Committee for a Responsible Federal Budget

We are writing in response to the proposed rule ED-2023-OPE-0123 RIN 1840–AD95 to waive student loan debt due to "likelihood to default" and if the borrower is experiencing "hardship." We are Marc Goldwein, Senior Vice President and Senior Policy Director for the Committee for a Responsible Federal Budget, and Alexander Holt, Senior Policy Advisor for Higher Education at the Committee for a Responsible Federal Budget. The Committee for a Responsible Federal Budget is a nonpartisan, non-profit organization committed to educating the public on issues with significant fiscal policy impact. We have significant experience analyzing the cost and effects of federal policy, including as it relates to higher education financing, that we hope will be helpful to the administration as they consider modifying or withdrawing this rule.

Background

We are concerned by the proposed rule to waive student loan debt due to "hardship." The proposal is arbitrary, unfair, creates perverse incentives, and appears to have no limiting principle, which could allow it to act as ongoing mass cancellation into the future. The rule also sets a dangerous and costly precedent under which the executive branch authorizes far more spending and borrowing than intended by Congress in violation of Administrative PAYGO rules and in possible violation of the laws governing the student loan program. We recommend a full withdrawal of this proposed rule; the proper channel for significant student loan reform is through Congress. We also believe the comment period for this rule to be unreasonably short given the complexity of the rule, the size and scope of the proposed changes, and the lack of available data. There has not been sufficient time for outside experts to study the rule and its implications. We thus respectfully request an extension of the comment period, following further important data runs. Below we will first give our critiques and concerns of the rule and then respond to the directed questions posed by the Department.

Concerns and Critiques

Black Box Model
The Department has proposed two 'black box' models, one each for § 30.91(c) and § 30.91(d). Neither of the descriptions give enough detail for external researchers to meaningfully evaluate these models. There are likely many ways with many different variables to get to 80 percent default for § 30.91(c), some of which make less sense than others when evaluating future borrower behavior.

The model for § 30.91(d) is especially important to be evaluated due to its proposed ongoing nature. This means the model will be attempted to be gamed by borrowers, so the model needs to be evaluated based on how likely it is to be subject to gaming.

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For example, the Department claims that cancellation will not be based solely on repayment history but without explaining the weighting of repayment history and what would push a borrower over the edge. The Department should consider releasing their proposed criteria confidentially to a group of researchers (including those critical of the rule) for confidential consultations on their criteria as well as data runs and modeling before publishing the final rule.

Inevitable Gaming of § *30.91(d)*

We commend the Department for recognizing the risk of potential gaming of § 30.91(d) but find its proposed solutions to the problem unsatisfactory. The Department proposes a "holistic assessment" and says that nonrepayment is no guarantee of a waiver and "could result in a borrower hurting themselves through delinquency or default with no guarantee of a waiver." This begs the question: if the goal of the proposed hardship rules is to decrease delinquency and default, then is it not a problem that the rule could encourage delinquency and default? Just because the Department *may* not forgive the debt, a borrower's rational calculus could still be to try to default and maybe go delinquent on a credit card for a few months just to see if the Department bites.

The Department says they will watch for "anomalous changes in repayment behavior," but this leads to two problems. First, borrowers leaving college (who are very likely to be online and watching videos or reading social media posts explaining gaming opportunities) will quickly learn that their best bet for cancellation is to *never* begin repaying their loans because that will avoid the "anomalous change" flag the Department has set up. If a borrower simply never engages with the repayment system, especially if they received a Pell Grant, and especially if they take on other forms of debt, it's not clear how these borrowers could possibly fail the Department's holistic assessment.

The second problem is the question of what the Department should do as a result of gaming. The Department has already stated that default is ruinous, and it has gone to great lengths to try to decrease or cancel defaulted debt. But if borrowers are strategically defaulting as a reaction to the Department's own misguided rulemaking, what is the Department's solution to this new class of borrowers who are defaulting? Give them a stern warning and then start involuntary collection? From the borrower's perspective, the Department is very unlikely to want to do that, and if borrowers wait out the Department long enough and strategically add criteria, they are likely correct in assessing that the Department will eventually cave and cancel the debt. If this seems like an unlikely scenario to the Department, we pose this question: How much energy and even other adverse financial consequences would you attempt to get, say, $100,000 in debt forgiven?

The Department already acknowledges that they are creating a time limit of § 30.91(c) in order to limit strategic default. If strategic default is a serious concern in § 30.91(c), then why is it not a concern in § 30.91(d)?

No Overarching Theory of Role of Outstanding Balance versus Repayment

In most cases, the generosity of the SAVE repayment plan ensures that a borrower experiencing significant hardship or financial insecurity is making no or low payments on their federal student loans. The Department never fully defines a situation in which no or low payments are insufficient to alleviate hardship *as it relates to student loans*. Since IDR already disconnects repayment from total debt, the Department struggles to explain why debt forgiveness is needed.

Undefinable and Arbitrary Definition of Hardship

The Department entertains various examples of borrowers experiencing hardship, though they do not use specific income levels or debt levels, making it difficult to even critique the examples. The Department entertains possibilities where payments are $0 in IDR already but does not explain why outstanding debt would be a problem in certain situations versus others. Since the Department merely explains that their approach would be "holistic," this is a setup for arbitrary decision-making related to some borrowers versus others. The government should be careful entering into a situation where they are determining winners and losers via subjective perceptions of levels of suffering.

Broken Cost-Benefit Analysis

The Department argues that the benefits of the proposed regulations outweigh the costs of the proposed regulations because many borrowers would not fully repay their loans. But if that is the case, then the costs should not be the estimated minimum of $110 billion. In footnote 101, the Department argues that even if SAVE is enjoined and the costs of the regulation thus substantially increase, it would still be worth the cost because "the Department believes the benefits of these proposed regulations would still outweigh the costs since the proposed regulations would authorize providing waivers to borrowers who are unlikely to fully repay their loans and, relatedly, the waivers would discharge debt that the Department is unlikely to fully collect in a reasonable period of time." This argument defies logic, and we request that the Department provide aggregate statistics on collections to back up their claim. Defaulted debt is often repaid in a timely manner due to the Department's extraordinary collection abilities, and the Department's own estimates of the cash recovery rate on loans also suggests this is the case.

Misunderstanding of Purpose of Title IV

The Department states:

> "In assessing the costs of collection, the Department may also consider whether collection advances the principles of the title IV programs. For example, a key purpose of the title IV programs is to enable borrowers who pursue postsecondary education to improve their future economic outcomes, and it may be contrary to this purpose to seek collection from borrowers who, due to labor market changes or family health challenges, are unable to participate fully in the market and repay their loans."

Along with this statement, the Department has an accompanying footnote that includes citing comments from President Lyndon Johnson after the bill had been passed. It is true that the Higher Education Act (HEA) intended to increase access to college in order to improve the economic possibilities for those who attended, but over the years the HEA has been amended to create different vehicles to achieve that result. The Pell Grant, introduced in the 1970s, is a grant with no expectation of repayment. Student loans, in contrast, were, up until relatively recently, always understood as a form of credit extended by the government and expected to be fully paid back (this was amended with the introduction of 2014 IBR enacted by Congress). Under the Department's reinterpretation of the HEA, borrowers should never be expected to pay back their loans because repayment inherently causes a reduction in economic benefit from the program compared to nonrepayment. It's unclear why Congress would mandate repayment and collections, allow for temporary economic hardship deferments, create a repayment program based on income, but somehow forget to mention that in case the borrower was not improving future economic outcomes, the Secretary can waive all debt.

Questionable Legal Logic

We are not legal scholars, but we specifically are concerned about the lack of a limiting principle in the Department's claim of "general powers" to cancel debt as it relates to rule § 30.91(d). The Department has not explained any way in which it is limited, which implies a future Secretary theoretically has the ability to cancel all student loan debt. As written, the rule and the legal explanation does not put any guardrails on the Secretary's ability beyond a vague assertion that very few borrowers would qualify for a black box formula. We are concerned this would violate the non-delegation principle of the major questions doctrine.[1]

Danger of the Catch-All Provision

The lack of a limiting principle is most clear when the Department "proposes that the list be non-exhaustive, and further proposes a 'catch-all' provision in § 30.91(b)(17), to preserve the Department's flexibility to address unanticipated factors that affect specific borrowers." Here the Department is unambiguously stating that there is no limiting principle and that the Secretary has complete authority to cancel debt at will based on any additional factor that can be dreamt up. Even if the current and next Secretary of Education are responsible with this discretion, it opens the door for future Administrations to effectively cancel as much student debt as they want.

Underestimation of Costs

For § 30.91(c), using the limited public information available, we expect that at least 7 million borrowers are 80 percent likely to default, as opposed to the Department's estimate of 6 million. We suggest that the Department use a larger range for a normal and high estimate.

For § 30.91(d), we believe the Department is significantly underestimating the number of borrowers that will eventually receive cancellation. The Department is using metrics like persistent poverty rates that have very little to do with matching the proposed criteria that constitute relief. When examining repayment rates, number of students who received Pell Grants, number of people with higher education degrees that also have other types of debt, and the number of people who have higher balances six years after starting repayment, the Department

[1] See CRS Report on Major Questions Doctrine https://crsreports.congress.gov/product/pdf/IF/IF12077

should be estimating cancellation of 40 percent of the remaining portfolio over the course of 10 years after cancellation from § 30.91(c). We continue to believe that the total combined cost from the hardship changes could total up to $600 billion over the course of ten years.

Directed Questions

1. Is "two years" the appropriate measurement window for the waivers specified in proposed § 30.91(c) related to borrowers who are likely to be in default, or should the Department use a different time frame, and if so, what timeframe and why?

We believe that two years is too long of a measurement window because it allows for borrowers to game the formula. Despite the Department's contentions that borrowers would not be able to game it, without providing the formula, there's no way to believe the Department. If someone is 90 days delinquent, they very likely will show up in any model as at least 80 percent likely to default. By creating the incentive to default, the borrower probably *is* at least 80 percent likely to default because the Department has now sent a signal that anyone who defaults gets their loans cancelled. Any window that is 90 days or longer is therefore at risk of moral hazard.

2. Is "80 percent" likelihood of being in default within the next two years the appropriate eligibility threshold for immediate relief in proposed § 30.91(c), or should the Department consider a different likelihood percentage, and if so, what should it be and why?

Eighty percent is too low of an eligibility threshold. As stated, we suspect that anyone who is at least 90 days delinquent will be considered likely to default, and that delinquency issue can squarely be attributed to the Department's mishandling of the payment pause and its restart. The Department needs to fix the system it broke as opposed to sweep it away.

We oppose this rule thoroughly, but if the administration wants to consider it, they should use a 98 percent likelihood. At 98 percent, the only people likely to pass that threshold are those already in default. This limits the arbitrariness that the model would introduce to debt cancellation (beyond the already arbitrary decision to cancel defaulted debt). Indeed, the Department should consider the public outcry of two very similar borrowers where one gets forgiveness and the other doesn't for unknown reasons (since the Department's model is not public). The 80 percent threshold guarantees that disastrous public relations outcome which will spur further confusion and distrust of the loan program.

3. As described in this NPRM, eligibility for a hardship waiver under proposed § 30.91(d) would be relatively rare and limited to circumstances where the Secretary finds: (i) the borrower is highly likely to be in default, or experience similarly severe negative and persistent circumstances, and (ii) other options for payment relief would not sufficiently address the borrower's persistent hardship. The Department invites feedback from the public on what circumstances constitute similarly severe negative and persistent circumstances that are comparable to default.

Nothing and everything constitutes persistent hardship because, as defined by the Department, hardship is subjective. Someone living under the poverty line but not paying rent could be in more dire straits than an early career tech worker paying 50 percent of their income towards rent in a high-cost area. That tech worker would have a much higher monthly payment in IDR than the person living under the poverty line, whose payment in IDR would be zero. The Department is creating a program where the workers employed to evaluate applications will have to subjectively determine the extent of human suffering the borrower is putting forward, then attempt to determine why, for whatever reason, a payment plan based on the borrower's income is not sufficient.

The Department proposes in the NPRM, for example, a borrower who suffered hardship in the past and who "may have seen their balance increase in size such that full repayment of that greater amount is no longer feasible." Of course, there are Income-Driven Repayment plans available, and the borrower would not need to pay higher than a set percentage of their income. If they pay that debt for a set number of years, any outstanding debt would be forgiven. Why does this borrower warrant forgiveness while others who have always made payments in IDR, no matter what, would not?

There is no obvious way to overcome the fundamental arbitrary nature of the Department's proposed words and definitions of "hardship" and it is why we expect the Department is significantly underestimating the cost of this program. When an application is before a Department employee or contractor, who's to say the borrower is not suffering?

4. Under proposed § 30.91(d), is "highly likely" to be in default or to experience similarly severe negative and persistent circumstances the appropriate eligibility threshold? If so, why? If not, should the Department use a different likelihood threshold, and, if so, what threshold and why?

§ 30.91(d) suffers from arbitrariness and lacks a limiting principle; it appears to be designed to turn into perpetual loan forgiveness. It makes little sense in any circumstance. However, we will use this opportunity to point out just how unworkable ED's proposed threshold is.

According to the Department's own estimates, the likelihood of an Unsubsidized Stafford loan issued this year to default over the lifetime of the loan is 29 percent.[2] According to the Department, that is not "likely to default" but instead "will default". Does the Department plan to forgive 29 percent of Unsubsidized Stafford Loans moving forward?

As mentioned previously, any borrower who is 90 days delinquent is probably "highly likely" to default. This creates a clear incentive for a borrower to not repay their loan and then apply for hardship cancellation. If they happen to have received a Pell grant, that will, according to the Department, further increase their likelihood to default (despite the fact that it has no causal link

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[2] See FY 2025 Congressional Justifications Student Loans Overview p. 36
https://www.ed.gov/sites/ed/files/about/overview/budget/budget25/justifications/t-sloverview.pdf

to their current earnings or ability to pay). "Likely to default" creates a threshold that can be gamed. Of course, "definitely will default because they are currently in default" also creates a gameable threshold, which is why no threshold is workable.

5. How should the Department help make certain that borrowers have the opportunity to enroll or apply for other programs administered by the Department that may be advantageous to the borrower and successfully demonstrate a hardship that qualifies for a waiver under proposed § 30.91(d)?

Based on applications for other student loan relief, we do not anticipate this will be an issue, and the more likely issue will be the Department's ability to process the applications in a timely manner. This will in turn put pressure on the Department to relax standards in order to speed up the approval process, thus increasing the costs of the rule.

6. How can the Department improve or refine the estimates in the RIA related to the anticipated volume of applications for the application-based hardship waiver process, as well as the estimates related to the approval rate for such applications?

We have the following suggestions for predicting expected volume:

a. Assume that at least the volume the Department predicts for lifetime default will all apply for relief.
b. Use the Survey of Consumer Finances to create a percentage of borrowers that have student loan debt as well as other forms of credit that the Department says would be considered, create a reasonable amount of debt that the Department thinks will qualify, and use that percentage to estimate applications.
c. We disagree with the Department's rejection of PSLF and IDR as "simple." Three administrations' worth of the Department of Education has been dealing with the complexity of both applications that borrowers nonetheless apply for in high numbers. Past years of IDR applications prior to income linking might provide helpful estimates. PSLF seems to be a comparably difficult process, so any estimates the Department has on the percentage of eligible public service borrowers that apply could be substituted.
d. The Department has numbers on the percentage of people who applied for debt relief for their first student loan cancellation plan. That was not fully publicized, so any percentage should be increased to assume increased knowledge over time.
e. CBO and presumably the Department had calculated an uptake rate for the application for the first cancellation. By the 10th year, we expect the volume of applications per cohort to approach that number, since nearly all borrowers should qualify under one of the 17 factors, especially as borrowers learn to game the application over time.

For approval rate estimates, we believe the Department's current methodology is incorrect. The Department states "we assume that for every borrower who is approved at the Secretary's discretion, there would be one that is rejected, *i.e.*, we assume an approval rate of 50 percent." We propose a more Bayesian approach to considering what the "Secretary's discretion" may look like.

This Secretary has proposed mass cancellation that would have applied to 95 percent of borrowers. After the Supreme Court ruled that the Department's legal argument was invalid, the Secretary proposed another form of mass cancellation that would cost $147 billion using a nearly identical legal argument. After that, the Secretary proposed another one-time cancellation in this proposal for all defaulted borrowers and perpetual debt cancellation for those borrowers experiencing hardship. This Secretary has also issued one-time waivers for most requirements or verification related to months in IDR and years in public service, resulting in tens of billions of dollars of additional cancelled loans with very few to no questions asked.

Given that nearly all borrowers qualify for one of the 17 factors listed (especially once the factors are known and borrowers begin to game it), and that one of the factors is a "catch-all" provision for anything else the Secretary deems important, and given the Secretary has a clear intent to cancel large swaths of student debt, we would expect application approval to approach 100 percent. The Department has offered no reason to believe otherwise based on their explanation of the application process, and there is no accountability system to prevent this Secretary or a future Secretary from executing his or her desire to cancel debt in the future. Therefore, the Department should be honest that this is an open-ended rule to allow perpetual debt cancellation and estimate the costs accordingly.

7. As described in this NPRM, the Department believes a presumption in favor of a full waiver is appropriate and would provide consistency in decision-making, but that this presumption could be rebutted in certain circumstances. For example, the Secretary may find the presumption in favor of full waiver is rebutted if there is evidence that a partial waiver would sufficiently reduce a borrower's monthly payment in a manner that alleviates their hardship under these regulations. The Department seeks input from the public on the types of circumstances and evidence that the Department should consider to determine when partial relief is more appropriate.

With Income-Driven Repayment available, payments for struggling borrowers are no longer linked to outstanding debt. Nearly all borrowers experiencing hardship should be enrolled in an IDR plan in order to reduce the burden of monthly payments. The fact that this is a question the Department has suggests the underlying illogic of this plan that seems to envision a world before the safety net of IDR existed. We are neither in favor of full or partial forgiveness, and suggest the Department may need to reconsider, or at least explain, how they think debt levels interact with monthly payments when IDR exists.

8. Under what circumstances, pursuant to proposed § 30.91(d), would a borrower who is eligible for a $0 monthly payment under an income-driven repayment plan meet the standard for relief in proposed § 30.91(d) of being highly likely to be in default or experience similarly severe and persistent negative circumstances, and other options for payment relief would not sufficiently address the borrower's persistent hardship?

None. In all proposed criteria, the Department is making an implicit value judgement that money owed to private entities (such as a landlord or a hospital) supersedes the amount of money owed to the federal government. This is a remarkable shift of precedent. There are not tax debate regulations currently going on at the IRS under what circumstances a borrower's taxes should be waived due to external circumstances. Historically, money owed to the government should come first.

But even more strange, in this example the borrower is already paying nothing and, under the SAVE plan, the interest is being forgiven each month. No one – not the borrower, not the Department of Education – can accurately predict the borrower's financial situation in the coming years. The entire point of the IDR system is to provide a safety net when needed, and to have a borrower repay when they can. The Department is asking a question that defies the logic of IDR.

9. Under what circumstances would a borrower be highly likely to be in default, or experience similarly severe negative and persistent circumstances, such that relief pursuant to proposed § 30.91(d) would be appropriate?

Given the availability of multiple IDR plans that offer $0 or affordable payment, a borrower is likely to default only because of a lack of knowledge that such a plan exists or an unwillingness to engage with the system. Both of these issues are a responsibility for the Department to remedy. Any attempt the Department makes will have to include current and former repayment history, and as soon as those criteria are included, borrowers will be tempted to game the system by not repaying.

10. What type of data could the Department use to determine whether a borrower who has not submitted an application qualifies for relief under proposed § 30.91(d), and how could ED obtain those data?

The fact that the Department wants to automate cancellation without a borrower applying is further evidence that this is actually a strategy for perpetual cancellation. We strongly discourage the Department from attempting to automate the process.

11. If the Department were to establish a cap on the amount of relief eligible borrowers could receive, what would be a reasonable cap and what data, research, or other information would support the setting of such a cap? The Department is particularly interested in different approaches for formulating and justifying the amount of capped relief. For example, the Department welcomes feedback on whether the Department should apply any of the following approaches: a universal cap, a progressive cap based on the extent of the hardship up to a maximum possible limit, or a cap that provides proportional relief based on other circumstances.

We are opposed to any amount of relief but will comment theoretically on how the Department could consider this and what data they should use. A progressive cap or proportional relief cap seems unworkable from a logistical perspective. Already the binary decision of whether to provide relief or not based on a set of circumstances is subjective and seemingly unrealistic to have inter-operator reliability. Imagining a formula in which the borrower gets more cancellation as they check more and more criteria seems perverse and not likely to reflect the reality of a given borrower's hardship, nor able to be standardized across operators.

Since anyone experiencing hardship should almost certainly be enrolled in a plan that determines their payment based on their amount borrowed, the effect of partial cancellation would be that it *may* decrease the amount of time the borrower is in repayment. But that would only be true if the borrower is making principal payments, which seems unlikely if the borrower is experiencing persistent hardship. Even if they are making principal payments, the effect is to reduce the total time borrowed.

The Department could change their conception of the point of this program to target low-debt borrowers. By having a cap of, say, $3,000, the Department could consider this as a way of clearing out small dollar debt that genuinely might be more expensive to collect than is worth pursuing. The smaller the total debt, the more likely that the Department's claim of not recouping the amount spent is likely.

We propose the Department display very fine-grained statistics of non-payment (i.e. no engagement) in a repayment plan from initial debt borrowed, from $500 up to $5,000 in increments of $500. We also propose that the Department cross-reference those amounts as they relate to the criteria the Department is proposing. We further suggest the Department estimate the cost savings of this approach.

We also propose the Department create a cost-benefit analysis of collecting debt for low debt levels. For example, if a non-paying borrower has $500 in debt, can the Department estimate the cost of attempting to recoup the debt, versus the cost recovered, and do that for various debt levels? This could help the Department determine a cap that would achieve its cost/benefit objective as stated in the NPRM.

Conclusion

We reiterate our opposition to the proposed hardship rule and encourage the Department to withdraw the rule. The proper place for reforming the student loan system is in Congress. Thank you for your consideration of our comments.

Sincerely,

Marc Goldwein and Alexander Holt