25448/p-12>

¹¹ Available at: <https://www.studentloanborrowerassistance.org/loan-cancellation/school-related/false-certification/>

¹² Available at: <https://www.studentloanborrowerassistance.org/loan-cancellation/school-related/closed-school/>

¹³ *Supra*, at page 94: <https://www.federalregister.gov/d/2016-25448/p-94>

approach wherein ED opts-in borrowers who have not applied for borrower defense but who fit the criteria of a group discharge claim in process to be considered for loan forgiveness; these borrowers are notified by ED and given the ability to opt-out of being considered for loan forgiveness. Additionally, the rule also codified ED’s decision to process “affirmative” borrower defense claims (i.e., the agency would not force borrowers to wait until they were facing a collection action from ED to apply for relief). The agency decided to begin processing affirmative claims in 2015 partly as a result of the closure of Corinthian Colleges which contributed to the over 100,000 applications for borrower defense the agency received that year.¹⁴

Proposed Changes

Among the most significant proposed changes in the current rule are 1) expanding ED provision of debt relief (i.e., loan forgiveness) to include students enrolled at selective, non-profit institutions, 2) mandating public disclosure requirements for schools that make students sign pre-dispute arbitration agreements prior to enrollment, 3) expanding the categories of financial instruments schools may use to comply with ED’s financial protection requirements, 4) extending the window in which borrowers would qualify for a closed school discharge from 120 to 180 days while also proposing substantive changes to limit its scope, 5) rescinding changes made by the 2016 final rule to the definition of a “substantial misrepresentation,” and 6) eliminating ED’s use of group discharges and automatic enrollment when processing claims.

The Department also proposes to change its interpretation that it needs to regulate pre-dispute arbitration agreements “to protect the interests of the United States and promote the purposes” of the Direct Loan Program under Section 454(a)(6) of the HEA (i.e., the position ED took in its 2016 rule).¹⁵ Also, the agency seeks comment in the proposed rule on whether it should continue processing affirmative borrower claims. Finally, as previously noted, the proposed rule would also rescind most of the changes not yet in effect from ED’s 2016 final rule.¹⁶

This public comment focuses on four of the significant proposals noted above. It makes the case that two of ED’s substantive changes better comply with Executive Branch requirements that agencies “adopt a regulation only upon a reasoned determination that the benefits...justify its costs” relative to the *status quo* of its 2016 final rule.¹⁷ These include 1) rescinding the 2016 final rule’s definition of misrepresentation and 2) equal treatment of borrower defenses across for-profit

¹⁴ Available at: <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/proposed-institutional-accountability-regulations.doc>

¹⁵ 20 U.S.C. 1087d(a)(6). Available at: <https://www.gpo.gov/fdsys/pkg/USCODE-2017-title20/html/USCODE-2017-title20-chap28-subchapIV-partB-sec1087.htm>

¹⁶ 81 FR 75926. Available at: <https://www.federalregister.gov/documents/2016/11/01/2016-25448/student-assistance-general-provisions-federal-perkins-loan-program-federal-family-education-loan>

¹⁷ Executive Order 12866 of September 30, 1993 “Regulatory Planning and Review.” Available at: <https://www.gpo.gov/fdsys/pkg/WCPD-1993-10-04/pdf/WCPD-1993-10-04-Pg1925.pdf>

and non-profit schools. It also suggests that it is less clear that no longer accepting affirmative claims would comply with this same Executive requirement. Finally, this public comment notes that the agency’s proposal to eliminate the use of group discharges is not likely to reduce administrative burden that ED describes.

Rescinding Changes to the Definition of “Misrepresentation”

One of the key changes in the 2016 final rule was what it would consider school behavior that constituted a “substantial misrepresentation” to borrowers of its education program or the employability of its students. This term, which pre-dated the 2016 final rule, defines the conditions under which ED will approve a borrower defense claim and also initiate proceedings against schools to recover the costs of loan forgiveness. The Department is proposing to rescind the 2016 final rule’s changes to the definition of misrepresentation and retain the 34 CFR §668.71(c) definition of 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 deceive*.¹⁸

The 2016 final rule changed the word *deceive* to “mislead under the circumstances” and added the following sentence: “Misrepresentation includes any statement that omits information in such a way as to make the statement false, erroneous, or misleading.” I previously filed a public comment during the comment period for that proposed change in 2016 that noted the following issues:¹⁹

- The original language (“to deceive”) is more closely aligned with requiring proof that schools intentionally misrepresented the value of their education to students.
- These changes to the definition of misrepresentation created a lack of clarity for schools regarding how to comply.
- The changes would likely affect the efficiency and effectiveness with which ED administered its Direct Loan Program by significantly increasing the amount of borrower

¹⁸ Emphasis added.

¹⁹ Daniel R. Pérez, The George Washington University Regulatory Studies Center. “Public Interest Comment on the Department of Education’s Proposed Rule: Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program” August 1, 2016. Available at: <https://regulatorystudies.columbian.gwu.edu/public-comment-department-education%E2%80%99s-proposed-rule-student-assistance-general-provisions-federal>

defenses that were either 1) later ruled to be unsubstantiated or 2) approved by ED where schools might unreasonably bear the burden of discharges in situations where they made good-faith efforts to comply with ED regulations.

- ED has limited resources to direct towards the investigation of borrower defenses; the investigation of unsubstantiated cases against schools would necessarily shift resources away from borrowers looking for relief in cases where they had legitimately been defrauded.

The 2016 final rule estimated that its changes would impose an annual cost of between \$1.9 billion and \$3.5 billion. The majority of costs contained within ED's estimates were due to losses to taxpayers in cases where ED would not be able to successfully recover its losses from schools. The magnitude of these potential costs suggest the importance of maintaining the agency's ability to protect borrowers *defrauded* by schools while also limiting actions against schools to cases where there is *clear evidence of wrongdoing* such that ED's borrower defense regulations more closely follows E.O. 12866's requirement for an agency to:

...design its regulations in the most cost-effective manner...and propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.²⁰

The agency cited a case in its 2016 final rule that serves as an example of a borrower being provided relief based on a relatively more narrow interpretation of misrepresentation than the expanded definition in the 2016 rule. In *Moy v. Adelphi Inst., Inc.* the court stated that in order to claim fraud under the laws of the state of New York, a plaintiff must allege:

(1) that the defendant made a misrepresentation, (2) as to a material fact, (3) which was false, (4) and known to be false by the defendant, (5) that the representation was made for the purpose of inducing the other party to rely upon it, (6) that the other party rightfully did so rely, (7) in ignorance of its falsity, (8) to his injury.²¹

The fact that the court ruled in favor of the plaintiffs (borrowers) in this case demonstrates that ED's existing definition of misrepresentation is capable of protecting borrowers from the type of abuses that the HEA intends to prevent even though the Department requires a reasonable level of proof that a misrepresentation occurred. This ultimately reduces costs by granting loan forgiveness only when necessary and appropriate.

²⁰ *Supra*, at 5, §1(b)(5) and §1(b)(6).

²¹ *Moy v. Adelphi Inst., Inc.*, 866 F. Supp. 696, 706 (E.D.N.Y. 1994). Available at: <http://law.justia.com/cases/federal/district-courts/FSupp/866/696/1376278/>

Given that this approach is likely to reduce costs to the public while preserving benefits, the agency’s proposal to rescind its 2016 change to the definition of misrepresentation better complies with existing Executive regulatory requirements.

Rescinding Inequitable Treatment of Institutions by Type

Another substantive change in ED’s proposed rule is the Department’s decision not to assess the inherent quality of an institution solely based on its structure (e.g., for-profit or non-profit). In its 2016 final rule, ED exempted non-profit schools from several reporting requirements and mandatory triggers based on the agency’s assessment that they posed less risk than for-profit schools. Additionally, the 2016 final rule provided scenarios in which borrowers would not qualify for loan forgiveness—even in cases where selective, non-profit institutions were found to have misrepresented themselves to students to the detriment of borrowers—because “the borrower received a selective liberal arts education which represents the value that he could reasonably expect.”²²

As I pointed out in my 2016 public comment to the agency, ED’s decision to treat for-profit institutions differently was problematic for several reasons. First, although ED correctly pointed out that the default rate for students attending proprietary schools is higher than other institutions providing postsecondary education, it is also the case that the outstanding loan balances from this sector constitute a disproportionately smaller percentage of outstanding U.S. federal student loans.²³

The risk to borrowers and taxpayers from loans issued to attend public and private schools can be equivalent or greater when considering the magnitude of outstanding loans, even at relatively lower rates of default. Table 1 illustrates this point using the latest cohort default rates reported by ED.²⁴ The data here are instructive. Column 5 of this table illustrates that borrowers who attended for-profit schools present less risk than borrowers who attended non-profit schools (public and private). Even if the cohort default rate for borrowers attending for-profit schools increased by 250%, they would still present less exposure to risk than borrowers from the non-profit sector.

²² 81 FR 75926, Appendix A, example 6. Available at: <https://www.federalregister.gov/d/2016-25448/p-2187>

²³ Adam Looney and Constantine Yannelis, “A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attend Contributed to Rising Loan Defaults” Brookings Papers on Economic Activity, Fall 2015. Available at: <https://www.brookings.edu/wp-content/uploads/2016/07/PDFLooneyTextFallBPEA.pdf>

²⁴ Available at: <https://www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf>

Table 1: Comparison of Risk to Borrowers by School Type

School Type	Cohort Default Rate ²⁵	Total Outstanding Loan Balance (in billions) ²⁶	Risk Exposure ²⁷	Non profit vs. For profit Risk Exposure
Public	11.3%	\$597.50	\$67.52	\$102.02
Private	7.4%	\$466.20	\$34.50	
For-profit	15.5%	\$248.40	\$38.50	\$38.50

Second, it may be inappropriate to focus on for-profit schools even though their students have higher default rates relative to selective, non-profit institutions²⁸ due to the difficulty inherent in disentangling the various causal mechanisms responsible for these defaults. For example, scholars find that under certain assumptions it is likely that as much as 50% of student defaults are likely caused by socio-economic factors typical of “non-traditional” borrowers, who are more likely to attend proprietary colleges.²⁹

Finally, conditions that produce the greatest risk of default can shift over time; I suggested that ED write its regulations in a way that set consistent and clear rules for all institutions and provide an opportunity of borrowers attending both types of schools to bring claims of misrepresentation to the agency.

The agency’s proposed changes removing any *a priori* “assumptions about the inherent quality of [an] institution”³⁰ are an improvement to the approach taken by ED in its 2016 final rule.

Affirmative Claims

In its 2016 final rule, ED stated that it would allow borrowers to apply for borrower defense in affirmative cases. Under its current regulations (i.e., absent changes made by the 2016 rule which

²⁵ According to ED’s methodology: “For schools having 30 or more borrowers entering repayment in a fiscal year, the school’s cohort default rate is the percentage of a school’s borrowers who enter repayment on certain Federal Family Education Loans (FFELs) and/or William D. Ford Federal Direct Loans (Direct Loans) during that fiscal year and default (or meet the other specified condition) within the cohort default period.” Available at: <https://ifap.ed.gov/DefaultManagement/guide/attachments/CDRGuideCh2Pt1CDRCalculation.pdf>

²⁶ ED data available at: <https://studentaid.ed.gov/sa/about/data-center/student/portfolio>

²⁷ For the sake of analysis here, risk exposure provides a measure of the total amount of money that ED stands to lose assuming that everyone currently in default remains so. This produces an upper-bound estimate, but it is still useful for comparisons given its consistent treatment across school type.

²⁸ Stephanie R. Cellini and Latika Chaudhary “The Labor Market Returns to a Private Two-Year College Education,” NBER Working Paper No. 18343 August 2012 (revised April 2014). Available at: <http://www.nber.org/papers/w18343>

²⁹ *Supra*, at 22.

³⁰ Available at: <https://www.federalregister.gov/d/2018-15823/p-46>

have not yet become effective), a borrower may only seek a defense against repayment (e.g., loan forgiveness) in response to a collection action by ED. Under the 2016 final rule, borrowers would not have to wait to be in default to apply. In this proposed rule, the Department seeks comment on whether it should continue accepting affirmative borrower defense claims—the interpretation of its statutory authority that ED has taken since 2015—or whether it should revert back to the narrower interpretation that requires a borrower to wait until ED tried to collect.³¹ In addition, ED seeks public comment on how to “balance the need to serve borrowers with the need to limit unsubstantiated claims.”

There are at least three reasons that ED should retain borrowers’ ability to file affirmative claims with the agency: 1) restricting borrower defense to loans in collection would create incentives for borrowers who would otherwise work to avoid entering default to strategically enter into collection to qualify for borrower defense, 2) the status quo provides ED an opportunity to better comply with the requirements of E.O. 13563 by collecting evidence on its outstanding borrower defense claims to inform regulatory revisions, and 3) ED’s actions to rescind the change in the definition of misrepresentation made by the 2016 final rule already works to reduce the number of unsubstantiated claims while maintaining the Department’s efforts to protect borrowers.³²

Incentives for Strategic Default

Scholars studying strategic behavior of Countrywide borrowers using a difference-in-difference design estimated that a similar policy proposal in the mortgage sector increased the probability that borrowers defaulted by 13 percent. Additionally, the authors found that:

The borrowers whose estimated default rates increased the most in response to the program were those who appear to have been the least likely to default otherwise, including those with substantial liquidity available through credit cards and relatively low combined loan-to-value ratios.³³

Requiring borrowers to wait until they are facing collection action by ED is therefore likely to create the unintended consequence of a moral hazard problem—where borrowers who would otherwise work with the agency to avoid default would instead be incentivized to enter default to qualify for relief. In addition to the increased costs to the agency in the form of a reduction in student loan payments, this approach would likely generate additional costs to consumers whose

³¹ For instance, in 20 U.S.C. 1087e(h) under the Department’s current regulation at § 685.206(c), a borrower may assert a defense against repayment of a Direct Loan: “in response to a proceeding...to collect...”

³² Additionally, in this proposed rule ED maintains its standard of evidence for approving a claim: “a preponderance of the evidence.”

³³ Mayer et al. “Mortgage Modification and Strategic Behavior: Evidence From a Legal Settlement with Countrywide” NBER Working Paper 17065. Available at: <http://www.nber.org/papers/w17065.pdf>

credit scores and general availability to access credit may be negatively affected by a collection action by ED.³⁴

Expanding the Use of Evidence and Retrospective Review

Executive Order 13563 states that “agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” It “recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch.”³⁵

The proposed rule indicates that ED has over 107,000 outstanding borrower defense applications. Rather than risk unintended harm to borrowers by forcing them to wait for an ED collection action,³⁶ the Department could use this opportunity to better comply with E.O. 13563’s direction to “maintain a consistent culture of retrospective review and analysis.” Analyzing this data would also improve future regulations (i.e., rulemaking would benefit from a substantial amount of additional data on borrower defense outcomes).

Conducting more rigorous program evaluation of its outcomes related to the agency’s processing of borrower defense claims is consistent with a framework for producing evidence-based regulation (EBR).³⁷ Additionally, this addresses concerns raised by the U.S. Department of Education Office of Inspector General Report (OIG) recommendations submitted to ED’s Federal Student Aid (FSA) office on December 8, 2017.³⁸

Management needs quality information to make informed decisions and evaluate the entity’s performance in achieving objectives and addressing risks. Because FSA did not have ready access to current and complete information on borrower defense claims, FSA cannot ensure that the borrower defense process meets its objectives, management may be unable to make well-informed business decisions.³⁹

³⁴ Available at: <https://studentaid.ed.gov/sa/repay-loans/default/collections>

³⁵ Executive Order 13563 of January 18, 2011 “Improving Regulation and Regulatory Review.” Available at: <https://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>

³⁶ In the proposed rule ED states that eliminating affirmative claims could result in “unintended consequences, including damage to borrower credit scores, increased default collection costs for taxpayers, and increases to institutional cohort default rates.” (83 FR 37244).

³⁷ Peacock, Miller, and Pérez. “A Proposed Framework for Evidence-Based Regulation” The George Washington University Regulatory Studies Center. February 22, 2018. Available at: <https://regulatorystudies.columbian.gwu.edu/proposed-framework-evidence-based-regulation>

³⁸ U.S. Department of Education Office of Inspector General “Federal Student Aid’s Borrower Defense to Repayment Loan Discharge Process” December 8, 2017. ED-OIG IO4R0003. Available at: <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2018/i04r0003.pdf>

³⁹ *Ibid.* p. 27.

Proposed Changes to Misrepresentation Address the Issue of Unsubstantiated Claims

In the proposed rule, the department states it is concerned that accepting affirmative claims could lead to a large increase in the amount of unsubstantiated claims filed by borrowers:

For example, a borrower may attempt to seek loan forgiveness simply because he or she is dissatisfied with the education received or with his or her ability to get a particular job, rather than as a result of a *misrepresentation* by the institution. This situation could easily increase the burden on the Department of identifying legitimate claims among those that do not meet the defense to repayment standard... a borrower could be tempted to submit a claim whether or not he or she has been harmed.⁴⁰

However, as previously noted, the agency's proposal to rescind changes to the definition of misrepresentation already works to limit the number of unsubstantiated claims filed by borrowers. So, there is no need to remove borrowers' ability to file affirmative claims to address this particular issue (e.g., unsubstantiated claims). When ED published its 2016 proposed rule, the agency received numerous comments from institutions (both for- and non-profit schools) indicating that the existing statutory language defining misrepresentation struck the *correct* balance between providing a satisfactory level of protecting for defrauded students and protecting institutions from unsubstantiated claims. Several of these institutions pointed out that as long as the misrepresentation constituted a *willful* act, they would be protected from frivolous claims.⁴¹

In summary, the agency should retain borrowers' ability to file affirmative claims, and collect additional data to inform future rulemaking.

Effect on ED's Administrative Burden in Borrower Defense Processing

The agency also proposes to stop processing borrower defense claims using a group discharge process and stop automatically opting-in borrowers with similar characteristics into a borrower defense claim in cases where they did not apply. The agency also claims an unquantified benefit in its RIA as a result of a reduction in the agency's administrative burden related to these changes in processing defense to repayment applications.

⁴⁰ Emphasis added. Available at: <https://www.federalregister.gov/d/2018-15823/p-32>

⁴¹ See, for instance, the public comment submitted by the United Negro College Fund (UNCF), Thurgood Marshall College Fund (TMCf), and the National Association for Equal Opportunity in Higher Education (NAFEO). Available at: http://9b83e3ef165f4724a2ca-84b95a0dfce3f3b3606804544b049bc7.r27.cf5.rackcdn.com/production/PDFs/HBCU_Coalition_Letter_Re_Borrower_Defense_NPRM_7.29.16.pdf

IG Report Suggests Efficiency Gains Using Group Discharge

It is not clear that eliminating the use of group discharges would also reduce the agency’s burden in processing borrower defense claims—particularly in the context of large institutional collapses. For instance, in response to the collapse of Corinthian Colleges in 2015, ED changed its approach for processing claims such that borrowers who attended Corinthian would be eligible for loan forgiveness without requiring the agency to consider every case on an individual basis.

The 2017 IG report includes data on FSA’s borrower defense processing before and after its decision to process group discharges. These data indicate that ED was able to process roughly 316 claims per month prior to changing its approach and roughly 4,000 claims per month thereafter.⁴² Additionally, even accounting for differences in staff between these two periods—full-time attorneys plus any contracted staff—the data indicate that ED processed roughly 40 claims per staff member each month before the use of group discharges versus roughly 235 claims per staff member each month. These numbers indicate that, in certain contexts, there may be considerable efficiency gains—reductions in administrative burden—related to processing borrower claims as a group.⁴³

The agency should more thoroughly consider the net impact of its proposed rule on ED’s administrative burden as a result of processing borrower claims on a case-by-case basis.

Conclusion

This public comment provided insights on four of the significant changes in the Department’s proposed rule. It made the case that two of ED’s substantive changes better comply with E.O. 12866 requirements that agencies “adopt a regulation only upon a reasoned determination that the benefits...justify its costs” relative to the *status quo* of its 2016 final rule.⁴⁴ It also responded to ED’s request for comment on whether to continue accepting affirmative claims and suggested that the Department more thoroughly consider the net impacts of eliminating its use of group discharges. In summary:

- The Department’s proposal to rescind its 2016 change to the definition of misrepresentation better complies with existing Executive regulatory requirements.
- The Department’s decision to change its 2016 approach making *a priori* assumptions about the quality of non-profit and for-profit schools is also more consistent with Executive

⁴² Author’s calculations using data in Table 1 of the December 2017 IG report.

⁴³ It is less straightforward to disentangle the net effect on administrative burden of automatically opting-in borrowers to a group claim who did not originally apply for loan forgiveness. Nonetheless, in its proposed rule ED is choosing to end its policy of automatically opting-in borrowers.

⁴⁴ Executive Order 12866 of September 30, 1993 “Regulatory Planning and Review.” Available at: <https://www.gpo.gov/fdsys/pkg/WCPD-1993-10-04/pdf/WCPD-1993-10-04-Pg1925.pdf>

regulatory requirements. Additionally, ED's expanded provision of debt relief (e.g., loan forgiveness) to include students enrolled at selective, non-profit institutions generates additional benefits for borrowers attending these schools.

- ED should retain borrowers' ability to file affirmative claims, and collect additional data to inform future rulemaking.
- ED should more thoroughly consider the net impact of its proposed rules on ED's administrative burden as a result of processing borrower claims on a case-by-case basis.

READ THE AUTHOR'S PUBLIC INTEREST COMMENT on

Dept. of Education's proposed loan and assistance rule change from Aug. 2016.

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