

July 20, 2023

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

Re: Docket ID ED–2023–OPE–0123; Intent to Establish a Negotiated Rulemaking Committee.

Dear Secretary Cardona:

The Center for Responsible Lending (CRL)¹, files this comment in response to the U.S. Department of Education’s notice of intent to establish a negotiated rulemaking committee to prepare proposed regulations under section 432(a) of the Higher Education Act, Docket ID ED–2021–OPE–0123.

With nearly 45 million Americans owing 1.7 trillion dollars in student loan debt,² the Department’s intent to establish a negotiated rulemaking committee to examine proposals under the waiver, modification, and compromise authority is critical to increasing fairness and affordability for those who must accrue debt to pursue higher education. The sheer scale of the student loan debt crisis in America—and its disproportionate and, often, inequitable, impact on borrowers of color—compels us to urge the Department to use this negotiated rulemaking to develop and put in place a series of strong, impactful programs and policies that will make repaying federal student loans less onerous, more affordable, and less likely to end up in default.

Though a federal student loan is not an inherently predatory financial product, the use of federal student loans to finance higher education has devolved into a practice that is ripe with potential predation. This is especially true for borrowers of color. Since CRL released its 2014 report highlighting the rapid growth of for-profit colleges that charge more money to obtain

¹ The Center for Responsible Lending is a non-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices, including student loan debt incurred as a result of fraudulent representations by higher learning institutions. CRL’s views on student lending are informed by its affiliation with Self-Help, one of the nation’s largest nonprofit community development financial institutions. Self-Help has provided \$6 billion in financing to 70,000 homebuyers, small businesses and nonprofits and serves more than 80,000 mostly low-income families through 30 retail credit union branches in North Carolina, California, and Chicago.

² Zack Friedman, “Student Loan Debt Statistics In 2022: A Record \$1.7 Trillion,” *Forbes* (May 16, 2022), available at <https://www.forbes.com/sites/zackfriedman/2022/05/16/student-loan-debt-statistics-in-2022-a-record-17-trillion/?sh=7361aa474d5a>.

education with less labor-market value,³ lax regulatory oversight has allowed the predatory, and often racially-targeted practices of these institutions to disproportionately affect millions more minority borrowers by saddling them with debt that their educations cannot sustain.⁴ At the same time, equally lax oversight of the Department’s servicers has led to many borrowers of color needlessly being placed in deferment, forbearance, or subsequently defaulting on a student loan, due to their unawareness of income-driven repayment options.⁵

The result is a perfect storm. Far too many borrowers of color not only pay more for an education that has less labor-market value,⁶ but also have less access to built-in, relief mechanisms that minimize default and prevent debt escalation through existing interest capitalization policies.⁷ These challenges are only multiplied by the pre-existing racial wealth gaps for minority households,⁸ which force students of color to borrow more money to pay for their college educations in the first place.⁹ Finally, after college, borrowers of color face significant wage disparities when compared to their white counterparts,¹⁰ and endure more income volatility in an economy already plagued by stagnant wages.¹¹ Given these facts, it is no surprise that minority borrowers are both especially susceptible to default and have found it more difficult to pay off their federal student loan debt.¹² An astounding 40% of Native American and Native Alaskan graduates end up defaulting on their student loan repayment, along with 35 % of Latino graduates, and 30% of African American borrowers.¹³ Past racial inequities and continuing, overt discrimination make it difficult, if not impossible, for too many borrowers of color to sustain their federal student debt obligations.

³ Peter Smith and Leslie Parrish, “Do Students of Color Profit from For-Profit College: Poor Outcomes and High Debt Hamper Attendees’ Futures,” Center for Responsible Lending (October 2014), available at <https://www.responsiblelending.org/student-loans/research-policy/CRL-For-Profit-Univ-FINAL.pdf>.

⁴ Suzanne Kahn, Mark Huelsman, Jen Mishory, “Bridging Progressive Policy Debates: How Student Debt and the Racial Wealth Gap Reinforce Each Other,” at 10, The Century Foundation, The Roosevelt Institute, Demos (September 2019), available at https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Student-Debt-and-RWG-201909.pdf.

⁵ Center for Responsible Lending, Unidos US, NAACP, National Urban League, Leadership Conference Education Fund, “QUICKSAND: Borrowers of Color & the Student Debt Crisis,” at 11 (September 2019), available at <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-quicksand-student-debt-crisis-jul2019.pdf>.

⁶ Smith, Parrish, *supra* note 3 at 20.

⁷ *See, e.g.*, Meredith Kolodner, “Do income-based repayment plans drive young borrowers of color deeper into debt?,” Hechinger Report (January 15, 2021), available at <https://hechingerreport.org/do-income-based-repayment-plans-drive-young-borrowers-of-color-deeper-into-debt/>.

⁸ Kahn, Huelsman, Mishory, *supra* note 4 at 13.

⁹ *Id.*

¹⁰ Rachel Louise Ensign and Shane Shifflett, “College Was Supposed to Close the Wealth Gap for Black Americans. The Opposite Happened,” *The Wall Street Journal* (August 7, 2021), available at <https://www.wsj.com/articles/college-was-supposed-to-close-the-wealth-gap-for-black-americans-the-opposite-happened-11628328602>.

¹¹ *Id.*

¹² *Id.*

¹³ Urvi Neelakantan, [Black-White Differences in Student Loan Default Rates Among College Graduates | Richmond Fed](https://www.richmondfed.org/publications/research/economic_brief/2023/eb_23-12#:~:text=Default%20rates%20differ%20markedly%20by,Black%20and%20White%20college%20graduates) (April 2023), available at https://www.richmondfed.org/publications/research/economic_brief/2023/eb_23-12#:~:text=Default%20rates%20differ%20markedly%20by,Black%20and%20White%20college%20graduates.

A. By its text, §432(A) of the Higher Education Act Grants the Administration Broad Authority to Modify, Compromise, and Waive the Terms of Repayment of Federal Student Loans.

Under Section 432(a)(6) of the Higher Education Act of 1965,¹⁴ the Department of Education has authority to "... compromise, waive, or release **any** right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption," of Federal Family Education Loan Program (FFELP) and Perkins student loans.¹⁵ Under Section 432(a)(4), the Department also has authority "to consent to modification, with respect to rate of interest, time of payment of any installment of principal and interest or any portion thereof, or any other provision of any [student loan]."¹⁶ Because 20 U.S.C. §1087 provides that Direct Program "loans ... shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers of [FFELP loans]," these three statutory provisions have been recognized as granting the Secretary of Education broad settlement authority of any federal student loan's repayment obligations.¹⁷

Though the Notice of Intent to establish the negotiated rulemaking committee contains no express proposals to consider, CRL continues to believe that these statutory provisions provide the Department with an alternative legal authority to repropose the Administration's prior debt cancellation proposal that was recently struck down by the Supreme Court. We also believe that it is critical that policymakers and advocates begin immediately thinking through the dynamics, effectiveness, and feasibility of developing additional proposals applying already existing models of loan modification and compromise programs in order to develop a strong set of proposed regulations related to the settlement of student loan debt under the Higher Education Act.

Specifically, based on the scope of the Secretary's power, we recommend that the negotiated rulemaking committee consider additional proposals to:

- (1) develop an Offer-in-Compromise program based on the Borrower's ability to repay and modeled upon the pre-existing program used by the Internal Revenue Service;
- (2) refund any Interest Recapitalization on all outstanding loans if the recapitalization was not required by statute, and

¹⁴ HIGHER EDUCATION ACT, PUB. L. NO. 89-329, 79 STAT. 1219 (1965), codified as 20 U.S.C. §1082(a).

¹⁵ *Id.* (Emphasis added).

¹⁶ 20 U.S.C. § 1082(a)(4) (emphasis added) (FFELP); *id.* §1087hh(1) (emphasis added) (Perkins).

¹⁷ See Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 BUFFALO L. REV. 281, 296, 395 (2020). A core issue that the negotiated rulemaking committee will need to consider is whether the Department's authority under the cited statutory provisions limits relief to being considered on an individual basis as opposed to a broader, blanket cancellation of a specific dollar amount. That issue arises due to the requirement that the Department of Justice review any use of the cited authority if it exceeds \$100 million dollars. Similar limitations in the IRS's settlement authority to negotiate compromises and requiring Department of Justice approval for compromises in excess of \$50,000 have generally been interpreted as requiring relief to be granted on a case-by-case basis.

(3) simultaneously implement servicing guidelines, policies, and contract provisions that require servicers to proactively address student loan delinquency.

B. The Center for Responsible Lending’s Issue Recommendations for the Negotiated Rulemaking Committee.

1. The Negotiated Rulemaking Process Should Consider the Development of an Offer-in-Compromise Program Based on the Borrower’s Ability to Repay.

The Internal Revenue Code authorizes the Secretary of the Treasury to reach compromise agreements in civil or criminal cases regarding the internal revenue laws using language similar to that contained in the HEA.¹⁸ Under the code, the Internal Revenue Service (“IRS”) allows taxpayers to make an Offer-In-Compromise (“OIC”) to satisfy their outstanding tax liabilities for less than the amount that the federal government is owed.¹⁹ The program contains special rules targeting instances where the IRS has doubts that it will collect because paying the full outstanding amount would cause the taxpayer *economic hardship*.²⁰ In such cases, the IRS will allow the taxpayer to retain funds for basic living expenses.

A customized OIC model for student loan borrowers could have similar parameters for economic hardship. For example, an OIC scheme promulgated by the Department could consider factors such as:

- the borrower’s *local* standard of living expenses.²¹
- the financial impact of a long-term illness suffered by the borrower.²²
- costs associated with the care of dependents; or²³
- a borrower’s ability to borrow against their assets.²⁴

Likewise, the Department should exclude non-liable spouses’ assets and income when calculating a married student loan borrower’s OIC.²⁵

Congress has authorized the IRS to accept OICs since 1954.²⁶ The IRS began issuing guidelines for low-income taxpayers in 1976²⁷ and considering the economic hardship impact of

¹⁸ 26 U.S.C. §7122(a)(2018), as amended (“The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.”)

¹⁹ 26 C.F.R. §301.7122-1(2023)

²⁰ *Id.* at §301.7122-1(b)(3)(i).

²¹ *Id.* at §301.7122-1(c)(2)(i).

²² *Id.* at §301.7122-1 (c)(3)(i)(A).

²³ *Id.* at §301.7122-1 (c)(3)(i)(B).

²⁴ *Id.* at §301.7122-1 (c)(3)(i)(C).

²⁵ *Id.* at §301.7122-1 (c)(2)(ii).

²⁶ INTERNAL REVENUE CODE, PUB. L. NO. 83-591, 68A Stat. 849 (1954)

²⁷ PUB. L. NO. 94-455, 90 Stat. 1520 (1976)

tax assessments in 1998.²⁸ In 2012, it streamlined its OIC program to process OIC applications more efficiently.²⁹ The IRS' OIC program has succeeded in lightening the tax load for those facing economic struggles.³⁰ CRL urges the Department to move swiftly in developing its own offer-in-compromise program for student loan borrowers facing economic hardship.

2. The Negotiated Rulemaking Process Should Consider a Proposal to Refund Any Interest that was Accrued as a Result of a Recapitalization Event if the Interest was Not Required by Statute.

The Department has finalized its proposed regulations eliminating interest capitalization in instances where it is not statutorily required, such as when; (1) a borrower enters repayment, (2) exits forbearance, (3) defaults, (4) after periods of negative amortization under the alternative and ICR plans on an annual basis, and (5) when a borrower who is repaying under either the Pay as You Earn (PAYE) or REPAYE income drive repayment plans fails to recertify income on time or chooses to leave the plan.³¹ We firmly support the Administration's proposal and believe that these regulatory changes will have a positive impact on making student loan repayment more affordable for millions of borrowers and, as a result, reduce the overall likelihood of student loan defaults.

During the negotiated rulemaking process, the Department indicated that it would not make changes to interest capitalization policies retroactive to all borrowers with outstanding federal loan debt because "it would be too burdensome and error-prone."³² The Department went on to suggest that its "resources are better directed toward improving other loan discharge provisions."³³ We believe that the department's position is not only incorrect, but also ignores the reality that retroactive application of interest capitalization policies to outstanding loan debt could be a significant tool to address the existing racial and socio-economic disparities of student loan debt burden.

²⁸ PUB. L. NO. 105-206, 112 Stat. 685 (1998).

²⁹ IRS STREAMLINED OFFER-IN-COMPROMISE PROGRAM AIMS TO CUT RED TAPE (DEC 21, 2012), <https://mpacpas.com/irs-streamlined-offer-in-compromise-program-aims-to-cut-red-tape/> (last visited Jul 18, 2023).

³⁰ In 2022 alone, the IRS accepted some \$234.3 million in OICs in lieu of the total amount of outstanding tax debt. DELINQUENT COLLECTION ACTIVITIES, FISCAL YEARS 2021 AND 2022 (Internal Revenue Service), (live.com)(last visited Jul 18, 2023).

³¹ *Supra* note 26 at 245.

³² Owen Daugherty and Hugh T. Ferguson, "Closed School Discharges, Interest Capitalization, and PSLF: Neg Reg in Full Swing With Packed Day 2," National Association of Student Aid Financial Administrators, (November 3, 2021), available at <https://www.nasfaa.org/news-item/26332/Closed-School-Discharges-Interest-Capitalization-and-PSLF-Neg-Reg-in-Full-Swing-With-Packed-Day-2> (last accessed August 3, 2022).

³³ *Id.*

For example, research by the Department,³⁴ Brookings Institution,³⁵ and other researchers³⁶ has shown that borrowers of color—and, specifically African American borrowers—are far more likely to owe more than they originally borrowed four years, and even ten years, after entering repayment. Specifically, Brookings’ found that “nearly half (48 percent) of all black graduates owe more on their federal undergraduate loans at this point than they did at graduation, compared to just 17 percent of white graduates.” The research went on to find that approximately one quarter of the total debt differences between white and black student loan borrowers could be specifically attributed to “differences in rates of repayment and interest accrual...[because] Black graduates are much more likely to experience negative amortization (interest accumulating faster than payments received).” These findings suggest that retroactive application of the Department’s proposed interest capitalization policies could serve as a powerful tool to ameliorate the disproportionately harmful impacts of student debt burden on borrowers of color.

3. The Negotiated Rulemaking Process Should Consider Simultaneously Developing Servicing Guidelines, Policies, and Contract Provisions that Require Servicers to Proactively Address Student Loan Delinquency.

Evaluating debt modification proposals requires considering how they are implemented. Servicers must adhere to the Department’s contracts and guidelines. Requiring servicers to be proactive about implementing modifications is an accepted way of helping debtors.

The Department launched a plan in April for the Unified Servicing and Data Solution (“USDS”), which will give borrowers a “long-term loan servicing solution designed to serve [student loan] borrowers better.”³⁷ To serve borrowers better, the Department should require USDS loan servicers³⁸ to keep borrowers informed about their loan modification options.

FHFA’s Loan Modification Model

In 2008, Congress established the Federal Housing Finance Agency (“FHFA”) to create a stronger regulator to oversee the government sponsored enterprises (“GSEs”).³⁹ In November of that year, FHFA used its broad conservatorship authority to announce a new “streamlined

³⁴ 87 Fed. Reg. at 41,952.

³⁵ Judith Scott-Clayton and Jing Li, “Black-white disparity in student loan debt more than triples after graduation,” Brookings (October 20, 2016), available at https://www.brookings.edu/wp-content/uploads/2016/10/es_20161020_scott-clayton_evidence_speaks.pdf

³⁶ *Supra* note 13.

³⁷ THE NEXT GENERATION OF LOAN SERVICING: THE UNIFIED SERVICING AND DATA SOLUTION (USDS) IS THE LONG-TERM LOAN SERVICING SOLUTION DESIGNED TO SERVE BORROWERS BETTER (studentaid.gov)(Apr 24, 2023), https://studentaid.gov/sites/default/files/usds-fact-sheet.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= (last visited Jul 18, 2023)(The Department plans to go live with the USDS in 2024.)

³⁸ U.S. DEPARTMENT OF EDUCATION’S OFFICE OF FEDERAL STUDENT AID AWARDS NEW CONTRACTS TO FIVE COMPANIES TO SERVE BORROWERS, REDUCE DELINQUENCY, AND IMPROVE ACCOUNTABILITY (APR 24, 2023) , <https://content.govdelivery.com/accounts/USED/bulletins/356d904> (last visited Jul 18, 2023)(The Department granted 5 companies -- Central Research, Inc.; Ed Financial Services; Maximus Education, LLC; Missouri Higher Education Loan Authority (MOHELA); and Nelnet Diversified Solutions – with new contracts to “modernize and enhance loan servicing for more than 37 million borrowers.”)

³⁹ HOUSING AND ECONOMIC RECOVERY ACT OF 2008, PUB. L. NO. 110-289, 122 STAT. 2655 (2008).

modification program” (“SMP/Standard Modification”).⁴⁰ For eligible borrowers, FHFA’s SMP/Standard Modification created a “fast-track” method for servicers to allow “at risk” borrowers to reduce their interest rate, extend the life of the loan, and defer part of the principal.⁴¹ FHFA formally launched the SMP/Standard Modification program the following month.⁴² In 2013, FHFA began implementing a new streamlined modification process that required mortgage servicers to *automatically* offer eligible borrowers delinquent beyond 90 days the opportunity to lower their monthly mortgage payments.⁴³

The 2013 streamlined modification process stopped the practice of requiring borrowers to contact their servicer and submit financial hardship documentation before getting the modification process started.⁴⁴ Borrowers simply signed and returned the modification agreement to their servicer.

By the end of 2015, the FHFA’S SMP/Standard and new streamlined modifications prevented some 1.1 million mortgages from going into foreclosure.⁴⁵ FHFA still offers the same loan modification protocols via its Flex Modification program.⁴⁶

FHA’s Advance Loan Modification

During the COVID-19 pandemic, the Federal Housing Administration (“FHA”) also introduced an Advance Loan Modification (“ALM”) that required servicers to permanently and automatically underwrite a 25% reduction to eligible borrowers’ monthly principal & interest (“P&I”) payment.⁴⁷ No action is needed by the borrower to effectuate the modification other than

⁴⁰ <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Implementation-Plans-for-Streamlined-Loan-Modification-Program.aspx> STATEMENT OF FHFA DIRECTOR JAMES B. LOCKHART AT NEWS CONFERENCE ANNOUNCING STREAMLINED MODIFICATION PROGRAM (SMP)(NOV 11, 2008), [https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-FHFA-Director-James-B--Lockhart-at-News-Conference-Announcing-Streamlined-Modification-Program-\(SMP\).aspx](https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-FHFA-Director-James-B--Lockhart-at-News-Conference-Announcing-Streamlined-Modification-Program-(SMP).aspx) (last visited Jul 18, 2023).

⁴¹ *Id.*

⁴² FHFA ANNOUNCES IMPLEMENTATION PLANS FOR STREAMLINED LOAN MODIFICATION PROGRAM (DEC 18, 2008), <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Implementation-Plans-for-Streamlined-Loan-Modification-Program.aspx> (last visited Jul 18, 2023).

⁴³ <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-New-Streamlined-Modification-Initiative.aspx> FHFA ANNOUNCES NEW STREAMLINED MODIFICATION INITIATIVE (MAR 27, 2013), <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-New-Streamlined-Modification-Initiative.aspx> (last visited Jul 18, 2023).

⁴⁴ *Id.*

⁴⁵ FHFA FORECLOSURE PREVENTION REPORT (3Q2015) (Federal Housing Finance Agency) (2015), https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FPR_3Q2015FINAL.pdf (last visited Jul 18, 2023).

⁴⁶ <https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-FHFA-Deputy-Director-Sandra-Thompson-on-New-Loan-Mod-Offering-for-Delinquent-Borrowers.aspx> STATEMENT OF FHFA DEPUTY DIRECTOR SANDRA THOMPSON ON NEW LOAN MODIFICATION OFFERING FOR DELINQUENT BORROWERS (JUL 14, 2016), <https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-FHFA-Deputy-Director-Sandra-Thompson-on-New-Loan-Mod-Offering-for-Delinquent-Borrowers.aspx> (last visited Jul 18, 2023).

⁴⁷ <https://www.hud.gov/sites/dfiles/OCHCO/documents/2021-15hsgml.pdf> MORTGAGEE LETTER 2021-15 EXTENSION OF THE FORECLOSURE AND EVICTION MORATORIUM IN CONNECTION WITH THE PRESIDENTIALLY-DECLARED COVID-19 NATIONAL EMERGENCY, FURTHER EXPANSION OF THE COVID-19 FORBEARANCE AND THE

signing and returning the documents to the servicer.⁴⁸ The ALM helped some 7.2 million Americans get automatic forbearances during the pandemic.⁴⁹

Like the IRS' OIC program, these proactive modification models could serve as a basis for crafting similar models in the student loan context. The Department should consider whether requiring loan servicers to implement loan modifications automatically could further reduce delinquency and additional costs for borrowers.⁵⁰

Like the IRS' OIC program, these proven mortgage modification models can apply to student loans. The Department should consider permanent rules that require loan servicers to implement loan modifications automatically.

C. Conclusion

The Center for Responsible Lending applauds the Department for immediately initiating the negotiated rulemaking process to explore proposals for student loan relief under §432(A) of the Higher Education Act. We believe this grant of authority allows the agency broad discretion to develop a series of policies and programs that could give individual borrowers access to meaningful default mitigation or debt reduction programs because of their financial distress. Without strong regulations that enable broad access to relief, borrowers and taxpayers will continue to pay the high cost of what has increasingly become an overwhelming, and at times, predatory, student loan market. Thank you for the opportunity to provide our initial thoughts on how the Department can use its authority to ensure that student loan repayment is both fair and affordable.

Sincerely,

The Center for Responsible Lending

COVID-19 HOME EQUITY CONVERSION MORTGAGE (HECM) EXTENSIONS, AND ESTABLISHMENT OF THE COVID-19 ADVANCE LOAN MODIFICATION (COVID-19 ALM) (U.S. Department of Housing and Urban Development) (2021), <https://www.hud.gov/sites/dfiles/OCHCO/documents/2021-15hsgml.pdf>

⁴⁸ *Id.*

⁴⁹ <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/23/fact-sheet-biden-administration-announces-additional-actions-to-prevent-foreclosures/> FACT SHEET: BIDEN ADMINISTRATION ANNOUNCES ADDITIONAL ACTIONS TO PREVENT FORECLOSURES (The White House) (2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/23/fact-sheet-biden-administration-announces-additional-actions-to-prevent-foreclosures/> (last visited Jul 18, 2023).

⁵⁰ CRL continues to believe that §432(a) grants the Administration the authority to cancel up to \$50,000 in student loan debt on an individual basis. As we have repeatedly noted in the past,^[12] cancelling \$50,000 in student loan debt is the minimum needed to begin addressing the problematic role that federal student loan debt has played in increasing the racial wealth gap. The upcoming negotiated rulemaking Committee has an opportunity to help reduce that gap by providing meaningful, student debt relief.