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The Biden Administration's Student Loan Debt Relief Rulemaking

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SUMMARY

Outstanding Higher Education Act (HEA) Title IV federal student loan debt exceeds $1.6 trillion and is owed by about 45 million borrowers. In August 2022, the Biden Administration announced it would invoke the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to cancel, on a one-time basis, up to $20,000 in qualifying federal student loan debt for borrowers with adjusted gross incomes below specified thresholds. The Department of Education (ED) did not cancel any federal student loan debt under the HEROES Act policy, though, due to litigation challenging the Secretary of Education's (the Secretary's) authority to carry it out. The U.S. Supreme Court ultimately struck down the policy in *Nebraska v. Biden*.

R48156

August 15, 2024

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Hours after the Supreme Court's decision in *Nebraska*, the Biden Administration announced it would begin a negotiated rulemaking process (as required under the HEA) to consider extending student loan debt relief further than what is currently available. Rather than rely on the HEROES Act, the new effort would rest on a different asserted statutory authority: HEA Section 432(a)(6). That section authorizes the Secretary to "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired" under the Federal Family Education Loan program.

On April 17, 2024, ED published the first of two planned Notices of Proposed Rulemaking (NPRMs) deriving from the negotiated rulemaking process "to address the burden of Federal student loan debt." (ED stated that it would publish the second proposed rule from the negotiated rulemaking process "in the coming months.") Under the first NPRM, ED proposes eight instances in which the Secretary may waive qualifying ED-held federal student loan debt. These waivers are based on four themes, which entail waivers of loan amounts for borrowers who

1. owe more on their federal student loans than they did when their loans entered repayment;
2. have loans that first entered repayment about 20 or 25 years ago;
3. are eligible for existing loan discharge, cancellation, or forgiveness opportunities but who have not successfully obtained such benefits; or
4. obtained loans to attend poorly performing institutions of higher education (IHEs) or programs.

The Secretary also proposes to waive certain commercially held federal student loans in three narrower circumstances than would be available for ED-held loans. Waiver of loan amounts would be available based on (1) the time since a loan first entered repayment, (2) eligibility for a closed school discharge, and (3) attendance at a poorly performing IHE.

ED estimates that about 27.6 million borrowers would be eligible for some amount of debt relief under the proposed waivers. Although ED did not provide a grand total estimate for the costs associated with the waivers, ED's individual cost estimates for each proposed waiver sum to approximately $147 billion.

ED's efforts may raise several policy, administrative, and legal considerations. Policy considerations include whether the proposed regulations would be sufficiently targeted to meet intended objectives and associated cost implications for the federal government. Administrative considerations relate to whether waiver benefits might be successfully operationalized, including whether automating benefits administration is achievable given current statutory constraints. Finally, legal considerations include interpreting the scope of the Secretary's waiver authority, as well as whether any third party would be able to challenge student loan debt relief measures through litigation.

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Introduction

Outstanding federal student loan debt exceeds $1.6 trillion and is owed by about 45 million borrowers.[1] The primary federal student loan programs are those authorized under Title IV of the Higher Education Act (HEA) and administered by the Department of Education (ED).[2] They include the William D. Ford Direct Loan (Direct Loan) program, the Federal Family Education Loan (FFEL) program, and the Federal Perkins Loan program.[3] The federal government offers borrowers student loan debt relief, in the form of loan discharge, forgiveness, or repayment, in somewhat targeted circumstances. These include student loan debt relief provided based on borrower adversity (e.g., total and permanent disability, bankruptcy, or death); fulfillment of certain employment service requirements; or participation in an income-driven repayment (IDR) plan.[4] In general, these forms of student loan debt relief draw their authority from HEA provisions describing loan terms, conditions, and repayment plans, as well as from regulations implementing these statutory provisions.[5]

A different HEA provision has been the recent focus of efforts to extend student loan debt relief further: HEA Section 432(a)(6). Between October 2023 and February 2024, ED convened four sessions of its Student Loan Debt Relief Negotiated Rulemaking Committee (the Debt Relief Committee), consisting of ED staff and representatives of more than a dozen stakeholders involved in Title IV programs. The Debt Relief Committee provided input on draft regulations that described when the Secretary of Education (the Secretary) might waive all or a portion of a borrower's outstanding federal student loan debt under HEA Section 432(a)(6).[6] That provision authorizes the Secretary to "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired," under the FFEL program.[7] Ultimately, members of the Debt Relief Committee reached consensus (i.e., no dissent) on regulatory language to be proposed by ED in a subsequent Notice of Proposed Rulemaking (NPRM) but did not reach consensus on

[1] *Portfolio by Borrower Location and Age*, U.S. DEP'T OF EDUC, https://studentaid.gov/data-center/student/portfolio (last visited Aug. 5, 2024) (Follow "Portfolio by Age" hyperlink to see Federal Student Loan portfolio data as of March 31, 2024).

[2] Higher Education Act of 1965, 20 U.S.C. §§ 1001–1161aa-1.

[3] The William D. Ford Direct Loan (Direct Loan) program is the primary federal student loan program, comprising about 89% of all HEA Title IV student loan debt. *Federal Student Aid Portfolio Summary*, U.S. DEP'T OF EDUC, https://studentaid.gov/data-center/student/portfolio (last visited Aug. 5, 2024) (follow "Portfolio Summary" hyperlink to see amounts outstanding for each of the HEA Title IV loan programs). It is the only program under which loans are being made. Loans are no longer being made under the Federal Family Education Loan (FFEL) and Federal Perkins Loan programs. 20 U.S.C § 1071(d) (FFEL program); *id*. § 1087aa(b)(2) (Perkins Loan program). However, many of those loans are outstanding and borrowers remain responsible for repaying them.

[4] *See* CRS Report R45931, *Federal Student Loans Made Through the William D. Ford Federal Direct Loan Program: Terms and Conditions for Borrowers*, by Alexandra Hegji (June 26, 2023, version) and CRS Report R47837, *Service-Contingent Federal Student Loan Forgiveness and Loan Repayment Programs*, by Alexandra Hegji, Elayne J. Heisler, and Sylvia L. Bryan (Jan. 29, 2024, version).

[5] Student loans made under the Public Health Service Act (PHSA), such as Health Education Assistance Loans (HEALs), contain loan relief options that are similar to those described above (e.g., discharge due to a borrower becoming totally and permanently disabled). *See, e.g.*, 42 U.S.C. § 292m (authorizing discharge of HEAL program loans if a borrower becomes totally and permanently disabled).

[6] Transcript of Record at 6, U.S. Dep't of Educ., 2023 Negotiated Rulemaking: Student Loan Debt Relief Committee (Oct. 10, 2023, morning sess.) (statement of James Kvaal, Undersec'y of Educ.).

[7] 20 U.S.C. § 1082(a)(6).

other provisions.[8] The HEA does not constrain ED from including nonconsensus language in a proposed rule.[9]

On April 17, 2024, ED issued the first of two planned NPRMs deriving from the negotiated rulemaking to "address the burden of Federal student loan debt."[10] The proposed rule would authorize the "waive[r]" of qualifying ED-held federal student loans in eight circumstances and would provide for the waiver of certain FFEL program loans held by a private entity or guaranty agency (commercially held FFEL program loans) in three cases.[11] Several of the proposed waivers were based on the consensus language reached during the negotiated rulemaking sessions. Other portions of the proposed rule were presented to the Debt Relief Committee but did not receive consensus.

The second planned NPRM is expected to address instances in which the Secretary might waive student loan debt because of borrower hardship.[12] When it released its first proposed rule in April 2024, ED stated that its second proposed rule would be published "in the coming months."[13] This report addresses the first of the NPRMs only.

This report discusses the ongoing rulemaking effort, including the impetus for the rulemaking; key features of ED's NPRM; and policy, administrative, and legal considerations relating to the rulemaking.[14]

Student Loan Debt Relief Rulemaking Background

On August 24, 2022, the Biden Administration announced it would invoke the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to carry out a "one-time student loan debt relief policy" to "address the financial harms of the [COVID-19] pandemic for low- and middle-income borrowers."[15] Under the one-time student debt relief policy (HEROES Act policy), ED would have cancelled up to $10,000 in qualifying HEA Title IV federal student loan debt for borrowers with an adjusted gross income (AGI) in 2020 or 2021 of less than $125,000

[8] Debt Relief Committee members could abstain from voting for consensus on a particular provision. Abstentions were considered "the equivalent of not dissenting" and, therefore, did "not prevent consensus from being reached." Transcript of Record at 36–37, U.S. Dep't of Educ., 2023 Negotiated Rulemaking: Student Loan Debt Relief Committee (Oct. 10, 2023, morning sess.).

[9] *See id*. § 1098a(b)(2).

[10] U.S. Department of Education, Student Debt Relief for the William D. Ford Federal Direct Loan (Direct Loans), the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program, 89 Fed. Reg. 27564, 27565 (Apr. 17, 2024) [hereinafter *NPRM*].

[11] *Id.* at 27612–17.

[12] *See* U.S. DEP'T OF EDUC., CONSENSUS DRAFT REGULATORY TEXT FROM FEB, 23, 2024 1 (draft 34 C.F.R. § 30.91), https://www2.ed.gov/policy/highered/reg/hearulemaking/2023/student-loan-debt-relief-proposed-regulatory-text-session-3-clean-version-of-consensus.pdf.

[13] *Biden-Harris Administration Releases First Set of Draft Rules to Provide Debt Relief to Millions of Borrowers*, U.S. DEP'T OF EDUC. (April 16, 2024), https://www.ed.gov/news/press-releases/biden-harris-administration-releases-first-set-draft-rules-provide-debt-relief-millions-borrowers (last accessed Aug. 7, 2024).

[14] This report discusses NPRM provisions that would appear in a new Subpart G in Part 30 of Title 34 of the Code of Federal Regulations. This report also discusses NPRM provisions that would appear in Part 682 of Title 34, authorizing waiver of commercially held FFEL program loans. However, this report does not discuss the NPRM's proposals to make more limited amendments to other Part 30 provisions, outside of the new proposed Subpart G. *See, e.g.*, *NPRM*, 89 Fed. Reg. at 27613 (adding a severability provision, proposed 34 C.F.R. § 30.39, for Subpart C).

[15] *Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, WHITE HOUSE (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/ (last accessed Aug. 7, 2024).

(for individuals or married borrowers who filed federal income taxes separately) or $250,000 (for married couples filing jointly and certain other individuals). Qualifying borrowers who had received a Pell Grant would receive up to an additional $10,000 (for a total of up to $20,000) of cancellation.[16] The Administration estimated that more than 40 million borrowers (about 88% of all federal student loan borrowers at the time) would have been eligible for relief under the policy. About 20 million of these qualifying borrowers (about 44%) would have seen their full outstanding student loan balances cancelled.[17]

ED did not cancel any federal student loan debt under this policy due to litigation challenging the Secretary's statutory authority to carry out the policy. One such case, *Nebraska v. Biden*, reached the U.S. Supreme Court in December 2023, after a federal appellate court enjoined the policy pending appeal from a district court dismissal. On June 30, 2023, the Supreme Court entered its decision in *Nebraska*, ruling that the policy exceeded the Secretary of Education's statutory authority under the HEROES Act.[18]

Hours after the Supreme Court's decision, the Biden Administration announced its intention to begin a negotiated rulemaking to consider providing student loan cancellation benefits for certain federal student loans under asserted authority in Section 432(a) of the HEA.[19] Soon thereafter, ED established the Debt Relief Committee to develop proposed regulations. It met for four negotiating sessions beginning in October 2023 and concluding in February 2024.[20] On April 17, 2024, ED issued the first of two planned proposed rules deriving from the student loan debt relief negotiated rulemaking to "address the burden of Federal student loan debt."[21]

ED's undertaking of the rulemaking process under the HEA is related to the prior HEROES Act policy in that both efforts sought or seek to provide new loan cancellation benefits to borrowers through administrative action. However, there are fundamental differences between the two policies. First, ED has relied on different statutes as authority for the two efforts. Second, ED is undergoing a formal rulemaking process for its second effort, which it did not do for the HEROES Act policy. Both of these factors will be discussed in turn.

Statutory Authorities Compared

ED has relied on two different statutory authorities as the bases for its two loan cancellation policies: the HEROES Act and Section 432(a)(6) of the HEA.

The HEROES Act Debt Relief

The Biden Administration invoked the HEROES Act as its statutory authority for the proposed cancellation benefits of its HEROES Act policy. The statute authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance

[16] U.S. Department of Education, Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61513, 61514 (Oct. 12, 2022).

[17] CRS Report R47505, *Student Loan Cancellation Under the HEROES Act*, by Edward C. Liu and Sean M. Stiff, (Apr. 14, 2023, version).

[18] *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023).

[19] *FACT SHEET: President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers*, U.S. DEP'T OF EDUC. (June 30, 2023), https://www.ed.gov/news/press-releases/fact-sheet-president-biden-announces-new-actions-provide-debt-relief-and-support-student-loan-borrowers (last accessed Aug. 7, 2024).

[20] Negotiated Rulemaking Committee; Announcement of Fourth Session of Committee Meetings—Title IV Federal Student Aid Program, Student Debt Relief, 89 Fed. Reg. 7317, 7317–18 (Feb. 2, 2024).

[21] *NPRM*, 89 Fed. Reg. 27564, 27564 (proposed Apr. 17, 2024) (to be codified at 34 C.F.R. pts. 30, 682).

programs" under Title IV of the HEA "as the Secretary deems necessary" in connection with a war, other military operation, or national emergency to ensure that such aid recipients are "are not placed in a worse position financially" in relation to that aid.[22]

The HEROES Act of 2003 evolved from an earlier statute, the HEROES Act of 2001, enacted in response to the terrorist attacks of September 11, 2001. The earlier statute gave the Secretary similar authority for individuals affected by the national emergency declared for September 11, 2001, or a subsequent national emergency declared for a terrorist attack.[23] Before the authority provided in the HEROES Act of 2001 terminated,[24] Congress enacted the HEROES Act of 2003,[25] which was substantially similar to the prior statute.[26] However, under the newer statute, the Secretary may issue waivers or modifications in connection with any "national emergency," not only one that stemmed from a "terrorist attack" (as was the case under the 2001 law).[27] In its original form, the HEROES Act of 2003 would have ceased to be effective on October 1, 2005.[28] In 2005, Congress extended this date by two years.[29] It then made the statute's authorities permanent in 2007.[30]

HEA Section 432(a) and the Current Rulemaking

In developing regulations to waive all or a portion of a borrower's outstanding federal student loan debt under the rulemaking process, ED has primarily invoked Section 432(a)(6) of the HEA.[31] That paragraph—located in HEA Title IV, Part B, which authorizes the FFEL program—authorizes the Secretary to "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired," under the FFEL program.[32]

HEA Section 432's legislative history is scant. The National Defense Education Act of 1958 (NDEA) contained language nearly identical to that in HEA Section 432(a). The NDEA granted the Commissioner of Education[33] authority to "compromise, waive, or release any right, title,

[22] 20 U.S.C. § 1098bb(a)(2).

[23] Higher Education Relief Opportunities for Students Act of 2001, Pub. L. No. 107-122, § 2(a), 115 Stat. 2386, 2386 (2002).

[24] *Id*. § 6, 115 Stat. at 2389 (terminating the Secretary's authority on September 30, 2003).

[25] Pub. L. No. 108-76, 117 Stat. 904 (2003).

[26] *Compare* Pub. L. No. 107-122, § 2(a), 115 Stat. at 2386-87, *with* Pub. L. No. 108-76, § 2(a), 117 Stat. at 904–05.

[27] *See* 20 U.S.C. § 1098ee(4) ("The term 'national emergency' means a national emergency declared by the President of the United States.").

[28] Pub. L. No. 108-76, § 6, 117 Stat. at 908.

[29] Pub. L. No. 109-78, 119 Stat. 2043, 2043 (2005).

[30] Pub. L. No. 110-93, 121 Stat. 999, 999 (2007).

[31] One NPRM provision expressly invokes ED's authority "to waive debt that the Secretary is unable to collect in full under the standards prescribed in 31 U.S.C. 3711(d)." *NPRM*, 89 Fed. Reg. 27564, 27614 (proposed Apr. 17, 2024) (to be codified at 34 C.F.R. pts. 30, 682) (proposed 34 C.F.R. § 30.81(a)). These "standards" include "regulations prescribed by the head of the agency." 31 U.S.C. § 3711(d)(1). The standards also include the Federal Claims Collection Standards (FCCS), rules jointly promulgated by the Departments of the Treasury and Justice. *See id*. § 3711(d)(2) (stating that an agency head "acts under standards that the Attorney General, the Secretary of the Treasury [sic], may prescribe"); *see also* 31 C.F.R. chap. IX (2024). The FCCS do not foreclose "agency disposition of any claim"—that is, a debt—"under statutes and implementing regulations" other than chapter 37 of Title 31 of the *U.S. Code* and the FCCS. 31 C.F.R. § 900.4 (2024).

[32] 20 U.S.C. § 1082(a)(6).

[33] The Commissioner of Education led the Office of Education (OE) within the then-U.S. Department of Health, Education, and Welfare (HEW). Congress later transferred OE functions to the Secretary of Education and the newly created Department of Education (ED). *See* Department of Education Organization Act, Pub. L. No. 96-88, § 301, 93 Stat. 668, 677 (1979).

claim, or demand, however arising or acquired under this title."[34] The NDEA's legislative history did not discuss this authority.

When Congress then enacted the HEA in 1965, the statute contained Section 432(a)(6) in its current form.[35] As with the NDEA, the HEA's legislative history did not discuss this authority. Since the HEA's enactment, the Secretary has not promulgated regulations further defining ED's Section 432 authority under key statutory verbs like "waive."

Procedures Compared

ED has used two procedures to pursue student loan debt relief: (1) an informal process of "notice" for the HEROES Act policy[36] and (2) the more formal process of HEA negotiated rulemaking and "notice-and-comment" rulemaking under the Administrative Procedure Act (APA) for its ongoing student loan debt relief rulemaking.[37]

"Notice" Under the HEROES Act

The HEROES Act generally exempts the waivers and modifications it authorizes from two procedural requirements. First, while HEA Section 492 requires that ED use negotiated rulemaking procedures (detailed below) to develop proposed regulations "pertaining to" HEA Title IV,[38] the HEROES Act states that HEA Section 492 "shall not apply to the waivers and modifications authorized or required" by the Act.[39] Second, while the Secretary must publish "notice" of authorized waivers and modifications in the *Federal Register*,[40] the waivers and modifications need not undergo notice-and-comment rulemaking under the APA.[41]

Secretary Miguel Cardona used these procedural exemptions to establish the HEROES Act policy. On August 24, 2022, he first announced the policy,[42] and on October 12, 2022, he published a notice of the policy in the *Federal Register*.[43] The policy did not undergo negotiated or notice-and-comment rulemaking.

[34] Pub. L. No. 85-864, § 209(a), 72 Stat. 1580, 1587 (1958). Congress may have derived this language from the Servicemen's Readjustment Act of 1944, commonly known as the GI Bill, whose list of waiver-related verbs mirrors that of HEA Section 432(a)(6). *See* Act of Dec. 28, 1945, ch. 588, § 8, 59 Stat. 623, 631 (amending the GI Bill to permit the Administrator of the Veterans' Administration to "[p]ay, compromise, waive or release any right, title, claim, lien or demand, however acquired, including any equity or any right of redemption" acquired under certain veteran loan programs).

[35] *See* Higher Education Act of 1965, Pub. L. No. 89-329, § 432(a), 79 Stat. 1219, 1246.

[36] 20 U.S.C. § 1098bb(b)(1).

[37] 5 U.S.C. § 553(b).

[38] 20 U.S.C. § 1098a(b)(2).

[39] *Id.* § 1098bb(d).

[40] 5 U.S.C. § 553(b).

[41] 20 U.S.C. § 1098bb(b); *see also* CRS In Focus IF10003, *An Overview of Federal Regulations and the Rulemaking Process*, by Maeve P. Carey (2021).

[42] Press Release, U.S. Dep't of Educ., Biden-Harris Administration Announces Final Student Loan Pause Extension Through December 31 and Targeted Debt Cancellation to Smooth Transition to Repayment (Aug. 24, 2022), https://www.ed.gov/news/press-releases/biden-harris-administration-announces-final-student-loan-pause-extension-through-december-31-and-targeted-debt-cancellation-smooth-transition-repayment.

[43] Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61513 (Oct. 12, 2022).

Negotiated Rulemaking and the Current Rulemaking

ED initiated the current student loan debt relief rulemaking under HEA Section 492, which generally requires that regulations pertaining to HEA Title IV "be subject to a negotiated rulemaking."[44] In July 2023, ED invited and received public comment on student loan debt relief.[45] It then created the Debt Relief Committee,[46] made up of ED representatives and nonfederal negotiators (i.e., individuals nominated to represent stakeholders involved in the Title IV programs).[47] The Debt Relief Committee aimed "to obtain consensus on proposed regulations," with consensus defined as "no dissent by any negotiator for the committee."[48] ED agreed that it would use the consensus-based language in its proposed regulations.[49]

The Debt Relief Committee met virtually for four negotiating sessions between October 2023 and February 2024.[50] After negotiating the content of draft regulatory text, the Debt Relief Committee took consensus votes on individual parts of the text. This process allowed the committee to reach consensus on parts of the draft regulation but did not require consensus on all parts of the text.[51] In general, the parts presented for separate consensus votes related to discrete circumstances in which student loan borrowers might be provided with a debt relief benefit. By the end of the fourth negotiating session, the Debt Relief Committee had reached consensus on some, but not all, parts of the proposed rule.

After negotiated rulemaking, on April 17, 2024, ED published in the *Federal Register* an NPRM containing proposed regulations.[52] The NPRM is the first of two planned proposed rules deriving from the negotiated rulemaking.[53] Some, but not all, of the NPRM's waiver provisions are based

[44] 20 U.S.C. § 1098a(b)(1)–(2). For more information about negotiated rulemaking, see CRS Report R46756, *Negotiated Rulemaking: In Brief*, by Maeve P. Carey (Apr. 12, 2021, version).

[45] *See* Negotiated Rulemaking Committee; Public Hearing, 88 Fed. Reg. 43069, 43069 (July 6, 2023).

[46] For a list of Student Loan Debt Relief Committee (Debt Relief Committee) members, see *Negotiated Rulemaking for Higher Education 2023-2024, Student Loan Debt Relief*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/highered/reg/hearulemaking/2023/index.html?src=rn#gen (last visited June 10, 2024).

[47] The HEA lists examples of stakeholders that might participate in a Title IV negotiated rulemaking. They include "individuals and representatives of the groups involved in student financial assistance programs under [Title IV], such as students, legal assistance organizations that represent students, institutions of higher education, State student grant agencies, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection agencies." 20 U.S.C. § 1098a(a)(1).

[48] *See* U.S. DEP'T OF EDUC., 2023 NEGOTIATED RULEMAKING STUDENT LOAN DEBT RELIEF COMMITTEE ORGANIZATIONAL PROTOCOLS, REVISED 1–2 (2023) [hereinafter U.S. DEP'T OF EDUC., PROTOCOLS], https://www2.ed.gov/policy/highered/reg/hearulemaking/2023/revised-student-loan-debt-relief-committee-protocols.pdf.

[49] *Id.* at 2. The protocols qualified this agreement by stating that ED would "act in good faith regarding the consensus reached and will not substantively alter the consensus-based language . . . unless the Department reopens the negotiated rulemaking process or provides a written explanation to the negotiators regarding why it has decided to depart from the language." *Id.*

[50] The sessions were generally publicly livestreamed, although, several *caucuses* occurred. When ED participated in a caucus, the full Debt Relief Commission's discussions were paused while ED met in closed session with selected Committee members. *See, e.g.*, Transcript of Record at 6–7, U.S. Dep't of Educ., 2023 Negotiated Rulemaking: Student Loan Debt Relief Committee (Nov. 6, 2023, afternoon sess.) (requesting caucus for "clarification about the Department's existing authority under" certain existing loan forgiveness, cancellation, and discharge programs). Additionally, members of the public were allowed to provide public comment to the Debt Relief Committee during its sessions. *See* U.S. DEP'T OF EDUC., PROTOCOLS, *supra* note 48, at 4.

[51] *See* U.S. DEP'T OF EDUC., PROTOCOLS, *supra* note 48, at 2.

[52] *NPRM*, 89 Fed. Reg. 27564, 27612–17 (proposed Apr. 17, 2024) (to be codified at 34 C.F.R. pts. 30, 682).

[53] In April 2024, ED stated it would publish the "second draft rule . . . in the coming months." Press Release, U.S. (continued...)

on the consensus language reached during the negotiated rulemaking. Pursuant to the APA's rulemaking requirements, members of the public had a chance to comment on the NPRM.[54] ED is reviewing the public comments; the APA requires federal agencies to "consider and respond to significant comments received during the period for public comment" when finalizing a rule.[55]

Under HEA Section 482(c)(1), ED must publish a regulation affecting the HEA Title IV programs by November 1 for it to take effect the next award year. [56] An award year begins on July 1 and ends on June 30 of the next year.[57] Thus, for a final rule to take effect on July 1, 2025, ED generally would have to publish the rule by November 1, 2024. However, the Secretary may designate any Title IV final rule published after November 1 for voluntary early implementation (i.e., implementation before the effective date that Section 482 would otherwise prescribe) by entities subject to the final rule.[58] In April 2024, ED stated it "aims to finalize [the] rules in time to start delivering relief this fall."[59]

The Proposed Regulations

In the April 17, 2024, NPRM, ED proposes new forms of student loan debt relief. These provisions would form a new Subpart G in ED's debt collection regulations, Part 30 of Title 34 of the *Code of Federal Regulations*.[60] Under the proposed regulations, Subpart G would contain regulations on the "waiver of Federal student loan debts."[61] The first proposed regulatory provision, 34 C.F.R. § 30.80, would introduce the new subpart. It would state that, under the conditions included in the new Subpart G, the Secretary "may waive all or part of any debts owed to the Department" under the Direct Loan, FFEL, and Perkins Loan programs, as well as under the Health Education Assistance Loan program authorized under the Public Health Service Act.[62] In other words, Subpart G would describe waivers for federal student loans held by ED.[63] Not all

Dep't of Educ., Biden-Harris Administration Releases First Set of Draft Rules to Provide Debt Relief to Millions of Borrowers (Apr. 16, 2024), https://www.ed.gov/news/press-releases/biden-harris-administration-releases-first-set-draft-rules-provide-debt-relief-millions-borrowers.

[54] *See* 5 U.S.C. § 553(c).

[55] Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015).

[56] 20 U.S.C. § 1089(c)(1).

[57] *Id.* § 1088(a)(1).

[58] *Id.* § 1089(c)(2) (stating that the Secretary may designate a Title IV regulatory provision published in final form after November 1 "as one that an entity subject to the provision may, in the entity's discretion, choose to implement prior to" July 1 of the second subsequent award year).

[59] Press Release, U.S. Dep't of Educ., Biden-Harris Administration Releases First Set of Draft Rules to Provide Debt Relief to Millions of Borrowers (Apr. 16, 2024), https://www.ed.gov/news/press-releases/biden-harris-administration-releases-first-set-draft-rules-provide-debt-relief-millions-borrowers.

[60] *NPRM*, 89 Fed. Reg. 27564, 27612 (proposed Apr. 17, 2024) (to be codified at 34 C.F.R. pts. 30, 682).

[61] *Id.* at 27614.

[62] *Id.* HEAL program loans were made with private (i.e., nonfederal) capital, and the federal government guarantees them against loss due to borrower default, death, permanent disability, and, in limited circumstances, bankruptcy. *See, e.g.*, 42 U.S.C. § 292d. Although Congress terminated authority to insure new HEAL program loans after September 30, 1998, program loans remain outstanding. HEAL program loans may be held by private lenders or ED. *See id.* § 292a(a). The Department of Health and Human Services (HHS) originally administered the program, but the Consolidated Appropriations Act, 2014 transferred administration of the program to ED. *See* Pub. L. No. 113-76, div. H, § 525, 128 Stat. 5, 413 (2014). For additional information, see CRS Report R46720, *Student Loan Programs Authorized by the Public Health Service Act: An Overview*, by Elayne J. Heisler and Alexandra Hegji (Mar. 16, 2021, version).

[63] *NPRM*, 89 Fed. Reg. at 27614.

federal student loans are held by ED, though.[64] The NPRM would also amend Part 682 of Title 34 of the *Code of Federal Regulations* to specify more limited circumstances in which the Secretary may provide for the waiver of commercially held FFEL program loans.[65] The NPRM does not, however, specify circumstances in which the Secretary may provide for the waiver of institutionally held Perkins Loans or commercially held HEAL program loans.

The NPRM provides special treatment for a category of federal student loans: consolidation loans. Direct Consolidation Loans allow individuals who have borrowed at least one Direct Loan program or FFEL program loan to borrow a new loan and use its proceeds to pay off their existing federal student loan obligations. Before July 2010, FFEL program Consolidation Loans allowed similar refinancing of existing qualifying federal student loans. Under the waivers proposed in the NPRM, the Secretary would gauge whether a Consolidation Loan qualifies for particular waivers by considering the disbursement and repayment histories of the loans that the Consolidation Loan repaid.

The Office of Information and Regulatory Affairs has designated the NPRM as a major rule under the Congressional Review Act.[66]

The NPRM's waiver proposals are discussed below.

Proposed Waivers of ED-Held Loans

ED has proposed eight instances in which the Secretary may waive ED-held federal student loan debt. In general, the waivers are based on four themes, which entail waivers of loan amounts for borrowers who

1. currently owe more on their federal student loans than when their loans entered repayment (growing loan balance);[67]
2. have loans that first entered repayment about 20 or 25 years ago, depending on the type of loan;[68]
3. are eligible for existing loan discharge, cancellation, or forgiveness opportunities but who have not successfully obtained such benefits;[69] or
4. obtained loans to attend poorly performing institutions of higher education (IHEs) or programs.[70]

[64] *See, e.g.*, Fed. Student Aid Data Ctr., U.S. Dep't of Educ., Location of Federal Family Education Loan Program Loans (2024), https://studentaid.gov/sites/default/files/fsawg/datacenter/library/LocationofFFELPLoans.xls.

[65] *NPRM*, 89 Fed. Reg. at 27616.

[66] *Id.* at 27587. For additional information on the Congressional Review Act, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis (Nov. 12, 2021, version).

[67] *See infra* "Waivers Based on Growing-Loan-Balance (Proposed 34 C.F.R. §§ 30.81 and 30.82)."

[68] *See infra* "Waiver Based on Date on Which Loan Entered Repayment (Proposed 34 C.F.R. § 30.83)."

[69] *See infra* "Waivers Based on Existing Loan Discharge, Cancellation, or Forgiveness Opportunities (Proposed 34 C.F.R. §§ 30.84 and 30.85)."

[70] *See infra* "Waivers Based on Poorly Performing IHEs or Programs (Proposed 34 C.F.R. §§ 30.86-30.88)."

Waivers Based on Growing-Loan-Balance (Proposed 34 C.F.R. §§ 30.81 and 30.82)

Borrowers of Title IV loans typically first enter repayment following a six-month grace or deferment period.[71] For certain borrowers, their original loan balances—roughly speaking, the amounts they owe upon entering repayment—will then diminish over time as ED applies payments to their accounts. In general, ED applies payments first to accrued charges and collection costs, then to outstanding interest, and finally to outstanding principal.[72] Other borrowers, though, may see their balances grow over time, including borrowers who make the payments required by their repayment plans. For example, under an IDR plan, a borrower's monthly payment is capped at a percentage of their discretionary income.[73] This approach to calculating monthly payments can lead to some borrowers experiencing *negative amortization*, which occurs if the borrower's required monthly payment is less than the interest that accrues that month. Thus, a borrower whose loan is in negative amortization sees their loan balance grow from month to month.[74]

Some borrowers may see their loan balances grow as the result of *interest capitalization*. Interest capitalization occurs when a lender adds to the outstanding principal balance of a loan interest that has accrued but not been paid by the borrower. After capitalization, interest begins to accrue on the new, larger balance. ED capitalizes interest when, for example, a borrower exits a deferment period.[75] Even if a borrower's loan is not in negative amortization—because their required monthly payment is at least equal to the interest that accrues in that same month—a prior instance of interest capitalization could result in their loan balance being greater than it was when the loan first entered repayment.

In either scenario, in colloquial terms, borrowers' loan balances "grow" while they are repaying their loans. ED has proposed two waivers to address such growing loan balances. One waiver would be available to borrowers with growing loan balances who are enrolled in an IDR plan (IDR Growing-Loan-Balance Waiver).[76] The other waiver would be available to borrowers with

[71] *See, e.g.*, 34 C.F.R. § 685.207(c)(2)(i) (2024) (providing a six-month grace period after a borrower ceases to be enrolled on at least a half-time basis for Direct Unsubsidized Loan borrowers); *id.* § 685.204(c)(1)(i) (providing a six-month deferment after a borrower ceases to be enrolled on at least a half-time basis for student Direct PLUS loan borrowers).

[72] *Id.* § 685.211(a)(1)(i). Under the income-based repayment (IBR) plan, the Secretary applies payments in a slightly different manner: first to accrued interest, then to collection costs, to late charges, and finally to loan principal. *See id.* § 685.211(a)(1)(ii). In July 2023, ED promulgated a final rule that changed how payments are applied under the IDR plans, but ED is enjoined from implementing SAVE plan provisions while litigation challenging the plan continues. Missouri v. Biden, No. 24-2332, 2024 WL 3738157, *4 (8th Cir. Aug. 9, 2024) (per curiam).

[73] Discretionary income is the portion of income that is not protected from consideration for loan repayment; it is defined as the amount by which a borrower's adjusted gross income (AGI) exceeds a specified multiple of the federal poverty level (e.g., 150%, 225%). *See* 34 C.F.R. § 685.209(b) (2024) (explaining how discretionary income is defined for different IDR plans). If a borrower's AGI is less than the applicable multiple of federal poverty level, their IDR plan monthly payment is $0. *See id.*

[74] CRS Report R47196, *Federal Student Loan Debt Cancellation: Policy Considerations*, coordinated by Alexandra Hegji, 24 n.56 (July 27, 2022, version).

[75] *See, e.g.*, 20 U.S.C. § 1087e(f)(1)(B). A *deferment* is a temporary period during which a borrower's obligation to make regular monthly payments of principal and interest is suspended. For some types of loans, interest continues to accrue during periods of deferment. *See* 20 U.S.C. § 1087e(f). For more information about deferment, see Hegji, *supra* note 4.

[76] *See infra* "IDR Growing-Loan-Balance Waiver (Proposed 34 C.F.R. § 30.81)."

growing loan balances who are not enrolled in an IDR plan (Non-IDR Growing-Loan-Balance Waiver).[77]

IDR Growing-Loan-Balance Waiver (Proposed 34 C.F.R. § 30.81)

Proposed 34 C.F.R. § 30.81[78] would authorize the Secretary to waive, once per borrower, the full amount by which each of the borrower's outstanding loan balances exceeds the following:

1. For loans that were *disbursed before January 1, 2005* (other than Parent and Graduate PLUS Loans), the original principal balance of the loan;[79]
2. For loans that were *disbursed on or after January 1, 2005* (other than Parent and Graduate PLUS Loans),[80] the balance of the loan on the day after its grace period ends;[81]
3. For Parent and Graduate PLUS Loans, the balance of the loan *the day after the loan was fully disbursed*; or
4. For Consolidation Loans, the *amounts determined under 1-3 above*, as applicable, for all loans repaid by the Consolidation Loan.[82]

A borrower would be eligible for this waiver if the borrower was enrolled in an IDR plan "as of a date determined by the Secretary" and if their AGI (or other calculation of income from documentation acceptable to the Secretary) shows that their annual income is less than (1) $120,000 for individuals or married borrowers who file federal income taxes separately; (2) $180,000 for individuals filing as heads of household; or (3) $240,000 for married couples filing jointly.[83]

The text of the proposed rule invokes ED's authority "to waive debt that the Secretary is unable to collect under" the Federal Claims Collections Standards (FCCS) and ED's other debt collection regulations, rather than HEA Section 432 expressly.[84] ED states that its intention with this waiver is to address "excessive interest accrual," the primary driver of which is a borrower's payments under an IDR plan that do not cover the full amount of accumulated interest.[85] Evidently tying growing loan balances to collectability concerns, ED asserts that growing loan balances

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[77] *See infra* "Non-IDR Growing-Loan-Balance Waiver (Proposed 34 C.F.R. § 30.82)."

[78] *NPRM*, 89 Fed. Reg. 27564, 27614 (Apr. 17, 2024).

[79] ED would determine the original principal balance of a loan "based on the original amount disbursed." *Id.* at 27571.

[80] ED proposes to treat loans disbursed before and after January 1, 2005, differently due to "data limitations that make it impossible to accurately ascertain the balance upon entering repayment for loans disbursed before January 1, 2005." *Id.* at 27573.

[81] FFEL program and Direct Loan program Subsidized and Unsubsidized Loans and Direct Consolidation Loans made before July 1, 2005, have a *grace period*, which is a six-month period that begins immediately after a borrower first ceases to be enrolled in an eligible school on at least a half-time basis. During the grace period, a borrower is not required to make payments on a loan. For Subsidized Loans and the portion of a Direct Consolidation Loan that repaid a Subsidized Loan, interest does not accrue during the grace period. *See, e.g.*, 34 C.F.R. § 685.207(b)(1) (2024).

[82] *NPRM*, 89 Fed. Reg. at 27614.

[83] *Id.*

[84] *Id.* However, ED's *summary* of the rule cites to only Section 432(a) of the HEA. *See id*. at 27571 (listing asserted statutory authority).

[85] *Id.* ED separately issued a final rule that has the effect of preventing debt balances from growing for borrowers enrolled in the new Saving on a Valuable Education (SAVE) repayment plan. ED will not charge borrowers enrolled in the SAVE repayment plan any accrued interest that remains unpaid after it applies the borrower's monthly payment (including a $0 monthly payment as calculated under the plan). U.S. Department of Education, Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education (FFEL) Program, 88 Fed. Reg. 43820, 43902 (Jul. 10, 2023) (to be codified at 34 C.F.R. pts. 682, 685).

undermine its ability to collect federal student loan debts. It states that a borrower's experience of seeing their loan balances increase while making required monthly payments can "lead to negative psychological impacts on borrowers who are attempting to repay their debt but are unable to, including that they lose hope and motivation to repay their debt."[86] ED appears to argue, in part, that waiving the amounts by which a borrower's loan balance exceeds the amount owed when the loan entered repayment—the growing-loan-balance amount—will improve collection of the remaining balance by avoiding these negative psychological impacts.[87]

Non-IDR Growing-Loan-Balance Waiver (Proposed 34 C.F.R. § 30.82)

Proposed 34 C.F.R. § 30.82 would authorize the Secretary to waive, once per borrower, the lesser of $20,000 or the amount by which each of the borrower's loans' outstanding balances exceeds the initial balance amounts described in items 1-4 under "IDR Growing-Loan-Balance" above, as applicable.[88]

The non-IDR growing-loan-balance waiver in proposed 34 C.F.R. § 30.82 is broader in some ways and narrower in others than its IDR counterpart in proposed 34 C.F.R. § 30.81. The waiver is broader in that all borrowers with qualifying growing debt balances would be eligible for a waiver, regardless of their repayment plan or income.[89] The waiver is narrower, though, because it would be limited to $20,000 of a borrower's growing-loan-balance amount, whereas proposed 34 C.F.R. § 30.81 would allow waiver of all of a borrower's growing-loan-balance amounts.[90] Borrowers who received a waiver of their student loan debt under the IDR Growing-Loan-Balance Waiver would not be eligible for this waiver.[91] Unlike the IDR Growing-Loan-Balance Waiver, the text of the proposed rule does not invoke authority "to waive debt that the Secretary is unable to collect under" the FCCS and ED's other debt collection regulations.[92]

ED expresses similar rationales for both growing-loan-balance waivers—reducing the negative psychological impacts of growing balances on borrowers.[93] However, ED explains that it would limit the proposed non-IDR Growing-Loan-Balance Waiver to $20,000 because ED does "not believe it would be appropriate to provide uncapped relief" through a waiver that would be available for all growing-loan-balance borrowers (i.e., available to all borrowers absent other eligibility criteria such as an income cap).[94] ED states that an uncapped benefit could provide an "unnecessary windfall" to some borrowers.[95] ED explains that the $20,000 cap "represents the 90th percentile of the amount by which balances exceed what borrowers originally owed upon entering repayment."[96] In other words, 90% of borrowers with growing loan balances have less

[86] *NPRM*, 89 Fed. Reg. at 27571.

[87] *See id* at 27572.

[88] *Id.* at 27614; *see also* notes 79–82 and accompanying text.

[89] *Compare NPRM*, 89 Fed. Reg. at 27614 (proposed 34 C.F.R. § 30.82) (containing no IDR or income eligibility criteria for waiver), *with id.* (proposed 34 C.F.R. § 30.81) (limiting waiver to borrowers enrolled in an IDR plan with income less than or equal to stated amounts).

[90] *Compare id.* (proposed 34 C.F.R. § 30.82) (authorizing waiver of the "the lesser of $20,000" or the borrower's growing-debt balance for each loan), *with id.* (proposed 34 C.F.R. § 30.81) (authorizing waiver of the entire amount of a borrower's growing-loan balance for each loan).

[91] *Id.*

[92] *Id.*; *see also id.* at 27575 (citing HEA Section 432(a) as asserted statutory authority for the waiver).

[93] *Id.* at 27574.

[94] *Id.* (referring to proposed 34 C.F.R. § 30.82 as a "universal benefit").

[95] *Id.*

[96] *Id.*

than a $20,000 loan balance increase. These borrowers would have all of that growing loan balance waived, either through the uncapped waiver in proposed 34 C.F.R. § 30.81 (the IDR Growing-Loan-Balance Waiver) or through the capped waiver in 34 C.F.R. § 30.82 (the non-IDR Growing-Loan-Balance Waiver). The remaining 10% of growing-loan-balance borrowers—those with a growing loan balance that exceeds $20,000—could still benefit from the NPRM's waivers. However, borrowers in this latter category would only have their entire growing loan balance waived if they qualified under proposed 34 C.F.R. § 30.81 or another NPRM provision that would authorize waiver of all amounts owed.

Waiver Based on Date on Which Loan Entered Repayment (Proposed 34 C.F.R. § 30.83)

The HEA and its implementing regulations provide borrowers with several options to manage student loan debt repayment. These options include several repayment plans, some of which have maximum repayment periods that may be as long as 30 years.[97] The options also include deferment and forbearance, which allow borrowers to temporarily suspend making monthly payments on their loans.[98] These options, as well as time spent in default, may result in some borrowers owing balances on their loans for extended time periods.

Proposed 34 C.F.R. § 30.83 would authorize the Secretary to waive the outstanding balance of loans that first entered repayment on or before July 1, 2005 (if a borrower is repaying *only* loans received for undergraduate study), or on or before July 1, 2000 (if a borrower has *any* loans for graduate study).[99]

The proposed waiver would use different date standards for different loan types to determine when a borrower's loan "enter[ed] repayment."[100] ED would consider a loan to have entered repayment as follows:

1. For Subsidized and Unsubsidized Loans,[101] on the *day after the loan's initial grace period ends*;
2. For Parent and Graduate PLUS Loans, on the *day the loan is fully disbursed*;
3. For Consolidation Loans made before July 1, 2023, on the *earliest date* described in 1 or 2 above for loans repaid by the Consolidation Loan; or
4. For Consolidation Loans made on or after July 1, 2023, the *latest date* described in 1 or 2 above for loans repaid by the Consolidation Loan.[102]

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[97] *See, e.g.*, 20 U.S.C. §§ 1078-3(c)(2)(A), 1087e(d)(1).

[98] *See, e.g.*, 20 U.S.C. §§ 1078(c)(3), 1087e(f).

[99] *NPRM*, 89 Fed. Reg. at 27614.

[100] *See id.*

[101] Direct Subsidized Loans currently are currently available only to undergraduate students who demonstrate financial need. 20 U.S.C. §§ 1078(a), 1087e(a)(1). Prior to July 1, 2012, Direct Subsidized Loans were available to graduate and professional students. *Id.* § 1087e(a)(3). Direct Subsidized Loans generally have an interest subsidy (i.e., interest is not charged, or is only partially charged) that applies during an (1) in-school period when a borrower is enrolled in an eligible program on at least a half-time basis, (2) a six-month grace period that borrowers receive before entering repayment on their loans, (3) periods of authorized deferment, and (4) certain other periods. 34 C.F.R. § 685.100(a)(1) (2024). Direct Unsubsidized Loans are available to undergraduate, graduate, and professional students, regardless of financial need. These loans generally do not have an interest subsidy. *See id.*

[102] *See NPRM*, 89 Fed. Reg. at 27614. FFEL program and Direct Loan program Subsidized and Unsubsidized Loans have a *grace period*, which is the time period during which a borrower is not required to make payments on a loan. The grace period begins after the borrower is no longer enrolled at an eligible school on at least a half-time basis. *See, e.g.*, (continued...)

ED explains that it would use two different repayment-entry dates for Consolidation Loans based on the potential for "strategic consolidation."[103] The date that divides proposed 34 C.F.R. § 30.83's two categories for Consolidation Loans—July 1, 2023—is the first day after the Supreme Court's decision in *Biden v. Nebraska.*[104] It is also the day after President Biden announced a "new approach" to student loan debt relief that would be based in the HEA rather than in the HEROES Act.[105] Consolidation Loans made before July 1, 2023, receive more favorable treatment under proposed 34 C.F.R. § 30.83 than those made on or after July 1, 2023. A Consolidation Loan made before July 1, 2023, will be waived if it repaid *at least one* loan that entered repayment on or before a date that is about 20 or 25 years ago (depending on the types of loans repaid), even if the Consolidation Loan repaid other loans that had entered repayment more recently.[106] Consolidation Loans made on or after July 1, 2023, would receive less favorable treatment in that the Consolidation Loan will be waived only if *all* the loans that it repaid entered repayment on or before a date that is at around 20 or 25 years ago (depending on types of loans repaid).[107] For both categories, a borrower's "repayment progress will not fully reset when a borrower consolidates loans."[108] However, borrowers who made a consolidation decision with potential knowledge of the current rulemaking—that is, borrowers who consolidated on or after July 1, 2023—would receive less favorable consideration of their repayment progress.[109]

To illustrate the effects of the July 1, 2023, date, suppose an individual borrowed a Subsidized Loan for his or her own undergraduate education and that this first loan entered repayment on December 1, 2000. Suppose that the same individual later borrowed a Parent PLUS Loan for his or her dependent undergraduate student's education and that this second loan entered repayment on August 1, 2020. If the borrower consolidated the two loans on July 1, 2021, the full balance of the Consolidation Loan could be waived under proposed 34 C.F.R. § 30.83.[110] That is because the earlier of the two loans repaid by the Consolidation Loan entered repayment more than 20 years ago.[111] The portion of the Consolidation Loan attributable to the Parent PLUS Loan would be forgiven, even though this second loan entered repayment about four years ago.[112] By contrast, if the borrower consolidated the same two loans on July 15, 2023, the Consolidation Loan would not be eligible for waiver of amounts owed under proposed 34 C.F.R. § 30.83, even though the first of the two loans it repaid entered repayment more than 20 years ago.[113]

34 C.F.R. § 685.207(b)(2), (c)(2) (2024). Parent and Graduate PLUS Loans do not have a grace period. Those loans enter repayment upon full disbursement. *Id.* § 685.207(d).

[103] *NPRM*, 89 Fed. Reg. at 27576. In describing when Consolidation Loans enter repayment for purposes of the waiver, the NPRM includes an apparently erroneous reference to "paragraphs (c)(1) or (2)" of proposed 34 C.F.R. § 30.83. *See id.* at 27614. Proposed 34 C.F.R. § 30.83 does not include a subsection (c). *See id.* The correct citation appears to be to paragraphs (b)(1) and (2) of the section, which describe when loans other than Consolidation Loans enter repayment for purposes of the waiver.

[104] *See* 143 S. Ct. 2355 (2023).

[105] President Joseph R. Biden, Remarks on the United States Supreme Court Decision on the Federal Student Loan Debt Relief Program and an Exchange With Reporters, DCPD202300589, at *3 (June 30, 2023).

[106] *NPRM*, 89 Fed. Reg. at 27614.

[107] *Id.*

[108] *Id.* at 27576.

[109] *See id.* at 27576–77.

[110] *See id.* at 27614.

[111] *See id.*

[112] *See id.*

[113] *See id.*

As with the growing-loan-balance waivers, the NPRM ties this proposed waiver to the collectability of federal student loans. ED argues that borrowers who still owe on loans that first entered repayment about 20 to 25 years ago "have been unable to fully repay in a reasonable time and have not even been able to repay in full in over an extended period."[114] Moreover, ED explains that the repayment timeframes considered in the proposed waiver (20 and 25 years, depending on loan type) align with forgiveness timeframes under certain IDR plans.[115]

Waivers Based on Existing Loan Discharge, Cancellation, or Forgiveness Opportunities (Proposed 34 C.F.R. §§ 30.84 and 30.85)

The HEA and its implementing regulations provide borrowers with several opportunities to have their qualifying loans discharged, cancelled, or forgiven, depending on borrower circumstances. However, borrowers who are otherwise eligible for these benefits do not always apply successfully. The borrower could, for example, be unaware that the benefit exists. Alternatively, the borrower could apply for the benefit but not receive it because of a deficient application. The NPRM notes persistent challenges to enrollment in or application for an IDR plan or other loan discharge and forgiveness benefits (e.g., closed school discharges) for borrowers who would benefit from such options.[116] The NPRM states that these challenges are due, at least in part, to its past administration of the programs.[117] ED has proposed two waivers to address such scenarios. One waiver would be available to borrowers who did not enroll in IDR plans but who are otherwise eligible to receive IDR plan forgiveness benefits.[118] The other waiver would be available to borrowers who did not successfully apply for a targeted loan forgiveness benefit but who are otherwise eligible for the benefit.[119]

Borrowers Eligible for Forgiveness Based on Repayment Plan (Proposed 34 C.F.R. § 30.84)

Borrowers have several repayment plan options that can be grouped into three general categories: fixed, IDR, and alternative repayment plans.[120] For fixed repayment plans—consisting of the standard, extended, and graduated repayment plans—ED calculates monthly repayment amounts based on the amount that a borrower owes, their loan's interest rate, and a repayment term.[121] Borrower income does not figure into this calculation.[122] For the IDR plans, ED calculates monthly repayment amounts using a borrower's discretionary income.[123] IDR plans require repayment over a term of years (10 to 25 years, depending on the plan), but any loan balance

[114] *Id.* at 27576.

[115] *Id*. Under the SAVE repayment plan, individuals may receive loan forgiveness in as few as 10 years, depending on the amount of federal student loans they borrowed. U.S. Dep't of Educ., Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education (FFEL) Program, 88 Fed. Reg. 43820, 43903 (Jul. 10, 2023) (to be codified at 34 C.F.R. pts. 682, 685).

[116] *NPRM*, 89 Fed. Reg. at 27577–78.

[117] *Id*. at 27578 (stating that ED's "past practices of administering IDR plans have made it too challenging for borrowers to successfully navigate these processes").

[118] *See infra* "Borrowers Eligible for Forgiveness Based on Repayment Plan (Proposed 34 C.F.R. § 30.84)."

[119] *See infra* "Borrowers Eligible for Targeted Forgiveness Opportunities (Proposed 34 C.F.R. § 30.85)."

[120] *See* 20 U.S.C. §§ 1087e(d), 1098e.

[121] *See id*. § 1087e(d)(1)(A)–(C).

[122] *See* 34 C.F.R. § 685.208(a) (2024).

[123] *See* 20 U.S.C. §§ 1087e(d)(1)(D)–(F) & 1098e(b).

remaining after the maximum repayment period is forgiven.[124] The HEA authorizes two types of IDR plans: income-based repayment (IBR) plans as well as income-contingent repayment (ICR) plans.[125] ED offers the third category of repayment plans—alternative repayment plans—case-by-case to borrowers who show that the other repayment plans "are not adequate to accommodate" their "exceptional circumstances."[126]

Proposed 34 C.F.R. § 30.84 would authorize the Secretary to waive the entire outstanding balance of a borrower's loan if the Secretary determines that the borrower is not enrolled in but is otherwise eligible for forgiveness under an IDR or alternative plan.[127] According to ED, waivers under this proposal would not extend to borrowers "benefits any larger than they otherwise would have if they successfully navigated the enrollment or re-enrollment process."[128] As noted above, regulations relating to the IDR plans state when a borrower may receive forgiveness, but those for the alternative repayment plans do not.[129] Still, the NPRM states that "the alternative plan . . . contains an option to provide borrowers forgiveness after a set period of time, even if they have not paid off the full balance."[130]

Borrowers Eligible for Targeted Forgiveness Opportunities (Proposed 34 C.F.R. § 30.85)

Under current law, borrowers have the opportunity to have their loans discharged or forgiven based on adversity-related factors. These debt relief opportunities include discharge due to

- a borrower's death (or for a PLUS Loan, the death of the student on whose behalf the loan was made);[131]
- a borrower's total and permanent disability (TPD);[132]
- a borrower's Title IV eligibility being falsely certified because of identity theft;[133]
- a borrower's institution making a Title IV disbursement that the borrower did not authorize;[134]
- a borrower's institution falsely certifying the borrower's Title IV eligibility;[135]
- the failure of a borrower's institution to refund loan proceeds to a borrower upon certain events;[136]
- a borrower defense to repayment (BDR);[137]

[124] *See, e.g.*, 34 C.F.R. § 685.209(k) (2024) (describing the conditions under which a borrower receives forgiveness of their outstanding loan balance after satisfying requirements of the IDR plans). *See supra* note 115.

[125] *See* 20 U.S.C. §§ 1087e(d)(1)(D)–(F).

[126] *Id*. § 1087e(d)(4).

[127] *NPRM*, 89 Fed. Reg. 27564, 27614 (proposed Apr. 17, 2024) (to be codified at 34 C.F.R. pts. 30, 682).

[128] *Id*. at 27578.

[129] *Compare* 34 C.F.R. § 685.209(k) (2024), *with id*. § 685.221.

[130] *NPRM*, 89 Fed. Reg. at 27578.

[131] 20 U.S.C. § 1087(a)(1).

[132] *Id*.

[133] *Id*. § 1087(c)(1).

[134] 34 C.F.R. § 685.215(a)(2) (2024).

[135] 20 U.S.C. § 1087(c)(1).

[136] *Id*.

[137] *Id*. § 1087e(h).

- a borrower's bankruptcy;[138] and
- a borrower's inability to complete their program of study because of school closure.[139]

Borrowers may also receive debt relief following completion of certain public service. These service-related debt relief options include the Public Service Loan Forgiveness (PSLF) program and the Teacher Loan Forgiveness (TLF) program.[140]

Proposed 34 C.F.R. § 30.85 would authorize the Secretary to waive up to the entire outstanding balance of a loan if the Secretary determines that the borrower has not successfully applied for but otherwise meets eligibility requirements for "any loan discharge, cancellation, or forgiveness opportunity" under the FFEL or Direct Loan programs.[141] For Consolidation Loans, the proposed regulation would authorize the Secretary to waive the portion of the outstanding Consolidation Loan balance that is attributable to an underlying loan that would have been eligible for the waiver in its own right, had it not been paid off by the Consolidation Loan.[142]

This proposal aims to facilitate borrower access to existing loan "discharge, cancellation, or forgiveness" options, but according to ED, the proposed waiver would not be identical to these existing authorities from an institution's perspective.[143] If an institution's borrowers receive relief under certain existing student loan debt relief authorities, ED may seek to recover from the institution the amount of the forgiven loan balance. For example, when ED grants a closed school discharge under existing law, the borrower is "deemed to have assigned to and relinquished in favor" of ED any right to pursue a loan refund from the institution or related parties.[144] Likewise, ED may seek to collect from an institution a BDR discharge amount.[145] Use of proposed 34 C.F.R. § 30.85 could not lead to similar recovery from an institution, according to ED, because the Secretary "would have waived the amounts owed by the borrower."[146] Thus, there would be "no liability that could then be established against the institution and then pursued" through administrative collections proceeding.[147]

Waivers Based on Poorly Performing IHEs or Programs (Proposed 34 C.F.R. §§ 30.86-30.88)

To participate in the HEA Title IV student aid programs, IHEs and their educational programs are subject to statutory and regulatory requirements relating to educational quality assurance,[148] as

[138] *Id.* § 1087(b).

[139] *Id.* § 1087(c)(1).

[140] *See id.* §§ 1087e(m), 1078-10. For more information about these loan discharge and forgiveness options, see Hegji, *supra* note 4.

[141] *NPRM*, 89 Fed. Reg. 27564, 27614 (proposed Apr. 17, 2024) (to be codified at 34 C.F.R. pts. 30, 682).

[142] *Id.*

[143] *See id.* at 27579 (describing the proposal as making preexisting student loan debt relief opportunities "available in a fairer manner that lessens the burdens on borrowers").

[144] 34 C.F.R. § 685.214(f)(1) (2024).

[145] *See id.* § 685.409. However, as of this writing, ED cannot apply portions of its BDR and closed school discharge rules because of pending litigation. *See* Career Colls. & Schs. of Tex. v. U.S. Dep't of Educ., 98 F.4th 220, 226 (5th Cir. 2024).

[146] *NPRM*, 89 Fed. Reg. at 27579.

[147] *Id.*

[148] *See, e.g.*, 34 C.F.R. § 602.1 (2024).

well as financial responsibility and administrative capability.[149] ED certifies and then periodically recertifies IHEs as Title IV eligible based on these requirements.[150] It also otherwise oversees Title IV compliance by institutions and their educational programs. These statutory and regulatory requirements are designed to provide some level of protection to federal student loan borrowers seeking to obtain a quality education from a capable institution. However, borrowers may nonetheless attend institutions later determined to have performed poorly in terms of offering the borrower an education of sufficient value. ED advances three waiver proposals to provide student loan debt relief for borrowers who attended certain institutions or educational programs that no longer participate in the Title IV programs (poorly performing institutions or programs).

Waiver Following Secretarial Action to End Title IV Participation (Proposed 34 C.F.R. § 30.86)

ED's first waiver proposal for poorly performing institutions or programs—proposed 34 C.F.R. § 30.86—focuses on those institutions or programs whose Title IV participation ends by secretarial action. In these cases, the Secretary (or another authorized ED official) would have made a final decision that terminates Title IV participation, denies recertification, or otherwise determines that the IHE or program is no longer eligible for Title IV participation.[151]

The reasons for secretarial action ending Title IV participation can vary. For example, ED might deem an institution or program "not financially responsible," within the meaning of Title IV regulations.[152] However, proposed 34 C.F.R. § 30.86 would only authorize the Secretary to waive the entire outstanding balance of a borrower's loan if the reason for the secretarial action concerns institution or program failures that fall into one of two categories.

The first qualifying category is failing to meet "an accountability standard based on student outcomes established under the HEA or its implementing regulations."[153] The NPRM's summary explains that these "accountability standards" are *cohort default rates* (CDRs) and *Gainful Employment* (GE) requirements.[154] The CDR measures the percentage of an institution's qualifying federal student loan borrowers who enter repayment on their loans in a given fiscal year and default on those loans within three years.[155] The GE requirement applies to almost all educational programs offered by proprietary (for-profit) institutions and most nondegree programs offered by public and private nonprofit institutions. Under the HEA, these programs are Title IV eligible if they "prepare students for gainful employment in a recognized occupation."[156] ED determines whether a program satisfies the HEA's GE requirement by examining two debt

[149] *See, e.g.*, *id.* §§ 668.16 & 668.171. For information on these requirements, see CRS Report R43159, *Institutional Eligibility for Participation in Title IV Student Financial Aid Programs*, by Alexandra Hegji (Feb. 8, 2023, version).

[150] *See generally* 34 C.F.R. § 668.13 (2024).

[151] *NPRM*, 89 Fed. Reg at 27614–15.

[152] *See, e.g.*, 34 C.F.R. § 668.174(a)(3) (2024) (stating that an institution is not financially responsible if it "has been cited during the preceding five years for failure to submit in a timely fashion acceptable compliance and financial statement audits required under this part, or acceptable audit reports required under the individual title IV, HEA program regulations").

[153] *NPRM*, 89 Fed. Reg at 27615.

[154] *Id.* at 27580.

[155] 34 C.F.R. § 668.202(b)–(d) (2024); *see also* CRS Report R47874, *Cohort Default Rates and HEA Title IV Eligibility: Background and Analysis*, by Alexandra Hegji and Sylvia L. Bryan (Dec. 12, 2023, version).

[156] 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A), 1002(c)(1)(A).

and earnings measures of a program's completers—the *debt-to-earnings rate* (D/E rate) and *earnings premium*, detailed below.[157]

The second category of failings that would make loan balance waivers available under proposed 34 C.F.R. § 30.86 is failing to "deliver sufficient financial value to students."[158] The proposed regulation lists engaging in "substantial misrepresentations, substantial omissions, misconduct affecting student eligibility, or similar activities" as examples of conduct that would constitute such a failure.[159]

Under proposed 34 C.F.R. § 30.86, the Secretary's waivers would be limited to loans borrowed to attend the IHE or program during "the period that corresponds with the findings or outcomes data that forms the basis" of ED's action.[160] For example, if the Secretary terminated Title IV participation based on an institution's CDR, the "period that corresponds with the findings" that form the basis for the Secretary's action would likely be the cohort used in the calculation. However, if the Secretary deemed it "appropriate," he could use a "different [time] period" to identify loans eligible for waiver.[161]

Consolidation Loans would be eligible for this waiver. However, the proposal would only authorize waiver of the portion of the Consolidation Loan that repaid a loan that would itself have been eligible for a waiver.[162] Take a borrower who has a Consolidation Loan with an existing balance of $10,000. The Consolidation Loan repaid two loans. At the time of consolidation, both loans had a balance of $5,000, and each was borrowed to attend a different institution. The Secretary terminated the Title IV eligibility of the borrower's first institution for failing GE measures, and the borrower was included in the data used for those failing calculations. The second institution continues to participate in Title IV programs. Under this proposed waiver, $5,000 of the $10,000 Consolidation Loan would be eligible for waiver, as that amount would be the portion of the Consolidation Loan that repaid a loan that would itself have been eligible for waiver.[163]

Waiver Following Institution or Program Closure (Proposed 34 C.F.R. § 30.87)

The second of ED's proposed waivers regarding poorly performing institutions or programs concerns institutions or programs that close under circumstances that might otherwise have led to secretarial action ending their Title IV participation. That is, it is possible that a program or institution that is *at risk* of having its Title IV participation end for failing accountability measures or not delivering sufficient financial value—the two types of failings that could lead to a waiver of loan amounts under proposed 34 C.F.R. § 30.86—would choose to close *before* its Title IV eligibility ends for those reasons.

ED's new GE rules provide an example of how such a closure might occur. Beginning in 2024, ED will calculate a GE program's D/E rates by comparing the median annual loan repayment amount of individuals who completed the program to those individuals' median annual

[157] 34 C.F.R. § 668.402(a) (2024).

[158] *NPRM*, 89 Fed. Reg at 27614–15.

[159] *Id.* at 27615.

[160] *Id*.

[161] *Id*.

[162] *See id*.

[163] *See id.* (stating that the Secretary "may waive the portion of the outstanding balance of the consolidation loan" attributable to a prior loan repaid by the Consolidation Loan if the prior loan itself would have satisfied the conditions for waiver).

earnings.[164] A program would fail the D/E rate metrics if its completers' median annual loan repayment amount exceeds: (1) 8% of their median annual earnings or (2) 20% of their median discretionary annual earnings.[165] The earnings premium will gauge whether the median annual earnings of a program's completers exceed those of working adults aged 25 to 34 who received only a high school diploma or equivalent.[166] A program would fail the earnings premium metric if the median annual earnings of a program's completers did not exceed the annual earnings of the working-adults comparison group.[167]

A GE program failing the D/E rate or earnings premium metrics in a single year would not immediately lose Title IV eligibility, but it would be at risk for doing so in the future. A program's Title IV eligibility would end with a second such failure in one of the next two award years (i.e., two failures within three award years).[168] The institution offering the program might choose to discontinue a program or close entirely before failing the relevant measure again, either to avoid ED action to end its Title IV participation or for other reasons.

Proposed 34 C.F.R. § 30.87 would authorize the Secretary to waive the entire outstanding balance of a loan associated with a student's attendance at an IHE or program that has closed under one of two sets of circumstances.[169] First, the proposal would authorize a waiver if ED has determined, based on the most recent reliable data, that for at least one year the closed IHE or program did not satisfy "an accountability standard based on student outcomes" (i.e., CDRs and GE requirements).[170] Second, the proposal would authorize a waiver if ED determined that an IHE or program "failed to deliver sufficient financial value to students" and was the subject of an unresolved ED review or action related to those findings at the time of its closure.[171] According to ED, when closures occur during a pending investigation, ED "may not finish those processes."[172] ED asserts that, amid such a closure, it is "reasonable for the Secretary to infer that in the absence of additional data or completion of program review or investigation that the Department would have terminated aid access going forward"—a termination that could make a borrower eligible for waiver under proposed 34 C.F.R. § 30.86.[173] Thus, while the institution or program's closure would likely make a waiver under proposed 34 C.F.R. § 30.86 unavailable,[174] proposed 34 C.F.R. § 30.87 might extend a waiver to the institution or program's borrowers.[175]

Aside from the fact that proposed 34 C.F.R. § 30.87 concerns institutions or programs that choose to close rather than have their Title IV participation ended by secretarial action, the proposal resembles ED's secretarial-action waiver. That is, as with proposed 34 C.F.R. § 30.86, waiver of loan amounts would be limited to loans borrowed to attend the IHE or program during "the period that corresponds with the findings or outcomes data that forms the basis" of ED's determination,

[164] 34 C.F.R. § 668.403(a) (2024).

[165] *Id*. § 668.402(c)(2). Discretionary earnings is defined as the median annual earnings of the students who completed the program during the cohort period, minus 150% of the applicable Federal Poverty Guidelines. *Id.* § 668.403(a)(1).

[166] *Id*. § 668.404.

[167] *Id*. § 668.402(e)(2).

[168] *See id*. § 668.603(a).

[169] *NPRM*, 89 Fed. Reg at 27615.

[170] *Id*. at 27582, 27615.

[171] *Id.* at 27615.

[172] *Id*. at 27582.

[173] *Id*.

[174] *See id.* at 27614 (authorizing waiver where an institution or program's Title IV participation ends because of secretarial action).

[175] *See id.* at 27614–15.

but the Secretary could use a different time period to identify loans eligible for waiver if he deemed it "appropriate."[176] Moreover, the proposal would authorize waiver of the portion of a Consolidation Loan that repaid a loan that would itself have been eligible for waiver.[177]

Proposed 34 C.F.R. § 30.87 authorizes waivers of loan balances used to attend certain closed schools and institutions, but as noted above, so does an existing HEA authority, commonly referred to as closed school discharge.[178] However, proposed 34 C.F.R. § 30.87 differs from closed school discharges in at least two respects. First, under a closed school discharge, borrowers are eligible to have loans associated with enrollment in an IHE discharged if the IHE closed (1) while the borrower was enrolled or (2) within 180 days of the student withdrawing, provided the student did not complete the program of study through other means, such as by transferring credits to another IHE.[179] The proposed waiver, on the other hand, would not be limited to loans borrowed during the time periods relevant to a closed school discharge, nor would the proposal bar those who later complete their programs of study from receiving waivers.[180] Second, when ED grants a closed school discharge, current law provides a means for ED to recover the discharged amount from the IHE.[181] ED has stated that under the proposed waiver, though, it would "not assess liabilities against the institution as a result of the Secretary waiving a borrower's Federal student loan debt."[182]

Waiver for Closed Gainful Employment Programs (Proposed 34 C.F.R. § 30.88)

As noted above, effective July 1, 2024, ED will measure whether GE programs "prepare students for gainful employment in a recognized occupation," as required to be Title IV eligible, by calculating their D/E rates and earnings premiums.[183] Those calculations could then result in loan waivers under proposed 34 C.F.R. §§ 30.86 or 30.87 if a failing institution's or program's Title IV participation ends by secretarial action or closure before such action. Neither of these waivers, though, would extend to loans borrowed to attend closed institutions or programs for which ED cannot calculate an official D/E rate or earnings premium because of the lack of data required to calculate those official measures.[184] ED's third proposed waiver relating to poorly performing institutions or programs would address borrowers who attended such closed institutions or programs.

In particular, proposed 34 C.F.R. § 30.88 would authorize the Secretary to waive the entire outstanding balance of a loan borrowed to enroll in certain GE programs that closed if, during the enrollment period for which the loans were received, the program had debt affordability or earnings measures (Section 30.88 measures) that fell below specified thresholds.[185] The proposed

[176] *Id.* at 27615.

[177] *Id*.

[178] *See* 20 U.S.C. § 1078(c)(1).

[179] *See, e.g.*, 34 C.F.R. § 685.214(d)(1)(i) (2024). The Secretary may, "for exceptional circumstances," extend the 180-day period. *See id*. § 685.214(d)(1)(i)(B).

[180] *See NPRM*, 89 Fed. Reg. at 27615 (presumptively limiting waiver "to loans that were borrowed during the period that corresponds with the findings that form the basis for the Secretary's findings" or, if the Secretary determines it appropriate, loans borrower "during a different period").

[181] 34 C.F.R. § 685.214(f) (2024).

[182] *NPRM*, 89 Fed. Reg at 27582.

[183] *See supra* notes 164–167 and accompanying text.

[184] *NPRM*, 89 Fed. Reg at 27584 (explaining that for certain programs that have closed "there will not be other data available showing the longer-term performance of the program").

[185] *Id.* at 27615.

regulatory text does not expressly refer to the Section 30.88 measures as either D/E rates or earnings premiums. However, the NPRM's summary explains that the Section 30.88 measures were "modeled on" the GE measures.[186] For example, the Section 30.88 measures include a comparison between the median annual loan payment of a program's completers and the median earnings figures of those completers. The D/E rates make the same comparison, using the same thresholds.[187]

The proposal would also authorize waiver of loans borrowed to attend a GE program for which ED cannot calculate *either* official GE rates *or* Section 30.88 measures.[188] In this circumstance, ED would determine whether the program was offered by an institution that received a majority of its Title IV funds from *other* GE programs with failing Section 30.88 measures.[189] If so, the Secretary would be authorized to waive loans associated with the program, even though ED could not calculate its Section 30.88 measures.[190]

As with the other poorly performing institutions or programs waiver proposals, proposed 34 C.F.R. § 30.88 would extend to Consolidation Loans.[191] It would authorize the Secretary to waive the portion of a Consolidation Loan that repaid a loan that would itself have been eligible for waiver.[192]

Proposed Waiver of Commercially Held FFEL Program Loans (Proposed 34 C.F.R. § 682.403)

Congress terminated authority to guarantee new loans under the FFEL program as of July 1, 2010,[193] but borrowers of outstanding FFEL program loans remain responsible for making payments on their loans. Under the program, nonfederal lenders made loans using nonfederal capital.[194] Lenders retain ownership of some FFEL program loans.[195] The HEA specifies that the Secretary guarantees lenders against loss due to borrower default through a system of guaranty agencies (GAs).[196] State and nonprofit GAs receive federal funds to play the lead role in administering many aspects of the FFEL program related to the loan guarantee, including reimbursing lenders when loans are placed in default and taking possession of defaulted loans to initiate collections work.[197] The HEA specifies that, upon a borrower's death, permanent and total disability, or inability to complete their program of study due to an IHE's closure, the Secretary discharges the borrower's loan and reimburses the loan holder (i.e., a lender or a GA, depending

[186] *See id*. at 27584.

[187] *Compare*, *e.g.*, *id.* at 27615 (comparing completers' median annual loan payments to (1) 20% of median annual earnings, minus 150% of the applicable FPL, and (2) 8% of median annual earnings), *with* 34 C.F.R. § 668.403(c) (2024) (making similar comparisons to calculate D/E rates).

[188] *NPRM*, 89 Fed. Reg at 27615.

[189] *See id.*

[190] *See id.*

[191] *Id*.

[192] *Id*.

[193] Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2201, 124 Stat. 1029, 1074 (2010).

[194] 20 U.S.C. § 1071(a).

[195] *See* Fed. Student Aid Data Ctr., U.S. Dep't of Educ., *Location of Federal Family Education Loan Program Loans*, https://studentaid.gov/sites/default/files/fsawg/datacenter/library/LocationofFFELPLoans.xls (last visited Aug. 7, 2024).

[196] 20 U.S.C. § 1078(c)(1)(A).

[197] *See*, *e.g.*, 34 C.F.R § 682.410(b)(6).

on the circumstances).[198] The statute directs the transfer of FFEL program loans to ED in several circumstances, at which point ED owns and administers the loan.[199] Thus, FFEL program loans are today held by nonfederal lenders, GAs, and ED. As of March 30, 2024, private lenders held about $75.6 billion in FFEL program loans (borrowed by or on behalf of 2.73 million individuals); GAs held about $19.4 billion (borrowed by or on behalf of about 850,000 individuals); and ED held about $81.2 billion (borrowed by or on behalf of between 2.25 million and 4.94 million individuals).[200]

The waiver proposals summarized thus far in this report would apply to ED-held FFEL program loans but not to FFEL program loans held by lenders or a GA (commercially held FFEL program loans). For this latter category of loans, ED instead advances three waiver proposals, using criteria similar to—but narrower than—those used for ED-held loan waiver proposals. In particular, for commercially held FFEL program loans, ED proposes to authorize waiver of loan balances based on (1) the time since a loan first entered repayment,[201] (2) eligibility for a closed school discharge,[202] and (3) attendance at a poorly performing IHE.[203]

Waiver Based on Time Since a Loan First Entered Repayment

The first proposed waiver for commercially held FFEL program loans would permit the Secretary to waive up to the entire outstanding balance of a borrower's loan if the loan first entered repayment on or before July 1, 2000.[204] ED picked the July 2000 repayment-entry date because qualifying loans for waiver that have been in repayment for at least 24 years is similar to the length of time, 25 years, required for forgiveness under the FFEL IBR plan.[205]

ED would determine the date on which a loan entered repayment as follows:

1. for Federal Stafford Loans,[206] the *day after the initial grace period ends*;
2. for Federal PLUS Loans,[207] the *day after the loan is fully disbursed*; and

[198] 20 U.S.C. § 1087(a), (c).

[199] *See, e.g.*, 34 C.F.R. § 682.409(a)(1) (2024). For more information about when a FFELP loan may be transferred to ED, see CRS Report R46409, *Proposals to Extend CARES Act Provisions to Federal Student Loans Not Held by the Department of Education: Frequently Asked Questions*, by Alexandra Hegji and Kyle D. Shohfi (June 10, 2020, version).

[200] *See supra* note 195. While ED's data report unduplicated totals of dollars outstanding and recipients across *all* holders of FFELP loans, the data do not report unduplicated totals for loans that are not held by ED or that are held by ED but in different capacities (e.g., assigned to a federal loan servicer or ED's Default Management System). For example, a borrower with one FFELP loan held by a private lender and another FFELP loan held by a GA would appear twice in the counts above for lender- and GA-held loans. A borrower could also have one FFELP loan held by one of ED's federal loan servicers and another attributed in ED's data to its Default Management System, resulting in the range reported above for ED-held FFELP loans. *See id.*

[201] *See infra* "Waiver Based on Time Since a Loan First Entered Repayment."

[202] *See infra* "Waiver Based on School Closure."

[203] *See infra* "Waiver Based on High Cohort Default Rates."

[204] *NPRM*, 89 Fed. Reg. at 27616.

[205] *Id.* at 27585; *see also* 20 U.S.C. § 1078(b)(9)(A)(iv).

[206] Federal Stafford Loans are FFEL program loans that are akin to Direct Subsidized and Unsubsidized Loans. *See supra* note 101.

[207] Federal PLUS Loans are FFEL program loans that are akin to Direct PLUS Loans for graduate students or parents of dependent undergraduate students. *See supra* note 101.

3. for Federal Consolidation Loans,[208] the *earliest day determined under number 1 or 2 above* for any loan that the Consolidation Loan repaid.[209]

The balance of a Federal Stafford or PLUS Loan that first entered repayment on or before July 1, 2000, could be waived in full under the proposal,[210] but it is unclear how Federal Consolidation Loans would be treated. Consider a borrower with a Federal Consolidation Loan that repaid two Federal PLUS Loans that entered repayment for purposes of the waiver—that is, were fully disbursed—on August 1, 1999, and August 1, 2000, respectively. Proposed 34 C.F.R. § 682.403(b) lists three "conditions for waiver," including waiver for loans that first entered repayment on or before July 2000.[211] Paragraph (f) then states that "if the conditions for waiver in paragraph (b) of this section are met but the loan has been repaid by a Federal Consolidation Loan that has an outstanding balance, the Secretary may waive the *portion* of the outstanding balance of the consolidation loan attributable to such loan."[212] Under this provision, only "the portion" of the Federal Consolidation attributable to the Federal PLUS Loan that entered repayment in 1999 could be waived.[213] However, proposed 34 C.F.R. § 682.403(b)(1)(C) states that a Federal Consolidation Loan is considered to have entered repayment on the earliest day determined under number 1 or 2 above "for *any* loan that was repaid by that consolidation loan."[214] This provision could be read to mean that a Federal Consolidation Loan meets the repayment-entry date criterion—and thus qualifies for waiver—so long as *one* of its underlying loans meets the July 2000 date, even if the other underlying loans do not.[215]

Waiver Based on School Closure

The second proposed waiver for commercially held FFEL program loans would permit the Secretary to waive up to the entire outstanding balance of a borrower's loan if the Secretary determines that a borrower is eligible for, but did not obtain, a closed school discharge.[216] The proposed regulations state that, for Federal Consolidation Loans, the Secretary may waive the portion of the Consolidation Loan's balance attributable to the underlying loans that met the waiver's condition.[217]

Waiver Based on High Cohort Default Rates

The CDR measures the percentage of an IHE's qualifying federal student loan borrowers who enter repayment on their loans in a given fiscal year and default on those loans within three years.[218] Borrowers are included in the CDR calculation for an IHE if they received FFEL program Stafford Loans or Direct Loan program Subsidized or Unsubsidized Loans (Subsidized and Unsubsidized Loans) for enrollment at the IHE.[219] Borrowers of Consolidation Loans are

[208] Federal Consolidation Loans are FFEL program loans that are akin to Direct Consolidation Loans. *See* 20 U.S.C. §§ 1078-3, 1087e(1)(a).

[209] *NPRM*, 89 Fed. Reg. at 27616.

[210] *Id.*

[211] *Id*.

[212] *Id*. at 27617 (emphasis added).

[213] *Id*.

[214] *Id.* at 27616.

[215] *Id*. (emphasis added).

[216] *Id*.

[217] *Id.* at 27617.

[218] 20 U.S.C. § 1085(a)(2), (m).

[219] 34 C.F.R. § 668.202(b)(1) (2024).

included in an IHE's CDR if their Consolidation Loan was used to repay a Subsidized or Unsubsidized Loan.[220] Borrowers who borrowed only Grad PLUS or Parent PLUS Loans for enrollment at an IHE or whose Consolidation Loans were used to only repay such loans are not included in the IHE's CDR.[221]

The third proposed waiver for commercially held FFEL program loans would permit the Secretary to waive up to the entire outstanding balance of "loans received" for attendance at an IHE that lost its HEA Title IV eligibility if the borrower was included in a cohort whose CDR was the basis for the IHE's loss of Title IV eligibility.[222] Thus, if a borrower was included in the failing CDR, the proposal would authorize waiver of all FFEL program loans (including Grad PLUS or Parent PLUS Loans) borrowed to attend that program, as those loans would have been "loans received" for attendance at the IHE, though not loans included in the CDR.[223] However, if a borrower received only PLUS Loans to attend the same IHE, the borrower would not be eligible for a waiver because the borrower would not have been included in the cohort used to calculate the failing CDR.[224] The proposed regulations would also authorize the Secretary to waive the portion of a Federal Consolidation Loan that repaid prior FFEL program loans that met the waiver's condition.[225]

Claims Procedures

Because ED proposes to waive loan balances for commercially held FFEL program loans for which lenders and GAs may otherwise be expecting payment from borrowers, ED proposes to establish a claims procedure to reimburse lenders and GAs.[226] The proposed procedures are similar to existing procedures for payment of FFEL program claims upon events such as borrower default, death, or total and permanent disability.[227]

Under the proposal, the Secretary would notify the lender or GA that a FFEL program loan qualifies for waiver, in whole or in part.[228] If a lender holds the loan, the lender would submit a waiver claim to a GA.[229] The GA would then pay the claim, be reimbursed by the Secretary, and assign the loan to the Secretary.[230] The Secretary would waive the loan once assigned.[231] If a GA holds the loan, the GA would be paid by the Secretary for the discharged amount.[232] The GA would assign the loan to the Secretary, who would then waive the loan once assigned.[233] In both cases, ED would notify the borrower of the waiver after waiving the loan.[234] The proposal would

[220] *Id*.

[221] *See id.*

[222] *NPRM*, 89 Fed. Reg. at 27616.

[223] *See id.*

[224] *See supra* note 221.

[225] *NPRM*, 89 Fed. Reg. at 27617.

[226] *See id.*

[227] *See generally* 34 C.F.R. § 682.402 (2024). For more information about these claims procedures, see COMMON MANUAL GUARS., COMMON MANUAL: UNIFIED STUDENT LOAN POLICY, 2023 ANNUAL UPDATE ch. 13 (2023), https://commonmanual.org/wp-content/uploads/2023/08/CM2023.pdf.

[228] *NPRM*, 89 Fed. Reg. at 27616.

[229] *Id*.

[230] *Id*.

[231] *Id.*

[232] *Id*.

[233] *Id.*

[234] *Id*.

establish timelines in which lenders and GAs must act (e.g., a requirement for a lender to submit a claim for payment within 75 days of being informed of the Secretary's determination that a loan is waiver eligible) but would not establish express timelines for ED to carry out the waiver.[235]

Finally, the proposed regulations would specify instances in which GAs would have to return loan payments made by borrowers during these procedures.[236]

Estimated Effects

In the NPRM's cost-benefit analysis, ED estimated the number of borrowers who would qualify for *each* proposed waiver.[237] Because it is possible that an individual borrower could qualify for multiple waivers, ED also provided the estimated total unduplicated count of borrowers who might qualify for *any* waiver.[238] These estimates are presented in **Table 1**. In total, ED estimates that about 27.6 million borrowers would be eligible for some amount of debt relief under the proposed waivers.[239]

The NPRM also contains ED's estimate of the proposed waivers' costs for outstanding direct loan and loan guarantee cohorts from 1994 to 2024 as well as future direct loan cohorts through 2034. These estimated costs are also presented in **Table 1**.

Again, it is possible that a borrower could *qualify* for multiple waivers; however, for a given loan balance amount, a borrower can *receive* a waiver only once. Thus, ED's cost estimate "stacks" the costs in the order shown in **Table 1** (with one exception, see table note "a"), with waiver of the full balance of a loan being evaluated before waivers for only part of a loan's balance.[240] However, ED presented the estimated costs for all commercially held FFEL program loans as a single figure.[241] Although ED did not provide a grand-total estimate of the loan modification costs associated with the waivers, ED's individual estimates sum to about $147 billion.

Table 1. ED-Estimated Number of Borrowers Who Would Be Eligible for Loan Waivers and Costs of Loan Waivers

Section[a]	Description	Borrowers (millions)	Cost for 1994-2034 cohorts ($ in millions)
34 C.F.R. § 30.83	Waiver of full loan balance based on time since a loan first entered repayment	2.6	$13,762
34 C.F.R. § 30.84	Waiver of full loan balance when a loan is eligible for forgiveness based upon repayment plan	1.7	$8,663
34 C.F.R. § 30.85	Waiver of full loan balance when a loan is eligible for a targeted forgiveness opportunity	0.3	$7,565
34 C.F.R. § 30.86	Waiver of full loan balance based upon secretarial actions	<0.1	$27,216[b]

[235] *See id.*

[236] *Id.* at 27616–17.

[237] *See id.* at 27593–602 tbls. 3.2–3.11.

[238] *See id.* at 27603 tbl. 3.12.

[239] *Id.*

[240] *Id.* at 27604.

[241] *See id.* at 27604 tbl. 4.1.

Section[a]	Description	Borrowers (millions)	Cost for 1994-2034 cohorts ($ in millions)
34 C.F.R. § 30.87	Waiver of full loan balance following a closure prior to secretarial actions	n/a[c]	
34 C.F.R. § 30.88	Waiver of full loan balance for closed Gainful Employment programs with high debt-to-earnings rates or low median earnings	<0.1	
34 C.F.R. § 30.81	Waiver of partial loan balance when the current balance exceeds the balance upon entering repayment for borrowers on an IDR plan	6.4	$10,966
34 C.F.R. § 30.82	Waiver of partial loan balance when the current balance exceeds the balance upon entering repayment	19.0	$62,094
34 C.F.R. § 682.403	Waiver of partial or full loan balance of FFEL Program loan debt	0.9	$17,053
Total		27.6[d]	$147,319

Source: CRS compilation of data presented in U.S. Department of Education, "Student Debt Relief for the William D. Ford Federal Direct Loan (Direct Loans), the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program," 89 Fed. Reg. 27564, 27603 tbl. 3.12, 27603–04 tbl. 4.1 (Apr. 17, 2024).

Notes:

a. A borrower could qualify for multiple waivers; however, for a given amount of loan balance, a borrower can receive a waiver only once. Thus, ED's cost estimate in table 4.1 of the NPRM "stacks" the costs, with waiver of the full balance of a loan being evaluated before waivers for only part of a loan's balance. Generally, in this table, information on the effects of each provision is presented in the order in which ED's estimated costs for each proposed regulatory provision were presented in table 4.1 of the NPRM. One exception is proposed 34 C.F.R. § 30.86. In table 4.1 of the NPRM, ED presented two cost estimates for this proposed waiver. First, and just after its presentation of proposed 34 C.F.R. § 30.84, ED presented the cost estimate of 34 C.F.R. § 30.86 with respect to loans that caused a school to lose access to Title IV aid due to a high cohort default rate. Second, following its presentation of estimated costs of proposed 34 C.F.R. § 30.85, ED presented the cost estimate of 34 C.F.R. § 30.86 with respect to loans borrowed to attend a gainful employment program. CRS combined ED's estimated cost effects of 34 C.F.R. § 30.86 into a single number for simplicity.

b. This figure includes an estimated cost of $15,000,000 for waiver under proposed 34 C.F.R. § 30.86 of loans to attend an IHE during a period that caused a school to lose access to Title IV aid due to a high cohort default rate, and an estimated cost of $27,201,000,000 for waiver under proposed 34 C.F.R. §§ 30.86-30.88 of loans borrowed to attend a gainful employment program that lost access to Title IV aid or that closed.

c. ED did not model the effects of this provision because ED believes the provision would not operate "on a large enough scale to model." *Id.* at 27600.

d. This figure represents the total unduplicated headcount of borrowers who might qualify for any waiver.

In addition, ED estimates that the waivers specified in 34 C.F.R. §§ 30.81 through 30.88 would result in a one-time administrative cost of about $13 million and that the waivers specified in 34 C.F.R. § 682.403 would result in an administrative cost of $18 million.[242]

[242] *Id.* at 27603.

Considerations for Congress

HEA Section 432(a)(6) authorizes the Secretary to "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired" under the FFEL program.[243] Several policy, administrative, and legal considerations may arise when defining the contours of the authority and implementing resulting regulations.

Policy Considerations

Two key stakeholders that would be affected by waiving some amount of federal student loan debt are student loan borrowers and the federal government. Waiving an amount of student loan debt may alleviate loan repayment burdens for qualifying borrowers, but depending on the policy design and individual borrower circumstances, borrowers may experience different levels of relief, possibly resulting in different effects on personal finances. Such a waiver policy may also affect an individual's decision to borrow student loans in the future; some have argued that it may create a moral hazard for borrowers in which they have less incentive to mitigate risk associated with student loan borrowing.[244] Thus, questions may arise as to whether the proposed policy is sufficiently targeted to meet intended objectives.

Waiving student loan amounts would also affect the federal budget.[245] **Table 1** depicts ED's estimates of the costs of each individual proposed waiver for all loan cohorts from 1994 to 2034. Given the finite nature of budgetary resources, policies that increase net costs to the government, such as the policies in the NPRM, necessarily require trade-offs to be made. For instance, to accommodate increased spending in one area, the government may decrease spending for other programs and priorities. Alternatively, Congress and the President could seek to increase tax revenue to offset the increased spending. Absent a reduction in other spending or an increase in revenue sufficient to offset the new spending, the government may engage in increased deficit spending, which could at least partially shift the fiscal burden of paying for the new spending from current taxpayers and program beneficiaries to future ones.

Along with effects on the federal budget, waiving amounts of student loan debt may have other effects on and implications for the federal government and the federal student loan system. These include implications for the continued operation of the federal student loan programs (e.g., should federal student loans remain the primary tool for aiding students and their families in paying for postsecondary education?). Waiving amounts of student loan debt may also prompt consideration about the extent to which the mix of federal financial aid programs might be altered to address prevailing concerns about student loan borrowing and debt.[246]

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[243] 20 U.S.C. § 1082(a)(6).

[244] *See, e.g.*, Fiona Greig & Daniel M. Sullivan, *Who Benefits from Student Debt Cancellation?* JPMorganChase (Mar. 2021), https://www.jpmorganchase.com/institute/all-topics/financial-health-wealth-creation/who-benefits-from-student-debt-cancellation, *How Long Before Cancelled Student Debt Would Return?*, Comm. for a Responsible Fed. Budget (Sept. 1, 2022), https://www.crfb.org/blogs/how-long-cancelled-student-debt-would-return.

[245] *See* CRS In Focus IF10453, *The Federal Budget: Understanding Fiscal Outcomes*, by Grant A. Driessen and D. Andrew Austin (2016).

[246] These and other policy considerations relating to cancelling amounts of student loan debt are discussed more fully in CRS Report R47196, *Federal Student Loan Debt Cancellation: Policy Considerations*, coordinated by Alexandra Hegji (July 27, 2022, version).

Administration of Benefits

Implementing a policy through which the federal government waives all or a portion of outstanding federal student loans may pose administrative challenges. Stakeholders have identified several issues with the administration and loan servicing environment of the Direct Loan program. For example, the Consumer Financial Protection Bureau has identified problems relating to (1) federal loan servicers' disclosure of existing student loan forgiveness programs and facilitation of enrollment in those programs and (2) breakdowns in servicers' customer service.[247] Servicers have reported receiving fragmented, incomplete, and untimely guidance from ED with respect to implementing existing loan forgiveness programs.[248] Similar issues may arise with implementing a student loan waiver policy, potentially causing confusion among borrowers and loan servicers, and resulting in uneven levels of success in implementing a waiver benefit.

Automating benefits administration—that is, qualifying borrowers for relief without requiring a borrower application—or providing borrowers with the choice to opt out of a waiver benefit rather than to opt in (as with most existing federal student loan discharge and forgiveness benefits) may alleviate some of these administrative issues. The NPRM's proposed regulatory text does not expressly state whether any of the proposed waivers would be automatic or instead require an application from the borrower. However, in the NPRM's summary, ED indicates that it intends for some waivers to be automatic or subject to an opt-out option for borrowers. For example, ED expresses its intent to make proposed 34 C.F.R. § 30.82 (waiver when the current balance exceeds the balance upon entering repayment) automatic.[249] Additionally, ED recently announced it would email "all borrowers with at least one outstanding federally held student loan" to "inform them that they have until" August 30, 2024, to "opt out" of potential student loan debt relief under the NPRM.[250]

One issue that may arise in attempts to automate a waiver process is how ED could identify qualifying borrowers if ED itself lacks data needed to verify eligibility criteria for a student loan waiver. For example, if ED intends to automate proposed 34 C.F.R. § 30.81 (the IDR Growing-Loan-Balance Waiver for borrowers with incomes below specified thresholds), it would need to determine whether a borrower is enrolled in an IDR plan with a qualifying AGI (or other calculations of income specified by the Secretary).[251] If ED presently lacks income information, automating the waiver would likely require another federal agency to share income information with ED. While the Department of the Treasury (Treasury) may possess income information from borrowers' tax returns, Section 6103 of the Internal Revenue Code (IRC) broadly prohibits disclosure of tax return information unless otherwise authorized by the IRC.[252] Section 6103 permits Treasury to disclose specified tax return information (including AGI) to ED "only for the

[247] *See, e.g.*, CONSUMER FIN. PROT. BUREAU, REPORT OF THE CFPB EDUCATION LOAN OMBUDSMAN 6–16 (2023).

[248] *See, e.g.*, GOV'T ACCOUNTABILITY OFF., PUBLIC SERVICE LOAN FORGIVENESS: EDUCATION NEEDS TO PROVIDE BETTER INFORMATION FOR LOAN SERVICER AND BORROWERS, GAO-18-547, at 16–17 (2018); Danielle Douglas-Gabriel, *Weeks Later, Servicers Still Waiting on Education Department Guidance for Loan Forgiveness Expansion*, WASH. POST (Oct. 28, 2021), https://www.washingtonpost.com/education/2021/10/28/pslf-waiver-education-department/.

[249] *NPRM*, 89 Fed. Reg. 27564, 27574 (proposed Apr. 17, 2024) (to be codified at 34 C.F.R. pts. 30, 682) (stating that ED intends to provide the non-IDR-Growing-Loan-Balance waiver to qualifying borrowers on a "broadly applicable, automatic basis").

[250] Press Release, U.S. Dep't of Educ., Biden-Harris Administration Takes Next Step Toward Additional Debt Relief for Tens of Millions of Student Loan Borrowers This Fall (July 31, 2024), https://www.ed.gov/news/press-releases/biden-harris-administration-takes-next-step-toward-additional-debt-relief-tens-millions-student-loan-borrowers-fall.

[251] *NPRM*, 89 Fed. Reg. at 27614.

[252] 26 U.S.C. § 6103(a).

purpose of (and to the extent necessary in)" administering the IDR plans for Direct Loans, monitoring earnings and reinstating loans discharged based on total and permanent disability, and aiding in completion of the Free Application for Federal Student Aid.[253] Absent statutory authority for Treasury to share tax return information, borrowers may need to provide ED consent to obtain their information from Treasury.[254]

Legal Considerations

ED's ongoing student loan debt relief rulemaking is evidently the first time that ED has sought to implement its HEA Section 432(a)(6) waiver authority through rules.[255] It raises novel legal questions about the scope of Section 432 authority and the ability of third parties to challenge the waivers through litigation.

Scope of Section 432 Waiver Authority

The first novel legal question that the rulemaking raises is the scope of the Secretary's "waiver" authority, both in terms of the authority that it confers and the loan programs to which it applies. The statute allows the Secretary to "waive" "any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption" acquired under the FFEL program.[256] The statute does not define the key verb "waive."[257] As a matter of ordinary meaning, Section 432's use of the term "waive" likely connotes "relinquish[ing]"[258] or "forego[ing]"[259] or "refrain[ing] from insisting upon" a "claim, privilege, or right."[260]

An interpretive question might center on one or more key terms or phrases in one section of a statute (e.g., in Section 432(a)(6) itself). An interpreter would not consider the meaning of those key terms in isolation. Rather, "statutory language has meaning only in context."[261] Interpreters often construe a statute's "entire text, read as an integrated whole."[262] Particular Section 432 waiver proposals might thus be evaluated in the context of other provisions of the HEA. Along these lines, ED states that it drafted certain Section 432 waiver proposals to provide waivers that,

[253] *Id.* § 6103(l)(13). Following the Supreme Court's invalidation of the HEROES Act policy, GAO issued a report recommending that ED "implement controls to avoid relying solely on self-reported data in any future debt relief efforts." In response to this recommendation, ED stated that the IRC authorizes the IRS to disclose certain tax information to FSA, which "can be shared to improve the administration of [student aid programs], as well as any future debt relief programs." GOV'T ACCOUNTABILITY OFF., STUDENT LOANS: EDUCATION SHOULD PROACTIVELY MANAGE FRAUD RISKS IN ANY FUTURE DEBT RELIEF EFFORTS, GAO-24-107142, at 27 (2023).

[254] 26 U.S.C. § 6103(c).

[255] That is not to suggest, however, that ED has not *used* its HEA Section 432 waiver authority in the past to administer the federal student loan portfolio. *See, e.g.*, 34 C.F.R. part 682, app'x D (2024) (explaining that a letter originally issued as an ED bulletin in March 1988 "sets forth the circumstances under which the Secretary, pursuant to sections 432(a)(5) and (6) of the Higher Education Act of 1965" and regulation, "will waive certain of the Secretary's rights and claims with respect to" FFELP loans "made under a guaranty agency program" that violated program requirements); Liu & Stiff, *supra* note 17, at 35 (identifying seven borrower groups that ED claims were provided student loan debt relief between 2019-2022 using HEA Section 432(a)(6) authority).

[256] 20 U.S.C. § 1082(a)(6). The statute includes other verbs, such as "compromise" and "release," *see id.*, but the NPRM consistently refers to its regulatory provisions as waivers.

[257] *See id.*

[258] *Waive*, 2 NEW WEBSTER DICT. OF THE ENGLISH LANGUAGE 707–08 (1964).

[259] *Waive*, GROSSET WEBSTER DICT. 622 (1966).

[260] *Waive*, 2 FUNK & WAGNALLS STANDARD DICT. OF THE ENGLISH LANG. 1413 (1965).

[261] Graham Cnty. Soil & Water Conservation Dist. v. U.S. *ex rel.* Wilson, 545 U.S. 409, 415 (2005).

[262] Schindler Elevator Corp. v. U.S. *ex rel.* Kirk, 563 U.S. 401, 408 (2011) (internal quotation marks omitted).

in ED's view, resemble other HEA provisions. For example, ED proposes to authorize waiver of commercially held FFEL program loans that first entered repayment on or before July 1, 2000.[263] ED explains that the only IDR plan that the HEA offers to FFEL program borrowers provides forgiveness after 25 years in repayment.[264] Though ED has not expressly said that it lacks authority to prescribe a different time-in-repayment-based waiver under Section 432, ED states it would not be "appropriate to select a forgiveness period that is otherwise unavailable for these borrowers."[265] Others may seek to use similar context-based arguments to challenge ED's waivers.

Another relevant tool could be the *canons of construction*. The canons include *substantive canons* that presume statutory text that meets certain criteria should be given a particular substantive application.[266] For instance, a court might resolve doubts about the scope of an ambiguous criminal statute in favor of a criminal defendant.[267] The Court in *Biden v. Nebraska* applied a substantive canon, the *major questions doctrine*, to the HEROES Act policy.[268] The Court has explained that, for an agency to regulate on an issue of major significance, it must have "clear" congressional authorization for its action.[269] In *Nebraska*, the Court reasoned that the HEROES Act policy fell within the scope of the major questions doctrine because of its estimated costs[270] and the breadth and novelty of the Secretary's asserted statutory power in comparison to past exercises of HEROES Act authority.[271] ED expected more than 40 million to be eligible for relief under the HEROES Act policy.[272] Fewer borrowers would qualify for an HEA Section 432 waiver, roughly 27.6 million.[273] Of those who may qualify, ED estimates that at least 19 million would be eligible for a partial waiver only (e.g., a growing-loan-balance waiver).[274] Even so, if considered together, the HEA Section 432 waivers may be of sufficient scope to result in major-questions scrutiny.[275]

However, loans are no longer originated under the FFEL program, which is authorized by Part B of Title IV. The vast majority of outstanding federal student loan balances were instead originated

[263] *See supra* "Waiver Based on Time Since a Loan First Entered Repayment."

[264] *See NPRM*, 89 Fed. Reg. 27564, 27609 (proposed Apr. 17, 2024) (to be codified at 34 C.F.R. pts. 30, 682); *see also* 20 U.S.C. § 1078(b)(9).

[265] *NPRM*, 89 Fed. Reg. at 27609.

[266] CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon, 31–32 (Mar. 10, 2023, version).

[267] *See* United States v. Davis, 588 U.S. 445, 464–65 (2019).

[268] 143 S. Ct. 2355, 2372–75 (2023).

[269] Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302, 324 (2014). CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers (Nov. 2, 2022, version).

[270] 143 S. Ct. at 2373 (stating that an estimated policy cost of roughly $500 billion amounted "to nearly one-third of the Government's $1.7 trillion in annual discretionary spending").

[271] *Id*. at 2372–73 ("Under the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the [Higher] Education Act.").

[272] Fact Sheet, White House, The Biden-Harris Administration's Plan for Student Debt Relief Could Benefit Tens of Millions of Borrowers in All Fifty States (Sept. 20, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/20/fact-sheet-the-biden-harris-administrations-plan-for-student-debt-relief-could-benefit-tens-of-millions-of-borrowers-in-all-fifty-states; *see also Nebraska*, 143 S. Ct. at 2369, 2373.

[273] *See supra* **Table 1**.

[274] *See id.*

[275] *Compare supra* **Table 1** (reflecting a cost estimate for cohorts 1994-2033 of about $147 billion), *with Nebraska*, 143 S. Ct. at 2373 (explaining that in prior cases applying the major questions doctrine the Court had found administrative action with an "economic impact" of roughly $50 million to be economically "significant" (internal quotation marks omitted)).

under the Direct Loan program, which is authorized under Part D.[276] Section 432 describes actions the Secretary may take in the "performance of, and with respect to, the functions, powers, and duties, vested in him by" *Part B*.[277] Another potential interpretative question raised by the rulemaking, then, is whether this Part B authority also applies to Part D loans.[278] In other contexts, ED has noted that, under the HEA, Part D loans generally "have the same terms, conditions, and benefits" as Part B loans.[279] ED has thus argued that its Section 432 authority is one of the "terms, conditions, [or] benefits" of Part B loans, and thus part of Part D loans as well.[280] It has reiterated that view in the NPRM.[281]

The Supreme Court's June 2024 decision in *Loper Bright Enterprises v. Raimondo* overruled the *Chevron* doctrine.[282] As a result, in lawsuits challenging agency action under the Administrative Procedure Act (APA),[283] a court must exercise its "independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."[284] A court may no longer defer to an agency's reasonable interpretation of a law simply because the court deems the statute "ambiguous."[285] However, even before the Court's decision in *Loper Bright*, during the Biden Administration ED does not appear to have urged the Court to defer, under *Chevron*, to its interpretation of either Section 432 or the HEROES Act in cases involving proposed discharges of federal student loan balances.[286] Thus, *Chevron*'s demise may not substantially affect how any litigation over ED's proposed Section 432 waivers might unfold.

Standing to Challenge Section 432 Waivers

Another legal question that Section 432 waivers might raise is whether any third party will seek and be able to challenge student loan debt relief measures through litigation—that is, whether a third party would have *standing* to bring such a challenge in federal court. To establish standing, plaintiffs must show that (1) they have suffered some injury-in-fact, (2) the injury is fairly traceable to the defendant's allegedly unlawful conduct, and (3) the injury is likely to be redressed

[276] *See supra* note 3.

[277] 20 U.S.C. § 1082(a)(6).

[278] One nonfederal negotiator argued that HEA Section 432 authority does not apply to Part D loans. *See* Josh Divine, *Consideration of Fairness to Taxpayers and Persons Who Have No Loans*, https://www2.ed.gov/policy/highered/reg/hearulemaking/2023/loan-proposal-taxpayers-and-persons-who-do-not-have-debt-submitted-by-josh-divine.pdf (last visited Aug. 7, 2024) (negotiator-submitted materials).

[279] 20 U.S.C. § 1087e(a).

[280] Fed. Resp.'s Opp. to the Appl. to Stay the J. Entered by the U.S. Dist. Ct. for the N. Dist. of Cal., Evergreen Colls., Inc. v. Cardona, No. 22A867, at 29 (U.S. Apr. 12, 2023), (arguing that "the Secretary has authority to settle a claim relating to [FFELP], and th[e] same settlement and release authority—which reflects terms, conditions, and benefits of the loans—also attaches to claims related to" Direct Loans), *application denied* (Apr. 13, 2023).

[281] *NPRM*, 89 Fed. Reg. 27564, 27566 n.4 (proposed Apr. 17, 2024) (to be codified at 34 C.F.R. pts. 30, 682).

[282] 144 S. Ct. 2244, 2273 (2024); *see also* CRS Legal Sidebar LSB11189, *Supreme Court Overrules Chevron Framework*, by Benjamin M. Barczewski (June 28, 2024, version).

[283] Parties challenging recent ED action affecting the Title IV student loan portfolio have invoked the Administrative Procedure Act as their asserted cause of action. *See, e.g.*, Compl. for Decl. and Inj. Relief, No. 4:24-cv-00520, at ¶¶ 161–272 (E.D. Mo. Apr. 4, 2024) (challenging revisions to student loan repayment plans in four Administrative Procedure Act claims).

[284] *Loper Bright*, 144 S. Ct. at 2273.

[285] *Id.*

[286] *See generally* Fed. Resp.'s Opp. to the Appl. to Stay the J. Entered by the U.S. Dist. Ct. for the N. Dist. of Cal., Evergreen Colls., Inc. v. Cardona, No. 22A867, at 29 (U.S. Apr. 12, 2023) (omitting reference to *Chevron* in defending settlement agreement that proposed to discharge federal student loans using asserted HEA Section 432 authority); Br. for the Pet'rs, Nebraska v. Biden and Dep't of Educ. v. Brown, Nos. 22-506 & 22-535 (U.S. Jan. 4, 2023) (omitting reference to *Chevron* in defending the HEROES Act policy);

by the remedy sought.[287] Litigation over the HEROES Act policy and other ED actions may preview the standing theories that third parties may seek to invoke to challenge Section 432 student loan debt relief rules.

In *Nebraska v. Biden*, the State of Missouri asserted standing to challenge the HEROES Act policy based, in part, on how the policy would affect the Higher Education Loan Authority of the State of Missouri (MOHELA), a state-chartered corporation whose injuries the Court considered to be injuries of the state.[288] In particular, Missouri's asserted injuries included the fact that MOHELA was a federal student loan servicer. Roughly "half of all federal borrowers" qualified to have their entire loan balances cancelled under the HEROES Act policy, resulting in the closure of accounts then allocated to loan servicers.[289] Account closure would have resulted in the loss of loan servicer revenue, including $44 million annually for MOHELA.[290]

Missouri or another loan servicer might therefore argue that implementation of an HEA Section 432 waiver policy will result in a loss of loan servicer revenue. Following the Court's decision in *Nebraska*, Missouri has successfully relied on the servicer-injury theory for its asserted standing to challenge revisions to federal student loan repayment plans that shorten timelines to forgiveness for certain borrowers.[291]

While *Nebraska* recognized a theory of Direct Loan servicer injury, it did so in the context of a student loan debt cancellation policy that qualified tens of millions of borrowers for *total* balance cancellation, using a single set of eligibility criteria (e.g., loan type, Pell Grant receipt, and AGI).[292] By contrast, ED is proposing nine different Section 432 waiver types, and nearly all of the borrowers who ED expects to qualify for such a waiver will only qualify for a *partial* loan balance waiver. In particular, ED expects 25.6 million borrowers to only qualify for one of the two growing-loan-balance waivers.[293] Thus, the vast majority of borrowers who qualify for a proposed Section 432 waiver would still owe on affected loans after ED applies the waivers. If accounts associated with these still-outstanding loans are not closed as a result of the growing-loan-balance waivers, loan servicers such as MOHELA may not face the same type of threatened loss of servicer revenue as in *Nebraska*.

Nebraska focused only on the potential *loss* of servicer revenue on account of the challenged policy. However, in litigation over ED's revisions to federal student loan repayment plans, the federal government has sought to include a loan servicer's potential *gain* in a standing analysis.[294] Thus, the federal government might seek to undermine a loan servicer's standing to challenge the Section 432 waivers by pointing to factors that the government contends cause MOHELA to

[287] Hollingsworth v. Perry, 570 U.S. 693, 704 (2013).

[288] *See* 143 S. Ct. 2355, 2367 (2023) ("Because [MOHELA] is part of Missouri, the State does not seek to rely on injuries suffered by others. It aims to remedy its own." (internal citations and quotation marks omitted)).

[289] *Id*. at 2366.

[290] *Id*.

[291] *See* Missouri v. Biden, No. 24-2332, 2024 WL 3738157, at *3 (8th Cir. Aug. 9, 2024) (agreeing with the district court that a lawsuit challenging ED's revisions to student loan repayment plans, brought by Missouri and other states, included allegations that were "substantially similar to, if not identical to, those the Supreme Court held were sufficient to establish Missouri's standing" in the HEROES Act litigation).

[292] *See supra* "The HEROES Act Debt Relief."

[293] *See supra* **Table 1**.

[294] Defs' Combined Memo. of Law in Supp. of Defs' Mot. to Dismiss and in Oppo. to Plfs' Mots. for a Temp. Restraining Order and P. Injun. at 12, *Missouri v. Biden*, No. 4:24-cv-00520-SEP (E.D. Mo. May 7, 2024) (arguing that the SAVE repayment plan may reduce MOHELA's operating costs, decrease the likelihood of servicing-error penalties, and "result in some borrowers' accounts remaining open longer, which will add to MOHELA's servicing earnings").

derive a net benefit from the proposed waivers. One district court, though, has rejected this approach to weighing potential Direct Loan servicer revenue gains against revenue losses.[295]

Direct Loan servicers are not the only the litigants who may seek to challenge Section 432 waivers. In recent years, plaintiffs challenging ED's management of its federal student loan portfolio have advanced a variety of standing theories beyond servicer injury, with varying degrees of success. These other theories have included claims of taxpayer injury,[296] loss of state tax revenue,[297] competitive harm to public service organizations as compared to private employers based on the asserted effects of ED action on the PSLF program,[298] economic impacts on commercially held FFEL program loans,[299] and violations of procedures that allegedly applied to making the ED policy concerned.[300] Regardless of the theory advanced, plaintiffs would need to demonstrate that they have suffered or imminently will suffer a concrete and particularized injury due to an HEA Section 432 waiver and that a federal court could redress that harm.[301]

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[295] Missouri v. Biden, No. 4:24-cv-00520, 2024 WL 3104514, at *19 (E.D. Mo. June 24, 2024) ("To the extent Defendants ask this Court to assess the alleged harms to Missouri by conducting a balancing test by weighing" the "potential benefits to MOHELA" of repayment plan revisions "against the loss of administrative fees" resulting from new forgiveness opportunities available under the revised repayment plan, "the Court declines to do so.").

[296] *See* Brown Cnty. Taxpayers Ass'n v. Biden, No. 22-C-1171, 2022 WL 5242626, at *2–3 (E.D. Wis. Oct. 6, 2022) (dismissing suit to enjoin the HEROES Act policy because it asserted an impermissible theory of taxpayer standing).

[297] Kansas v. Biden, No. 24-1055-DDC-ADM, 2024 WL 2880404, at *18 (D. Kan. June 7, 2024) (concluding that any loss in state tax revenue because of SAVE repayment plan-based loan forgiveness was self-inflicted given eight states' decisions to mirror, for state law purposes, the income tax treatment under federal law for discharges of indebtedness).

[298] Mackinac Ctr. for Pub. Pol'y v. Cardona, 102 F.4th 343, 353 (6th Cir. 2024) (affirming dismissal of suit challenging one-time account adjustment premised on the view that the adjustment caused competitive harm to public service organizations whose employees were eligible for PSLF-based forgiveness by effectively shortening the time to forgiveness under that program).

[299] *Kansas*, 2024 WL 2880404, at *13 (holding that three states had adequately alleged Article III standing to challenge the SAVE plan based on its effects on FFELP loans held by their state instrumentalities).

[300] Dep't of Educ. v. Brown, 143 S. Ct. 2343, 2353 (2023) (holding that student loan borrowers had not shown a procedural injury traceable to the procedure ED used to issue the HEORES Act policy).

[301] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

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