DFI Defense of Freedom Institute

August 12, 2022

Via Federal eRulemaking Portal
Dr. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Public Submission in Response to Notice of Proposed Rulemaking, Student Assistance General Provisions, Federal Perkins Loan Program, and William D. Ford Federal Direct Loan Program, Dated July 12, 2022
Docket ID: ED-2021-OPE-0077-1350

Dear Secretary Cardona:

The Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and work. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Our organization is composed of former U.S. Department of Education appointees who are experts in education law and policy, in particular the areas covered by the agency's proposed regulations.

DFI makes this public submission to the proposed regulations published by the U.S. Department of Education (the "Department" or "ED") in its July 13, 2022, Notice of Proposed Rulemaking, *Student Assistance General Provisions, Federal Perkins Loan Program, and William D. Ford Federal Direct Loan Program* ("NPRM" or "2022 BDR NPRM"). Our submission focuses on the cost of the proposed regulations, the impact of recent Supreme Court jurisprudence on the Department's rulemaking effort, and the NPRM's provisions for borrower defense to repayment ("BDR"), prohibitions on pre-dispute arbitration agreements and class action waivers, closed school loan discharge ("CSLD"), and public service loan forgiveness ("PSLF"). The NPRM suffers from serious legal, policy, and budgetary weaknesses that necessitate its withdrawal by the Department.

THE DEPARTMENT SHOULD WITHDRAW THE NPRM BECAUSE THE PROPOSED RULES IMPOSE STAGGERING COSTS ON TAXPAYERS

The colossal cost of the NPRM and the Department's failure to justify those costs support DFI's position that ED withdraw the NRPM. In correspondence to the Secretary dated July 12, 2022,

Senator Richard Burr and Representative Dr. Virginia Foxx noted that the minimum cost of the NPRM is estimated at $85.1 billion dollars. Using more accurate data, Senator Burr and Dr. Foxx disclosed that the actual cost of the NPRM is closer to $120 billion. This expense alone compels the Department to change its regulatory approach to allow ED to conduct realistic assessments of the NPRM's actual costs, the agency's budgetary authority to establish new spending obligations without express Congressional authorization, and the NPRM's potential inflationary impact.

The expense imposed by the NPRM's BDR provisions alone warrant ED's withdrawal and reconsideration of the NPRM. Even compared to the Department's BDR regulations published in 2016, the cost of the 2022 BDR NPRM is simply colossal. The anticipated cost of the 2016 BDR regulations for the period 2020-2029 was $11.075 billion.[1] The estimated cost of the 2022 BDR NPRM's borrower defense provisions alone include a modification to cohorts through 2022 of $17.26 billion and a cost of $2.75 billion for cohorts 2023-2032.[2] As Senator Burr and Dr. Foxx note, the assumptions underlying these calculations are likely inaccurate. Considering the estimated costs provided in the 2019 BDR Rule for a similar cohort, the costs estimated in the 2022 BDR NPRM for cohorts 2023-2032 are likely to be hugely underestimated by ED. But, even if one accepts the Department's calculations regarding the NPRM's BDR provisions, these costs are startling and impose unacceptable burdens on the taxpayers.

The PSLF changes impose even greater obligations on the taxpayers. The estimated cost of the proposed changes to the PSLF regulations is $12.7 billion as a modification to cohorts through 2022 and $13.2 billion for cohorts 2023–2032, for a total of $25.9 billion. These expenses are borne by the taxpayers, and ED should reconsider its proposed rules in light of these immense costs.

The Department has a responsibility to serve as a sober steward of taxpayer dollars, but the NPRM's cost estimates demonstrate a complete disregard by the Department of this stewardship responsibility. Absent withdrawal of the NPRM, DFI requests that the Department provide a detailed explanation of how the Department considered these costs to taxpayers, its justification for the NPRM's hulking expenses, and what steps it took to reduce the expense of the NPRM. The Department should also explain how it plans to pay for the NPRM's costs, as well as its legal authority to appropriate (at least) $85.1 billion in new spending.

THE DEPARTMENT MUST WITHDRAW THE NPRM IN THE WAKE OF *WEST VIRGINIA V. EPA*

On June 30, 2022, prior to the July 13, 2022, publication of the NPRM, the Supreme Court of the United States decided *West Virginia v. EPA*.[3] This case directly engages foundational questions of

[1] 84 FR 49894.
[2] 87 FR 41957.
[3] 597 US __ (2022).

constitutional and statutory authority for federal agencies like the Department, most notably the principle that an agency must point to "clear congressional authorization" for the power that it claims.[4] Inexplicably, the Department has failed to analyze the effect of this historic case on these proposed rules. This is telling, as the Court's analysis supports DFI's view that the proposed rules present a "major question" and that the agency lacks the "clear congressional authorization" required by the Court for agency rulemaking. These are fatal defects that the Department cannot cure simply by addressing them in the preamble to a final rule. The Department has little choice but to withdraw the NPRM and reconsider its proposed rules in the wake of *West Virginia v. EPA*.

Sitting alone, the Department's failure to analyze its authority for the NPRM under *West Virginia v. EPA* is an incurable error. The public is entitled to understand the Department's views concerning this important case and why the Department presumably thinks that it has the authority to pursue these proposed rules; in turn, the public is also entitled to comment on the Department's views on these issues and to provide arguments, points, and authorities for the Department to consider as part of its notice-and-comment rulemaking. Informing the public about the Department's views on these issues in a final rule is inadequate as it will deprive the public of the opportunity to comment on the Department's views and disallow the agency from considering those comments. For this reason alone, the Department must withdraw the NPRM.

Given the case's importance and issuance nearly two weeks before the publication of the NPRM, the Department's failure to address it is simply perplexing. *West Virginia* is a clear signal that the Supreme Court is restive about federal agencies that justify major regulatory actions with vague grants of statutory authority. While it is true that neither the majority nor the concurrence questions the wisdom of the agency rule at issue, the holding rests on the principle that important matters of policy, with far-reaching consequences, should not be left up to a federal agency under a flimsy delegation of authority. After *West Virginia,* without clear congressional authorization, agencies are no longer free to create regulatory frameworks from wafer thin reeds.

Analyzing the "major questions doctrine," the *West Virginia* Court found that, given both the separation of powers principles and a practical understanding of legislative intent, an agency must point to "clear congressional authorization" for the rulemaking authority that it claims.[5] In the case, the Environmental Protection Agency ("EPA") claimed to discover "unheralded power" that allowed it a "transformative expansion in [its] regulatory authority"--power that allowed the agency to adopt a regulatory program that Congress itself had declined to enact. [6] The Court found that the authority that the agency relied upon was in the vague language of an "ancillary provision," "designed to function as a gap filler," and had rarely been used in the preceding decades.[7] Given the circumstances, the Court found that there was every reason to "hesitate before concluding that

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[4] *Id.,* at 19.

[5] *West Virginia* at pg. 4, quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).

[6] *Id.*

[7] *West Virginia* at pg. 24.

Congress" meant to confer on the agency the authority it claims.[8] The Court argued that "common sense as to the manner in which Congress [would have been] likely to delegate" such power made it very unlikely that Congress had actually done so.[9] Further, "extraordinary grants of regulatory authority are *rarely accomplished* through "modest words," "vague terms," or "subtle device[s]."[10]

The Department clearly does not wish to engage these issues because ED knows that it relies on the very type of "cryptic" statutory language, "modest words," and "subtle device[s]" criticized by the *West Virginia* Court. The Department knows that it lacks the clear congressional authorization required by the Court for the proposed rules, so ED ignores the issue in the NPRM and deprives the public of the right to comment on its analysis.

This issue is particularly concerning in regard to the BDR provisions of the NPRM. As a basis for statutory authority for the NPRM's far-reaching borrower defense regulations, the Department offers the "wafer-thin reed" criticized by the Court in *West Virginia v. EPA*.[11] For example, ED offers only 20 U.S.C. § 1087(e)(h) as specific statutory authority for the NPRM's BDR provisions:

> (h) BORROWER DEFENSES. – Notwithstanding any other provision of State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part . . .

In the preamble to the NPRM, where ED lists statutory authority, the Department cites only Section 1087e(h) as the authority for the BDR general provisions.[12] Not content with doing what the statute requires—simply designating institutional conduct subject to a defense to repayment—ED conducts a fundamental revision of the statute and grafts to it a complex loan forgiveness adjudication process: a BDR adjudication process;[13] elimination of the disbursement date schedule and the creation of the uniform process;[14] a new "Federal standard";[15] a new State law standard upon reconsideration;[16] a limitations period;[17]a "group" BDR process;[18] an evidentiary standard;[19]

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[8] *Id.* at pg. 24; quoting *FDA v. Brown & Williamson, Tobacco Corp.,* 529 U.S. 120, 159-160 (2000).
[9] *Id.* at pg. 18, quoting *Brown & Williamson* at 133.
[10] *Id.* at pg. 18, quoting *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001).
[11] *Id.,* at 17.
[12] 87 FR 41883.
[13] 87 FR 41885.
[14] 87 FR 41887.
[15] 87 FR 41888.
[16] 87 FR 41896.
[17] *Id.*
[18] 87 FR 41898.
[19] 87 FR 41900.

forms of evidence;[20] an institutional response process;[21] a new process based upon prior Secretarial actions;[22] timelines to adjudicate;[23] an adjudication process for BDR claims;[24] a borrower reconsideration process;[25] and determination of discharge amounts.[26] None of this was contemplated, much less clearly authorized, by Congress when it legislated Section 1087 1087e(h). These provisions are the type of "vague terms" and "modest words" questioned by the Court in *West Virginia*.

With reference to institutional recovery, the Department also cites Section 1087d(a)(3), which states that Title IV program participation agreements must:

> provide that the institution accepts responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement.

In the kind of sweeping statement now prohibited under *West Virginia v. EPA*, the Department states that the proposed regulations were "all authorized by Congress."[27] Further ignoring its obligations under that case and without any deeper analysis of its statutory analysis, ED states that it would not be reasonable to presume that, when Congress created these programs, "it intended to limit the cost of those programs through the types of operational and administrative barriers the Department is proposing to remove in this notice of proposed rulemaking."[28] Under *West Virginia v. EPA*, these types of justifications are fatal to ED's proposed rule.

Section 1087e(h), the fountainhead of the agency's sweeping borrower defense approval fantasies, does not provide the Secretary with the authority to take the kind of actions contemplated in the NPRM. That statute only authorizes the Secretary to "specify" which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan. It strains credulity to believe that such an act of specifying under § 1087e(h) would allow the agency to build a massive borrower defense claims industrial complex that serves as a process for adjudicating highly-complex and fact-specific borrower claims with billions of dollars at stake. Further, while § 1087d(a)(3) provided the authority for the Department to collect financial liabilities from institutions, the statute does not provide *any* authority for the BDR regulatory framework that undergirds the source of the financial liabilities that the Department would seek to collect.

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[20] *Id.*
[21] *Id.*
[22] 87 FR 41901.
[23] 87 FR 41904.
[24] *Id.*
[25] 87 FR 41906.
[26] 87 FR 41908.
[27] 87 FR 41881.
[28] *Id.*

The main source of "justification" for the BDR provisions, § 1087e(h), is very similar to what the Court described in *West Virginia* as a "wafer thin reed" upon which to base ED's claim of expansive powers in discharges billions of dollars of loans under the BDR regulatory framework. That provision, like the statute in *West Virginia,* was relatively obscure when it was enacted and seldom exercised until, twenty years later, it became the centerpiece for major ED action.
As a result, there is a legitimate issue of whether, per *West Virginia,* Congress really intended the provision to grant the power that the Department is attempting to wield and expand. There would also be little difficulty showing that what ED is doing on BDR has the broad economy-wide effect that the agency action in *West Virginia*, especially considering the economic impact of the proposed regulations.[29]

THE NPRM FAILS TO SATISFY THE REQUIREMENTS FOR A PERMISSIBLE RULE CHANGE UNDER THE ADMINISTRATIVE PROCEDURES ACT

The Department states that the proposed regulations seek to "address longstanding concerns regarding Federal student loan debt by improving, streamlining, expanding, and strengthening regulations governing the title IV, HEA programs." In identifying those "longstanding concerns," the NPRM points to and attempts to assess a regulation—the 2019 BDR Rule—that has been effective only since July 1, 2020. This pretextual analysis does not—indeed, cannot—justify the NPRM and thus does not meet the basic legal requirements for permissible regulatory changes imposed by the Administrative Procedure Act, 5 USC §551 *et seq.* ("APA"). As a result, the Department must withdraw the invalid NPRM and enforce the 2019 BDR Rule.

These issues are particularly egregious as they relate to the borrower defense provisions of the NPRM. The Department begins its assessment by stating its belief that the 2019 BDR Rule placed "burdens on borrowers to obtain relief that were far more onerous than any State standard, and went far beyond evidentiary requirements and argumentation that a reasonable borrower could be expected to provide."[30] The Department expresses concern that requiring a borrower to document and support his or her allegations of misrepresentation and the amount of financial harm pushes borrowers "to possess a level of data and knowledge about local and national labor market trends that would be unrealistic for an individual to possess."[31] The Department also states its belief that a borrower must act "as a labor economist" to demonstrate harm caused by an institution's misrepresentation.[32] The Department concludes that the 2019 BDR Rule imposes an

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[29] Justice Gorsuch's concurrence argues that a major question can arise if the agency action requires billions of dollars in spending by private parties, which the NPRM may ultimately require. *See, West Virginia,* Gorsuch (concurrence) at pg. 10.
[30] 87 FR 41883
[31] *Id.*
[32] 87 FR 41890.

"unreasonable set of requirements" that result in "many borrowers who were subject to misrepresentations or other wrongdoing by their institutions" failing to receive a discharge because of an "unreasonably high standard."[33]

Oddly, despite the mere passage of two years for the 2019 BDR Rule and the disruption arising from the COVID-19 pandemic, the Department contends that its "experience" in reviewing borrower defense applications shows that many schools make verbal misrepresentations or engage in "high pressure sales tactics" that somehow defy documentation that result in the denial of BDR applications.[34] The Department further cites the 2019 BDR Rule's Regulatory Impact Analysis ("RIA"), which states that the 2019 BDR rule would approve of 7.5% of BDR applications, and the 2016 BDR Rule's RIA, which points to a 65% approval rate.[35] The Department concludes that this drop-off "suggests that the 2019 regulation would result in denials for too many claims that should have a reasonable prospect of being meritorious."[36] The Department then states the following:

> While the 2019 regulations went into effect for new loans disbursed on or after July 1, 2020, *the Department has yet to adjudicate any claims under the 2019 regulations."*[37]

The Department explains that it has neglected applications filed under the 2019 BDR Rule because it is too busy processing claims covered by the 1994 and 2016 regulations. Without evidence or research, the Department also speculates that, because President Biden has extended the COVID-19 moratorium on student loan collections until August 31, 2022, "borrowers . . . may not have felt the need to apply yet."[38] This is a curious posture to take if one thinks that they have been defrauded by an institution and believes that there is a basis to discharge their student loans.

Despite admitting that it has failed to process any applications governed by the 2019 BDR Rule, the Department concludes that, over the last several years, it "has gained significant experience and expertise" adjudicating claims, which includes "identifying areas for improvement and refinement" that would not have been previously apparent.[39] As a result of that experience, the Department proposes to "build upon the lesson learned from implementation of the previous borrower defense regulations" and a "review" of the 2019 regulations to construct a "simpler and fairer" process for "all affected parties." Further, the Department states that the "current 2019 rules are too limiting fairly and accurately to adjudicate claims and that further regulations are needed to address issues that have continued to arise during the Department's claim review."[40] Finally,

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[33] 87 FR 41883.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] 87 FR 41884 *(emphasis added)*
[38] *Id.*
[39] *Id.*
[40] *Id.*

ED states that the agency must change the 2019 BDR Rule because it (mistakenly) understands that those regulations require the Department to "exclude" evidence of school activity in the Department's possession that would support borrowers' claims.[41]

This is a textbook case of the kind of arbitrary and capricious decision-making by an agency that violates the APA. One of the most basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.[42] The APA permits the setting aside of agency action that is "arbitrary" and "capricious" under the statute.[43] The APA does not make any distinction between initial agency action and subsequent agency action undoing or revising the previous action. The Supreme Court has held that an agency that seeks to enact a regulatory change must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made."[44] But where an agency has failed to provide even a minimal level of analysis, its actions will be held arbitrary and capricious and so cannot carry the force of law.[45]

In *FCC v. Fox Television Stations, Inc.*, the Supreme Court elucidated that, even in instances that involve the rescission of a prior regulation, "a reasonable analysis for the change" that goes beyond what may be required when an agency does not act in the first place is not required.[46] The *FCC* Court explained that the agency must provide a "reasoned explanation" for its action and show that the new policy is permissible under the statute, good reasons for it exist, and the agency believes it to be better.[47] But the Court also reasoned that sometimes an agency must provide a more detailed justification when the "new policy rests upon factual findings that contradict those which underlay its prior policy" or when "prior policy has endangered serious reliance interests that must be taken into account."[48] Indeed, the *FCC* Court stated that to ignore such matters would constitute arbitrary and capricious action. In such cases, the *FCC* Court found that it is not that further justification is demanded by the mere fact of policy change, "but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[49]

In *Encino Motorcars*, the Supreme Court refused agency deference on a U.S. Department of Labor regulation. In that case, the agency "said almost nothing" when explaining the "good reasons for

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[41] *Id.*
[42] *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016).
[43] 5 USC § 706(2)(A).
[44] *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983).
[45] *Id.* at 42-43.
[46] 129 S.Ct. 1800, 1810 (2008).
[47] *Id.*
[48] *Id.* at 1811, quoting: *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735, 742, 116 S.Ct. 1730 (1996).
[49] *FCC* at 1811.

the new policy."[50] The agency did state that it believed the "interpretation [was] reasonable" and "sets forth the appropriate approach."[51] The Court found wanting the agency explanation for the policy change and held that "conclusory statements do not suffice to explain its decision."[52]

The Department's proposed rulemaking does not comport with these legal requirements. The NPRM does not "examine the relevant data" nor does it rest its conclusions on "factual findings" or a "reasoned explanation." Rather, the Department admits that it has not adjudicated *a single claim* under the 2019 BDR Rule. This is a clear admission that the Department has no experience with the enforcement of the 2019 BDR Rule and in administering those regulations. The Department's conclusory explanation for its refusal to administer the 2019 BDR Rule is itself a violation of the APA; in any event, the NPRM does not explain what serves as the basis for ED's critique of the 2019 BDR Rule. The problems that the Department encountered enforcing the 1994 and 2016 BDR Rules have no bearing on the 2019 BDR Rule (each employs radically different standards and processes) and thus cannot serve as a legitimate basis for changing the never-before-administered current regulations contained in the 2019 BDR Rule. The Department also cannot offer as "reasoned explanation" its speculation that borrowers have not "felt the need" to apply for BDR relief due to the COVID-19 repayment pause on Federal student loan payments. If the Department has evidence for this conclusion, ED should have described this data in the NPRM. It did not.

The Department's proffered reasons for rulemaking–excessive burdens on borrowers; an "unreasonably high standard" for relief; denial of claims that have a "reasonable prospect of being meritorious"–are pure conjecture and not based upon any relevant facts or experience in administering the 2019 BDR Rule. This is exactly the kind of arbitrary and capricious decision-making that the APA prohibits.

The Department's work in this area of the NPRM is legally deficient in other ways. ED states that it conducted a "review" of the 2019 BDR Rule. Such an unspecified, unsubstantiated exercise does not satisfy the standard for an examination of the "relevant data" and a reliance upon "factual findings." Further, the Department does not attempt to draw a "connection between the facts found and the choices made." Rather, the Department simply disregards the facts and circumstances – or ignores them entirely – that underlay the prior rule. The Department does not identify *any* facts associated with its analysis of the 2019 BDR Rule. Instead, the Department makes numerous conclusory statements without conducting even a minimal level of analysis.

With regard to its "experience," the Department admits to *never* having enforced the 2019 BDR Rule with regard to an application. The "experience" that the Department relies upon to make changes to the 2019 BDR Rule arises from its politically favored laws, the 1994 and 2016 BDR Rules promulgated during the Clinton and Obama administrations. ED never explains how its

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[50] *Encino* at 2127.
[51] *Id.*
[52] *Id.*

experience enforcing two other markedly different rules – and identifying areas for "improvement and refinement" associated with those rules –sufficiently inform its analysis of, and proposed changes to, the 2019 BDR Rule. The Department thus fails to explain the basis for how it determined that the 2019 BDR Rule is "too limiting to fairly and accurately adjudicate claims" or created an "unreasonably high standard."

The Department relies upon the Regulatory Impact Assessments (RIAs) in the 2019 BDR Rule and the 2016 BDR Rule for its argument that the 2019 BDR Rule would result in "denials for too many claims that should have a reasonable prospect of being meritorious." Like the RIAs, this arguments rests on mere conjecture. The 2016 BDR Rule has an effective date of July 1, 2017, and the Department could have conducted its own analysis of the 2016 BDR Rule's actual approval rate but chose not to do so. Similarly, if the Department had properly administered the 2019 BDR Rule and processed claims as it was legally required to do, ED could have also obtained approval data for that regulation. Like the agency in *Encino Motorcars,* the Department states its conclusions, believes them to be reasonable, and wrongfully passes up the opportunity to explain itself. The Department cannot answer these basic questions to support its regulatory changes. Answers would assist the public in preparing comments on the NPRM.

Finally, the Department's statement that the 2019 BDR Rule requires the agency to "exclude" evidence in the Department's possession is simply incorrect and reflects the agency's complete lack of understanding of its own regulations. Part of the current 2019 BDR Rule, 34 C.F.R. § 685.206(e)(9)(ii) states as follows:

> With respect to the borrower defense to repayment application submitted under this paragraph (e), *the Secretary may consider evidence otherwise in the possession of the Secretary, including from the Department's internal records or other relevant evidence obtained by the Secretary,* as practicable, provided that the Secretary permits the institution and the borrower to review and respond to this evidence and to submit additional evidence.

(Emphasis added.) This error simply underscores the mortally damaging flaws in the NPRM. The Department has not conducted a reasoned analysis that correctly explains what the 2019 BDR Rule contains. The Department should withdraw the arbitrary and capricious NPRM and simply enforce the 2019 BDR Rule.

BORROWER DEFENSE TO REPAYMENT PROVISIONS

The NPRM's BDR Provisions Violate the Administrative Procedures Act and Exceed the Statutory Authority Granted by Congress to the Department under the Higher Education Act

This portion of DFI's public submission addresses the borrower defense provisions of the NPRM. A thorough analysis of the proposed regulations shows that these provisions lack statutory

authority under the HEA, violate the APA, lack sufficient description, and provide examples that lack clarity and confuse the reader. Failing ED's withdrawal of the NPRM in its entirety, DFI urges the Department to delete from any final regulation the NPRM's borrower defense provisions and to enforce the 2019 BDR Rule.

The NPRM's General Borrower Defense and Adjudication Provisions

Fatal deficiencies exist in the NPRM's general BDR and BDR adjudication process provisions. In the NPRM, the Department expresses concern that "too many borrowers have been unable to access loan relief" and that in too many situations the denial has arisen "due to regulatory requirements that have created unnecessary or unfair burdens for borrowers."[53] The Department thus proposes to "expand the current basis for a borrower to receive a discharge."[54] ED also proposes to "enhance the Department's recoupment authorities, making it easier for the Department to hold institutions accountable for costs, reducing the financial impact to taxpayers."[55] The proposal is made "in direct response to numerous instances observed by the Department over time in which students borrow to attend an institution only to find that the institution's promises were untrue, leaving the borrower with a loan for a substandard education and often lacking the ability to obtain the employment they were promised."[56]

The Department also seeks to "address longstanding" concerns regarding student loan debt by "improving, streamlining, expanding, and strengthening regulations governing title IV, HEA programs."[57] Specifically, the Department seeks to modify regulations for loan discharge programs to strengthen institutional accountability, expand program access for eligible borrowers, and provide a more efficient and "borrower-friendly" process overall.[58] To that end, the Department argues that the proposal would also result in more borrowers receiving discharges. ED also seeks to eliminate the need for individual BDR applications.

ED also proposes to use a borrower defense process "that is simpler and fairer for all affected parties."[59] To that end, the Department attempts to employ an approach that recognizes all possible sources of evidence and uses "common evidence" to facilitate a clearer and faster process for the adjudication of group claims.[60] The proposed regulations also seek to leverage existing procedures and retool them for BDR adjudication purposes.

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[53] 87 FR 41879.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] 87 FR 41881.
[58] *Id.*
[59] 87 FR 41884.
[60] *Id.*

To this end, the Department seeks to establish a "framework for uniform borrower defense discharges" for claims that are received by the Department on or after July 1, 2023, as well as for claims pending before the Department on that date.[61] The NPRM would allow for both affirmative and defensive claims, filed individually or as a group. The Department would allow for "State requestors" to file group claims. The proposal expands the bases for BDR claims and establishes a "rebuttable presumption of full relief." Borrowers receiving partial or no relief may request reconsideration from the Department. BDR claims would not be subject to any statute of limitations and could be filed at any time.

The HEA Neither Contemplates nor Authorizes Affirmative BDR Claims

The byzantine borrower defense structure contemplated by the NPRM rests on a slim, solitary statutory reed. This slender reed provides in pertinent part:

> Notwithstanding any other provision of State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution or higher education a borrower may assert *as a defense to repayment* of a loan under this part."[62]

By its plain words, the statute refers *only* to defenses to repayment. The provision does not contemplate a comprehensive adjudication structure that offers certain borrowers the affirmative right to discharge remaining amounts of the loan and to be refunded already paid amounts. The proposed regulations simply do not comport with the authorizing statute. When a regulation is "facially inconsistent" with the underlying statute, a court must set aside the agency's interpretation.[63] The statute simply authorizes the Secretary to "specify" the grounds for "a defense"; Section 1087e(h) is not ambiguous and does not provide the pathway for affirmative claims from borrowers contemplated by the Department in the NPRM.

The Department's abuse of its governing authority is so far beyond the pale that it activates the "major questions" doctrine, recently endorsed by the Supreme Court and discussed more fully above.[64] No "clear congressional authorization" exists in Section 1087e(h) for the Department to expand borrower discharge applications based on affirmative claims, much less the vast bureaucratic machinery envisioned by the Department to provide group discharges, discharges without applications, and reconsideration of denials or grants of partial relief.[65] These concerns simply underscore DFI's argument that the Department's failure to consider in the NPRM the

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[61] 87 FR 41885.

[62] 20 U.S.C. § 1087e(h)(*emphasis* added).

[63] *See, Bowen v. Yuckert,* 482 U.S. 137, 178 (1987) ("When a regulation is facially inconsistent with the statute, the administrative construction of the statute is necessarily wrong and there is no need to consider further the position of the agency.")

[64] *See, West Virginia, v. Ev't. Prot. Agency,* 142 S.Ct. 2587 (2022).

[65] *West Virginia* at pg. 19.

impact of *West Virginia* on its proposed rules and to provide the opportunity to the public to submit make comments on the Department's view of the impact of that case is fatal this rulemaking. ED must withdraw the NPRM or rescind this portion of the NPRM pertaining to borrower defense requirements.

The Proposed Regulations Fail to Provide Appropriate Due Process Protections

The NPRM severely restricts or entirely ignores institutional due process rights. Numerous proposed regulations – including, but not limited to, the adjudication process, the notification process, and timeliness provisions – run afoul of basic protections under the Federal Constitution.

As a federal department, the Department must observe due process rights afforded by the Fifth Amendment of the Constitution, which states that "no person shall be . . . deprived of life, liberty, or property, without due process of law."[66] Applying this constitutional protection to the title IV program, courts have held that institutions possess both liberty and property interests in continued program eligibility,[67] as well as a fundamental property right to title IV, HEA funds that they have already received.[68] The Department's NPRM must thus comply with these constitutional protections.

Yet, as discussed more fully below, proposed 34 C.F.R. § 685.405(d) provides a severely limited process for institutions to respond to BDR claims. Although the Department must notify the institution of the existence of a BD claim, the proposed regulations do not require the Department to provide to the institution with the notification in a timely manner or its contents, thus raising the likelihood that an institution will not receive notice about the basis of the borrower defense claims, the evidence provided by the borrower, or other significant elements that the institution may wish to consider when responding to a BDR claim. The proposed regulations do not reflect an agency truly interested in the fair adjudication of BDR claims, as they force an institution to engage in a prejudicial process that forces it to respond to claims without knowing the full basis of the claims or the evidence that supports (or does not support) the claim. The Department's proposed institutional response regulations conflict with constitutional due process protections.

The Proposed Regulations Needlessly Complicate BDR Adjudications

The method upon which the Department rests its adjudication procedures is not provided for by statute, is arbitrary and capricious under the APA, is needlessly complex, confusing, and burdensome, and will lead to unintended consequences that could further bog down BDR claim adjudications.

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[66] U.S. Const. Amend. V, § 3.

[67] *See, Cont'l Training Servs., Inc. v. Cavazos*, 893 F.2d 877, 893 (7th Cir. 1990).

[68] *See, Lynch v. Household Fin. Corp.,* 92 S.Ct. 1113, 1122 (1972).

With reference to applicable time frames for BD claims, the Department makes a confusing hash of the easily understandable time periods set forth in current regulations by proposing a retroactive basis for a discharge. Previously and currently, the Department has always relied upon "loans first disbursed" language to delineate which BD rule applies to which federal loans.[69] Without sufficient justification, the Department proposes to change this easily understandable framework to read: "This subpart . . . applies to borrower defense applications pending with the Secretary on July 1, 2023, or received by the Secretary on or after July 1, 2023."[70] ED further complicates the matter by also proposing provisions that would continue to use different standards and applicable time periods for borrower applications and institutional recovery. For example, 34 C.F.R. § 685.206(e) states that the time period "for loans first disbursed on or after July 1, 2020, and before July 1, 2023" will govern BD applications. Yet, 34 C.F.R. § 685.409(a) states that the Secretary may recover from institutions "for loans first disbursed on or after July 1, 2023."

As a result, the Department concocts a framework that would apply the NPRM to applications made *long* before the effective date of the proposed regulations. This incentivizes the current Administration to delay the processing of claims pending under the 2019 BDR Rule *in order to* adjudicate outstanding claims under the regulatory framework preferred by the Department's current political leadership. The NPRM's proposal to impose *no* statute of limitations on BDR applications further aggravates this deficiency.

In effect, the NPRM calls for retroactive application of the proposed regulations. But regulations cannot have retroactive effects, especially when not expressly provided for in statute.[71] Retroactive application has been particularly disfavored when, as with the NPRM, a rule also changes an established regulatory framework.[72]

These proposed changes burden not only institutions but also borrowers. For claims pending on or received on or after July 1, 2023, there are too many potential substantive standards for any lay borrower to comprehend and determine whether they have a legitimate claim. With the NPRM's complicating shift to a new Federal standard, the inclusion of a State law standard (in certain circumstances), and the role of State requestors (discussed later in this comment), the NPRM is calculated to confuse borrowers, who have not received sufficient guidance on whether or not they would have a legitimate BDR claim.

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[69] *See*, 34 C.F.R. § 685.206(c) ("Borrower defense to repayment for loans first disbursed prior to July 1, 2017); § 685.206(d) ("Borrower defense to repayment for loans first disbursed on or after July 1, 2017, and before July 1, 2020); § 685.206(e) ("Borrower defense to repayment for loan first disbursed on or after July 1, 2020); and 34 C.F.R. § 685.222 ("Borrower defenses and procedures for loans first disbursed on or after July 1, 2017, and before July 1, 2020, and procedures for loans first disbursed prior to July 1, 2017).

[70] *See*, 34 C.F.R. § 685.401(b).

[71] *See, Robbins v. Bureau of Nat. Affairs, Inc.,* 896 F.Supp. 18, 21 (D.D.C. 1995).

[72] *See, Redhouse v. C.I.R.*, 728 F.2d 1249, 1251 (9th Cir. 1984) ("Courts have declined to give retroactive effects to regulations that change settled law.")

The NPRM cannot have retroactive effect, and its overlapping, crisscrossing, and contradictory standards muddy the BD application waters for borrowers and institutions. Failing withdrawal of the NPRM, the Department must remove these provisions from any final regulation.

The Department Lacks Congressional Authorization for a Group BDR Claims Process

Nothing in the HEA sustains the NPRM's group BDR claims process. Perhaps understanding that it has no clear congressional authorization for such a far-reaching policy decision that will ripple through higher education, the Department does not even *attempt* to justify these provisions by identifying language that supports a group claims process. The Department's proposed "default" approach makes this issue all the more potent for borrowers and institutions.[73] If the Department refuses to withdraw the NPRM in its entirety, ED must still remove from any final rule its illegal and unjustified group BDR claims process.

This is the very kind of agency behavior that *West Virginia* curtails. Even if the Department relies upon general grants of "catch-all" authority in the HEA, such as 20 U.S.C. § 1094 and 20 U.S.C. § 1087d(a)(6), the Department still relies upon the thinnest of statutory reeds to foist a regulatory millstone upon itself and title IV-eligible institutions. *West Virginia* made clear that such "ancillary provision[s]" of authority are not sufficient for "extraordinary grants" for regulatory authority.[74] These provisions of the HEA are unavailing as they simply fail to provide the clear written authorization from Congress that the Department needs to create a group BDR claims process.

Particularly nettlesome for schools is proposed 34 C.F.R. § 685.402(b). It provides that the Department "may create a group based upon information from sources that include but are not limited to" actions by the Federal government, State attorneys general, other State agencies, lawsuits related to educational programs filed against institutions, and individual BDR claims.[75] This means that the Department would be able to use any reason to create a group BDR process, even without a reasonable basis or any meaningful opportunity for an institutional response. Yet, nothing in the HEA supports such a construction. This proposed rule is utterly without congressional authorization.

The group BDR claims provisions of the NPRM are also problematic for borrowers; the proposed regulations fail to provide a borrower with the opportunity to opt-out of a group BDR process. At the very least, a borrower ought to receive notice and an opportunity to opt-out of such a group. There are a number of justifications–tax consequences, income thresholds for government benefits, and the like–for why a borrower would choose to opt-out, not the least of which would be that the borrower is actually satisfied with their education. In any event, the Department lacks statutory

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[73] *See*, Issue Paper #6, Session 1, October 4-8, 2021, https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/6bdadjudprocess.pdf

[74] *West Virginia* at 18.

[75] *See*, § 685.402(b)(1-3).

authority under the HEA to provide a discharge when *a borrower has not even asked* for borrower defense to repayment relief.

In yet another example of regulatory overreach in excess of statutory authority, the proposed regulations also authorize the Department to consolidate multiple group claims formed through a State requestor process into a single group process (presumably to include claims against multiple schools).[76] Nothing in the HEA provides for a group process against *multiple* schools *at the same time to provide* blanket BDR discharges. As a result, because the Department cannot demonstrate "clear congressional authority" for its proposed group BDR claims process, the Department must remove these provisions from any final regulation absent withdrawal of the NPRM in its entirety.

The Proposal to Employ State Requestors Exceeds Statutory Authorization

The Department works to amend and add to the scope of HEA's borrower defense and loan relief authority in other illegal ways. Proposed 34 C.F.R. § 685.402(c) seeks to create a State requestor track for BDR relief. It is unquestionable that a regulation cannot expand the scope of the statute upon which it is based[77] or empower itself by adding to the statute that which is not there.[78] Indeed, DFI questions how the Department finds the clear congressional authorization to include in its proposed regulations a BDR process in which a *borrower* is not even an indispensable party to this proceeding. The likelihood exists that a borrower would not even know that it is part of a class of individuals seeking BDR discharges. Further, nothing in the HEA clearly authorizes the Department to allow for diminished standards for discharge or rely upon a presumption that the claims share common facts or circumstances based on the investigation of a state agency.

To make matters worse, the Department fails to provide a sufficient justification for its inclusion in the NPRM of a State requestor process, offering only the following:

> These State requestors have fostered, and could continue to foster, a more efficient borrower defense adjudication process by supplying needed evidence to support the potential approval of claims or expanding the Department's ability to quickly develop the facts in cases by identifying systemic issues at an institution resulting in several borrowers potentially being eligible for relief.[79]

This is simply an effort to deputize friendly state attorney general offices and regulators into the Department's efforts to discharge student loan debt—nothing in the NRPM authorizes the State requestor process or limits the types of claims that State requestors may include in any referral to

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[76] *See*, 34 C.F.R. § 685.402(c)(3).
[77] *See*, *Grupo Industrial Camesa ` v. U.S.*, 85 F.3d 1577, 1579 (Fed. Cir. 1996).
[78] *See*, *Calif. Cosmetology Coal. v. Riley*, 110 F.3d 1454, 1460 (9th Cir. 1997) ("A regulation may not serve to amend a statute . . .' nor add to the statute something which is not there.")
[79] 87 FR 41886.

the Department. Congress has not authorized any of this activity. Absent withdrawal of the NPRM in its entirety, because the Department cannot demonstrate "clear congressional authority" for its proposed State requestor process, the Department must remove the State requestor provisions from any final regulation.

The Proposed Reconsideration Process Exceeds Statutory Authority, Lacks Sufficient Justification, and Will Interfere with the Disposition of BDR Claims

The Department's reconsideration process proposed at 34 C.F.R. § 685.407 does not have clear congressional authorization, exceeds ED's statutory authority under the HEA, and lacks a sufficient justification.

Section 1087e(h) says nothing about a reconsideration process and simply directs the Department to discharge liability for borrowers after identifying which acts or omissions constitute a defense to repayment. Assuming that the Congress has clearly authorized a reconsideration, the NPRM fails to justify why reconsideration is necessary, as it fails to produce any evidence suggesting that BDR claims submitted under current regulations have suffered from a lack of reconsideration. Indeed, it cannot do so, because the Department has refused to process any applications filed under the 2019 BDR Rule.

Further, it is unclear why a reconsideration process is even necessary when the proposed rules "stack the deck" in favor of borrowers. The Department proposes a regulatory regime in which borrowers need not provide any evidence, their reliance on misrepresentations and harm are presumed, and they receive a rebuttable presumption of full relief. Under such a rubric, it is hard to fathom a scenario – beyond the unrealistic examples provided in the NPRM[80] – where a borrower would not be granted full relief, making reconsideration redundant, inefficient, and unnecessary. Underscoring the bias against title IV-eligible schools and ED's "stacked deck" in favor of borrowers, the NPRM does not provide schools with the opportunity to request reconsideration.

The policy failure does not stop there. The Department proposes a reconsideration process that will impose unlimited BDR liability for institutions. At proposed 34 C.F.R. § 685.407(f)(1), the Department states this:

> The Secretary may reopen at any time a borrower defense application that was partially or fully denied.

This paragraph is not time barred--fully or partially denied BDR claims never actually conclude, but simply bide their time for an opportunity to "reopen." When coupled with the Department's retroactive application of the NPRM, this provision allows the Department to revisit *every BDR claim ever adjudicated* to grant full relief. This is simply not sustainable as a matter of law, policy, or administration of claims.

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[80] *See*, 87 FR 41910. Please see our comments on these examples below.

The Proposed Removal of Time Limitations for BDR Claims Exceed Statutory Authority and Lack Sufficient Justification

At proposed 34 C.F.R. § 685.400, the NPRM removes all time limitations for BDR claims. The Department fails to cite clear statutory authorization for this proposal and does not sufficiently justify this change from the 2019 BDR. These provisions are also confusing.

The plain language of the Department's proposed regulations fails to include a statute of limitations on BDR claims; accordingly, any borrower may file a BDR claim since the beginning of the Direct Loan program. The proposal also ignores the problems inherent in years-old BDR claims, such as stale evidence, lack of witnesses with personal knowledge of relevant facts, the loss of records and documents, and other issues. As a result, based on the presumption of full relief, ED would grant stale claims *solely* on the basis of the accusations made by the borrower. The lack of a limitations period makes a mockery of the process and guarantees unfair, arbitrary, and capricious BDR claims proceedings. Absent withdrawal of the entire NPRM, the Department should remove this provision from any final rule and administer BDR claims in accordance with the time limitations set forth in the 2019 BDR Rule.

Proposed Subpart F Exceeds ED's Statutory Authority

The NPRM's proposed Subpart F definitions of "misrepresentation," "substantial misrepresentation," and "omission" are fundamentally flawed. The decoupling of these definitions from the legal concept of "reliance" is an unnecessary step back from the 2019 BDR Rule, one for which the Department fails to provide sufficient justification under the controlling authorities. As part of its effort to "stack the deck" in favor of borrowers against schools (and taxpayers), the NRPM also proposes a "presumption of reliance for both individual and group claim[s]."[81] No statutory language or evidence is provided by the Department to support this presumption. In fact, it is unclear how the Department came to accept the presumption, other than by relying upon its goal to provide more borrowers with discharges,[82] whether justified or not. If the Department does not withdraw the NPRM entirely, it should jettison these regulatory provisions and administer these areas as contemplated by the 2019 BDR Rule.

The Rebuttable Presumption of Full Relief is Wildly Inconsistent with the HEA

In the NPRM, the Department proposes that borrowers receive a rebuttable presumption of full relief[83] but flips the standard of evidence on its head at proposed 34 C.F.R. § 685.408(a)(1):

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[81] *See*, 87 FR 41889.
[82] *See*, 87 FR 41881.
[83] *See*, e.g., 87 FR 41884.

> There is a presumption that a borrower with an approved borrower discharge claim . . . is eligible for full discharge . . . unless the Department official is presented with a preponderance of evidence to the contrary.

This language reflects the illegal policy currently followed by the Department[84] that BDR applications are entitled to receive a "rebuttable presumption of full relief." ED shifts the burden of proof from the borrower to the school, demanding that, if the institution wishes to rebut the presumption, the school will have to *disprove harm*–entirely upending the any notion of what evidentiary burdens require. This presumption has no basis in the HEA and lacks sufficient justification in the NPRM. The proposed regulation is also simply awful policy. The Department should have to carry the burden to investigate and determine the appropriate amount of BDR discharges. The Department seems utterly ignorant to human nature and how this presumption will encourage borrowers, State requesters, and other mass filers to submit baseless, unsupportable, or frivolous applications in the hope of obtaining BDR relief.

DFI urges ED to withdraw entirely the NPRM. Should it not do so, the Department must remove from any final rule this proposed regulation. Any other arrangement is insufficient, arbitrary, capricious, and wildly inconsistent with the HEA.

The NPRM's Process for Institutional Responses and Recovery Lacks Sufficient Due Process Protections for Institutions

The Department's proposed changes to the institutional response and recovery provisions in the NPRM create a process that does not offer institutions an opportunity fairly to participate in the proceedings. ED's desire for efficiency has caused the Department to abandon its responsibility to create a fair and equitable process for all parties. The framework proposed by the Department rests upon the notion that it can divorce the adjudication of a BDR claim from a recovery process against an institution. The NPRM also fails to explain why the current the institutional recovery processes need revision if the Department has never used them to recoup losses associated with BDR claims.

The NPRM's Institutional Response and Recovery Provisions

The Department proposes a number of significant changes to the institutional response and recovery regulations. At 87 FR 41900, ED states that the NPRM will continue to provide for an institutional response process but will "clarify" the role of an institutional response in the adjudication of a borrower's claim. Further, the proposal will "ensure" that institutional responses

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[84] On August 24, 2021, the Department enacted an illegal policy to rescind the previous administration's partial relief methodology for approved borrower defense to repayment claims. In its place, the Department enacted an unlawful, arbitrary, and capricious "rebuttable presumption of full relief." *See*, Office of the Under Secretary "Rescission of Borrower Defense Partial Relief Methodology (EA ID: GENERAL-21-51), August 21, 2021.

are held to the same standards as for borrowers.[85] The Department also states its concern that the current regulations include an institutional response process that "did not provide sufficient clarity about how the response would factor into the Department's adjudication process."[86] If the Department requires additional information from the school, the school must respond to the request within 90 days.[87]

The Department also establishes a process where ED could consider prior Secretarial actions to determine whether to form and approve a group borrower defense claim.[88] Prior Secretarial actions include: Final Audit Determinations ("FAD"); Final Program Review Determinations ("FPRD"); an institution's failure to meet the administrative capability requirements that relate to the provision of educational services; an institution's loss of eligibility due to, for example, a high cohort default rate; Subpart G actions, including a fine, limitation, suspension, or emergency action related to an institution's misrepresentation or aggressive recruitment; and any other final Department actions.[89] Because the actions in this context are already "final," the institution would not have another opportunity to provide an additional response to the allegations.[90] The Department reasons that the change "better integrates such oversight and compliance work with borrower defense adjudication, by allowing findings generated in the course of other Departmental action to directly lead to the approval of borrower defense claims."[91] The NPRM does not explain to what extent it intends to rely on already existing prior Secretarial actions should this provision become effective in a final rule.

The most significant changes proposed by the Department concern the process to recover from institutions. ED proposes to delete 34 C.F.R. § 668.87, which governs the current BDR recovery process. Due to concern about delaying BDR discharges and conflating the processes between the Department and the borrower and the Department and the institution, ED proposes to separate the adjudication process and the recovery process, while also "preserving" the due process rights of institutions.[92] The regulations propose to allow an institution to contest the liabilities associated with the borrower's discharge through a "PRR" based upon the evidence in the Department's possession, the BDR application, any institutional response, any other relevant information, and the discharge amount.[93] The Department states that this process would provide "faster" answers on group applications and preserve a process for seeking recovery against schools.[94] Institutions would only face recovery for conduct that would have been approved under the BDR regulations

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[85] 87 FR 41901.
[86] *Id.*
[87] 87 FR 41905.
[88] 87 FR 41901.
[89] *Id.*
[90] 87 FR 41901-02.
[91] 87 FR 41902.
[92] 87 FR 41912.
[93] *Id.*
[94] *Id.*

at the time that the act or omission occurred and in the amount that would have been granted under the relevant regulation.[95]

Finally, the Department proposes a six-year statute of limitations on recovery actions against institutions,[96] with the period commencing on the date that the borrower graduated or withdrew from the school. If the BDR claim was the result of a judgment against a school, the Department imposes no limitations period.[97] ED proposes to toll the limitations period if, during the six-year period, the institution received notice of a claim from the Department, a class action lawsuit, or written notice from a Federal or State agency with the ability to investigate the institution for issues that could relate to a BDR claim.[98]

Deletion of 34 C.F.R. § 668.87 Lacks Sufficient Justification and Harms Schools

ED proposes as the replacement for Section 668.87 a new regulation, 34 C.F.R. § 685.409, which fails to inform schools on the process and procedures that institutions must follow and satisfy to respond to a recovery action by the Department. ED summarily concludes that 668.87 "conflates" the interaction between the Department and the borrower and the interaction between the Department and the institution, particularly during the group process.[99] Such summary conclusions are legally inadequate and fail to justify the necessity for deleting Section 668.87.

Although DFI's opposes the NPRM's proposed "bifurcated process," the proposed deletion of 668.87 fails to meet the legal requirements for a regulatory change. In support of this change, the NPRM offers nothing to the public. ED does not discuss prior efforts to recoup BDR liabilities from an institution—because it has never done so—and the Department cannot draw upon any experience in administering 668.87 to conclude that the regulation needs revision or deletion. The NRPM fails to provide a sufficient basis for the proposed deletion, because none exists.

As discussed above, the controlling legal authorities require the Department to provide a sufficient justification for regulatory change. ED's conclusory statements and wishful thinking are not enough to justify these drastic changes proposed in the NPRM. Mere policy concerns and preferences are not enough—ED must cite sufficient facts, evidence, or experience to support its proposed change. The Department does not state that the 2019 BDR Rule has resulted in delays in the group processes, only offering that the new regulations would provide "faster answers on group applications."[100] Such conjecture is insufficient under the APA.

The language in the proposed Section 685.409 offers no guidance to institutions on the internal procedures of a recovery action and merely provides a cursory statement on the Secretary's ability

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[95] *Id.*
[96] 87 FR 41913.
[97] *Id.*
[98] *Id.*
[99] 87 FR 41912.
[100] *Id.*

to collect, an explanation of circumstances where ED may not pursue recovery, and an identification of the applicable limitations period. Section 668.87 informs schools about expected process. Proposed Section 685.409 provides nothing.
If the Department does not withdraw entirely the NPRM, DFI urges ED to delete proposed Section 685.409 from any final regulation and administer current Section 668.87.

The Bifurcated Process Compromises Fairness and Due Process

The Department's proposal to create two distinct BDR processes–a BDR claim adjudication process and an institutional recovery action (the "bifurcated process")–compromises the fairness of BDR adjudications and unconstitutionally burdens an institution's due process rights. Without regard to whether an individual or a group claim, the institution is a critical party in the adjudication of a BDR claim *throughout the entire adjudication recovery process.* Limiting an institution's meaningful participation to the recovery procedures is akin to allowing a defendant to mount a defense only after liability has been determined. Excluding or constraining an institution's participation in these matters is a violation of the Federal Constitution.

Promoting efficiency of BDR claims processing cannot outweigh these constitutional requirements and basic notions of fairness. It is not the fault of schools that the Department, for whatever, has not resolved BDR claims over the years. The Department's emphasis on the speed of adjudications, stated explicitly in proposed 34 C.F.R. § 685.406(f), is no reason to cast aside legal protections for institutions and to disallow their presence at the table of BDR adjudication.

Moreover, the Department's bifurcated process is a recipe for severe reputational damage, which is perhaps what the Department hopes to see by keeping schools from defending their reputations during BDR claims adjudications. The Department's habit of publicly announcing the adjudication of borrower claims prior to providing an institution an appropriate opportunity to respond demonstrates that this concern is not without foundation.[101] Such actions carry significant risk of reputational damage, and a secondary institutional recovery procedure will never redress that damage. The Department should remove the bifurcated process from any final regulation in the even that it does not withdraw the NPRM.

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[101] *See, for example,* "Education Department Approves $415 Million in Borrower Defense Claims Including for Former DeVry Students," USDE Press Office, February 16, 2022, https://www.ed.gov/news/press-releases/education-department-approves-415-million-borrower-defense-claims-including-former-devry-university-students; For negative media coverage, *see:* Cory Turner, "DeVry University misled students. Now, the federal government is erasing their debt," NPR Online, February 16, 2022, https://www.npr.org/2022/02/16/1081107925/education-department-devry-university-borrower-defense-student-loan-relief.

The Use of Pre-Existing Processes Lack Justification and Are Unworkable and Confusing

The Department desires to incorporate currently-existing procedures (identified at 34 C.F.R. § 685.404(a)(1-5)) in the BDR adjudication process, but ED fails to provide a sufficient justification for the change. For example, the Department does not sufficiently identify why or how an institution's loss of eligibility due to its cohort default rate (at proposed Section 685.404(a)(3)) is a potential borrower defense issue that could give rise to claims. Along these lines, the Department also fails to discuss what limits would exist under Section 685.404(a)(2) and what issues could arise under administrative capability regulations. With an expansive revised definition of "educational services" at 34 C.F.R. § 685.206(e)(1)(iv), the boundaries of what could be considered by the Department expands far beyond BDR claims submitted under current and prior regulations. This is especially problematic because these are BDR claims *without actual claims* from students.

DFI also questions whether ED intends to carry over the time limitations from the current regulations governing Final Program Review Determinations (FPRD) and Final Agency Decisions (FAD). As the NPRM states, an institution must respond to a PRR within 30 and 90 days. [102] For example, an appeal is normally due, and a school must pay any funds that it owes as a result of an FPRD within 45 days of the school's receipt of the FPRD. Institutions can be subject to thousands of claims, and it is simply impossible for an institution to respond to each and every claim within that timeline. These are additional reasons why ED should jettison Section 685.404 from any final rule in the event that the Department does not withdraw the NPRM.

Greater Clarity that Recoupment Actions Are Only Subject to Regulations on Claims under the Current Regulations

At 87 FR 41884, the Department states the following:

> Separating the recoupment process from the borrower defense approval process also ensures that institutions will not face financial consequences from claim approvals tied to loans issued prior to July 1, 2023, unless the claim would have been approved under the borrower defense regulation in effect at the time the loans were issued.

The Department also declares at 87 FR 41888:

> The Department does not think it would be appropriate to hold an institution financially liable when the standard in place at the time the loan was disbursed would not have resulted in an approved claim, since the institution would not have had a way of knowing

[102] 87 FR 41901.

that certain types of conduct could later lead to financial consequences.

The Department repeats this throughout the NPRM[103] yet fails to codify this refrain in the proposed regulatory text. This is confusing and underscores that the Department should withdraw the NPRM or, failing withdrawal, clarify in any final regulation that schools have these protections.

Tolling of the Limitations Period Encourages Frivolous Filings

Proposed 34 C.F.R. § 685.409(c)(2) would allow even clearly frivolous filings and baseless investigations to toll the limitations period. As written, the simple filing of a class action complaint or a written notice of an investigation from a Federal or State agency would toll the limitations period.[104] This is sure to encourage the filing of frivolous lawsuits with the sole purpose of tolling limitations period to maintain access to the "stacked deck" borrower-friendly BDR claims process at the Department. The Department's failure to include proposed language clarifying when tolling would come to an end is another deficiency. Absent withdrawal of the NPRM, the Department should remove this language from any final regulation.

Directed Questions Regarding Institutional Responses and Recovery Actions

Should the Department refuse to withdraw the NPRM in its entirety, DFI requests the Department to answer the following directed questions:

> Directed Question No. 1: At 34 C.F.R. § 668.89(b)(3)(iii), the Department states that, in a hearing, the institution has the burden of "establishing any offsetting value of the education." What types of evidence, documents, fact, or data must the institution offer in order for the school to establish such "offsetting value"?
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> Directed Question No. 2: With reference to ED's initial review of claims, how would the Department initiate the process to determine whether the individual has a BDR claim under 34 C.F.R. § 685.403? What would be the process for initiating claims and evaluating claims for frivolity and the level of review by the Department undertakes before submission of the claim to institutions?
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> Directed Question No. 3: What circumstances does the Department envision will require additional information from the school under 34 C.F.R. § 685.406(d)?

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[103] *See*, 87 FR 41887, 41893, 41896, 41902 (twice), 41912

[104] *See*, 34 C.F.R. § 668.409(c)(2)(ii-iii).

Directed Question No. 4: With reference to the application of the current BDR standards during a recovery action, does the Department plan to conduct an entirely separate and secondary adjudication? If so, has the Department conducted an analysis of the delaying effects of the secondary adjudication?

The Department's BDR Proposal Regarding Aggressive and Deceptive Recruitment is Unsupported by Statutory Authority and Impermissibly Vague

At 87 FR 41893, the Department proposes to add a new category for the granting of BDR claims arising from aggressive and deceptive recruitment efforts by institutions. This category lacks statutory support in the HEA and its language impermissibly vague and will result in confusion for students, institutions, and the public. If ED refuses to withdraw the entire NPRM, DFI urges the Department to delete proposed 34 C.F.R. §§ 668.500 and 668.501 from any final rule. DFI also submits Directed Questions concerning this element of the NPRM.

The Department Rejected Similar Provisions During its Rulemaking in 2016

The NPRM notes that an "aggressive and deceptive recruitment" proposal was made during the 2016 BDR rulemaking. At that time, the Department was concerned about developing "clear, consistent standards as to when such conduct, absent a misrepresentation . . . should give rise to relief."[105] As a result, the 2016 NPRM concluded that it was more reasonable to see aggressive and deceptive recruitment as an aggravating factor "elevat[ing] the misrepresentation to a substantial misrepresentation for the purposes of asserting a borrower defense."[106] The Department did not change its position in the 2016 BDR Rule, concluding that the final regulation struck "a balance between the Department's interests in establishing consistent standards by which the Department may evaluate borrower defenses" and "providing borrower and schools with clear guidance as to conduct that may form the basis of a borrower defense claim."[107]

The Department Abruptly Shifts its Position in the NPRM

Such concerns have evaporated in the NPRM. Abruptly shifting gears, the Department states that it has achieved "clarity" about how to avoid "isolated instances of well-intentioned recruiter behavior" from being served up as an approved BDR claim.[108] Noting that "many existing State consumer protection laws" include this sort of claim "in different forms," the Department breezily assumes that including such a claim in the Federal standard would ensure a "more comprehensive Federal standard and ensure equitable treatment for borrowers regardless of where they live."[109]

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[105] 81 FR 39343.
[106] *Id.*
[107] 81 FR 75952.
[108] 87 FR 41894.
[109] *Id.*

ED also contends that "after five more years of receiving borrower defense claims . . . the Department is confident that an appropriate standard can be articulated and enforced in the borrower defense context and that such an element is a necessary addition to address gaps in the Federal standard."[110] ED also mentions that it has "seen" that institutions engage in aggressive tactics "through program reviews, audits, and other investigations." Perhaps not realizing that a federal agency is already policing these issues, the Department also points to a Federal Trade Commission settlement against an educational institution.[111]

Proposed 34 C.F.R. §§ 668.500 and 668.501 Lack Statutory Support and Clarity

The HEA simply does not support the Department's proposed regulations. Underscoring this fact, ED does not cite (because it cannot cite) any statutory authority to create a new basis for borrower defense relief premised on this category. The proposed regulations are also impermissibly vague and introduce an unreasonable level of subjectivity that undercuts any possibility of fair and consistent interpretation and enforcement by the Department.

For example, ED's poorly drafted rule fails to explain which parties would be considered "representatives" for purposes of proposed 34 C.F.R. §§ 668.500(a) and 668.501(a). The Department fails to define "immediately" for purposes of Section 668.501(a)(1), particularly with reference to the phrase "including on the same day of first contact." ED also does not define the meaning of "unreasonable emphasis" in Section 668.501(a)(2) and fails to explain the differences between reasonable and "unreasonable emphasis," as well as examples of what actions would constitute "unreasonable emphasis."

Proposed Section 668.501(a)(3) is also vague and unclear as the provision fails to explain what it means for an institution to "take advantage" of a student's lack of knowledge about or experience with postsecondary programs. ED neglects to explain how an institution would know a prospective student's experience. This lack of clarity will lead to swearing contests between BDR applicants and schools (assuming the institution receives appropriate notice of the claim and the evidence that supposedly supports it). Section 668.501(a)(5) fails to clarify how an institution refusing "to respond to the student's or prospective student's requests for more information" would constitute an "aggressive and deceptive recruitment" tactic. With regard to proposed Section 668.501(a)(7), the Department proposes an impermissibly vague, entirely subjective proposal regarding "threatening or abusive language or behavior." This ambiguous provision suffers from a lack of concrete examples.

Finally, proposed Section 668.501(a)(8) fails to define the terms "repeatedly engage" and "unsolicited contact" and neglects to explain what would constitute a student's request "not to be contacted further." The Department's failure to define the boundaries of this provision will lead to unwanted outcomes. For example, if a student was only a semester away from graduating and the institution contacted the student multiple times to enroll in order to finish their program, the

[110] 87 FR 41895.
[111] *Id.*

institution would run the risk of being accused of an aggressive and deceptive recruitment tactic. As a result, the institution may choose not to contact that student for fear of being subject to a revocation action by the Department, having a limitation imposed on its title IV participation, or being denied participation at the next opportunity for recertification.

Directed Questions Regarding the Aggressive and Deceptive Recruitment

Absent ED's withdrawal of the NPRM or removal of 34 C.F.R. §§ 668.500 and 668.501 form any final regulation, DFI submits the following Directed Questions to the Department:

> Directed Question No. 1: With reference to each of the elements provided in proposed in Section 668.501(a)(1-8), how would an institution disprove an allegation of "aggressive and deceptive recruitment"? What evidence will persuade the Department? How would an institution rebut the allegations made by the student? How would the Department evaluate any evidence against the allegations?
>
> Directed Question No. 2: With reference to the FTC settlement in 2019 cited by the Department in which the settling institution did not admit to any misconduct, how does a settlement without a finding of wrongdoing support the Department's proposed regulations?
>
> Directed Question No. 3: Does the Department take the position that the UDAP, State consumer protection statutes, and FTC laws and regulations provide statutory authority and clear congressional authorization for the aggressive and deceptive recruitment provisions of the NPRM? Does the Department take the position that the HEA permits the agency's reliance on these authorities?

The NPRM's BDR Relief Examples Regarding ED's Handling of Partial and Full Relief Discharges Under the Proposed Regulations Lack Clarity and Confuse the Reader

At 87 FR 41910, the Department offers examples to clarify how it intends to decide issues of partial and full relief for BDR claims. The examples lack clarity and confusing to the public. If the Department does not withdraw the NPRM in its entirety, DFI urges the Department to remove these examples from any final regulations. DFI also proposes several Directed Questions to the Department on these issues.

Acceptable Misrepresentations

In this example, the Department oddly ignores the regulatory framework proposed in the NPRM in order to find a borrower who suffered a misrepresentation was not entitled to a discharge (or a small discharge). Despite the misrepresentation in the school's marketing materials, the

Department refuses the claim in the example because the borrower attended a "highly ranked and highly selective program" and "programs in that category can move around in annual rankings anyway."[112] The notion that a school's selectivity, ranking, or prestige should relieve it of BDR liability is utterly outrageous and an affront to basic fairness and a sound borrower defense to repayment program—one completely unsupported by the regulatory text proposed in the NPRM. The Department also references that, despite the obvious misrepresentation, academic degrees from the program "continue to serve as an effective, well-regarded credential." The Department must clarify its approach to "highly ranked and highly selective programs" and whether or not the Department, as indicated in this example, believes that such programs are immune from BDR claims.

Indeed, the Department argues that even though the borrower was lied to, no discharge was appropriate because of a "lack of evidence that the reliance upon the misrepresentation was to the detriment of the borrower."[113] Curiously, elsewhere in the NPRM, reliance upon a misrepresentation is presumed, and an individualized showing of harm is not required. The Department reasons in those passages that a demonstration of financial harm in the 2019 BDR Rule was "beyond what a reasonable borrower should have to do."[114] Yet, with regard to so-called selective institutions, a borrower must demonstrate reliance *and* harm in order to receive full relief.

In a related vein, proposed 34 C.F.R. § 685.206€(3)(iii) specifically states that submissions to national ranking organizations that are materially different from actual institutional numbers is evidence that a misrepresentation may have occurred. Yet, in this example, the Department states that the misrepresented information was "made to an organization that publishes widely recognized rankings and primarily concerned false data not related to the outcomes of the education." The resolution of this example runs the risk of telling the public that borrowers at certain institutions operate under a different set of unpublished rules because of the Department's own assessment that the credential they received is "effective" and "well-regarded." This inconsistency between proposed regulatory text and examples in the NPRM is confusing to borrowers, institutions, and the public.

DFI submits the following Directed Questions to the Department regarding this example:

> Directed Question No. 1: Does the Department take the view that institutions that produce "effective, well-regarded" credentials or that are considered "selective institutions" are immune from BDR claims?

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[112] 87 FR 41910.
[113] *Id.*
[114] 87 FR 41890.

Job Placement Rate Claims

In this example, the Department concludes that a full discharge would be warranted for a borrower who enrolled in a highly selective graduate program, but whose school gave significantly inflated data to a ranking organization regarding the rate at which its graduates obtain jobs. The Department referred to these types of "job placement rate" representations as a "key factor" under consideration for students when choosing which institution to attend.[115] As in the first example, it is confusing to the public why the Department places negative emphasis on the submission of the inflated and falsified data to a national ranking organization, especially in light of the proposed 34 C.F.R. § 685.206(e)(3)(iii). Moreover, the proposed regulation does not take into account that placement rate data is subject to wild swings over time. In certain circumstances, the change is due to actions taken by the institution, but economic factors, such as economic decline or war, are far beyond the control of an institution. For a multi-year program, the change in placement rate could be significant.

DFI submits the following Directed Question to the Department regarding this example:

> Directed Question No. 1: In a circumstance where an institution provides job placement rate data to students on a yearly or semi-yearly basis, how would the Department would handle a claim arising from a situation where the job placement rate disclosed to a student prior to enrollment is different from the job placement rate at the time of their graduation and the change is due to factors outside of the institution's control?

Minimum Requirements

In this example, the Department states that a borrower who attended an institution that misrepresents that its educational programs meet minimum licensure requirements would be entitled to a full discharge. The Department states that a "similar analysis" would apply to an institution that had said it would provide required internships, clinicals, or externships that were not in fact provided to the students.[116] The Department overlooks scenarios where a student is not provided an internship or similar opportunity because he or she did not meet the requirements for an internship, such as not completing the required courses, meeting grade point average requirements, or an academic or disciplinary suspension or dismissal. The Department needs to provide institutions with examples of the evidence that they would need to provide in these types of cases to rebut the presumption of full relief and how ED would weigh the evidence provided by the institution against the allegations made by the student.

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[115] 81 FR 41910.
[116] 87 FR 41911.

In this example, the Department states that a borrower, who enrolled in a program relying upon the institution's representations regarding three award winning faculty, was entitled to no relief under the proposed regulations. At some time after the representations were made, the three faculty members left, and the school did not update its marketing materials. ED reasoned that, although the institution made a misrepresentation, it is "unreasonable to presume that a borrower would have relied upon this misrepresentation to enroll."[117] The Department added that "the mere presence of award-winning faculty . . . does not guarantee that the borrower would have been able to take classes" with them. Finally, the Department concludes that the student "may" have ultimately not chosen to major in the field in which the instructor teaches or the class might have had limited enrollment.[118]

The 2016 BDR Rule included a similar example where a student enrolled in a school because three of its faculty members had received the "highest award in their field."[119] Like the example in the NPRM, the school failed to update its marketing materials to reflect the fact that the faculty had left the school. The Department stated that, while the borrower reasonably relied upon the misrepresentation, the student received the "value she expected" and that she was not entitled to relief.[120]

The Department's example raises serious issues regarding bias and favoritism by ED. The proposed relief in this example communicates to the public that borrowers at certain institutions operate under a different set of unpublished rules based upon the Department's assessment on whether the borrower received the "value" he or she expected. In turn, this raises concerns about selective enforcement and favoritism toward certain institutions and programs.

Indeed, the borrower in this example suffered a misrepresentation. Nothing in the NPRM allows for the Department to make an independent assessment of value of a borrower's education and then apply that assessment to the borrower's detriment. In fact, in this example, the borrower plainly *did not* receive the value she expected when she enrolled in the school. The Department fails to explain why it would be "unreasonable" to presume that a borrower would have relied upon this misrepresentation.

Elsewhere in the proposed regulations, the Department states that it will "use a presumption of reasonable reliance."[121] ED explains that it would find "reasonable reliance" if a prudent person would believe and act upon the misrepresentation if told it by another person.[122] The example does

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[117] *Id.*
[118] *Id.*
[119] 81 FR 76087.
[120] *Id.*
[121] 87 FR 41889.
[122] 87 FR 41890.

not make clear why a prudent person would not reasonably rely upon this misrepresentation. We note that the example does not say that the student expected to be in one of the award-winning faculty's classes, only that they relied upon the misrepresentation about their employment at the college.

The Department also inconsistently sets forth two arguments. First, the Department explains that the "mere presence" of award-winning faculty does not guarantee that the student would be able to take classes with them. By the example's own terms, however, the borrower did not enroll *in order to take classes* with the award-winning faculty, only that they were employed at the school. Second, the Department mentions that "many universities" employ faculty that have "minimal teaching responsibilities." The Department fails to explain why this is a relevant factor to consider for BDR relief.

PROHIBITIONS ON PRE-DISPUTE ARBITRATION AGREEMENTS AND CLASS ACTION WAIVERS

If the Department refuses to withdraw the NPRM, DFI urges ED to remove from any final rule its provisions prohibiting pre-dispute arbitration agreements and class action waivers and maintain the current regulations as promulgated under the 2019 BDR Rule. The Department's proposal on these issues suffers from significant legal and policy limitations. ED fails to provide a legally sufficient explanation for its proposed regulatory changes that fully address the arguments in the 2019 BDR Rule or justify why the Department seeks to abandon this element of the current regulation. The proposed regulations are also confusing and require clarification. DFI also asks the Department to answer several Directed Questions in the event that the Department refuses to withdraw the NPRM or jettison its proposed language regarding arbitration agreements and class action waivers.

The NPRM's Pre-Dispute Arbitration Agreements and Class Action Waiver Provisions

The NPRM restores and expands the 2016 BDR Rule's prohibition on pre-dispute arbitration agreements and class action waivers. The Department concludes that "restrictive provisions in students' enrollment agreements stymie a borrower's ability to fully reap the rights and benefits of the Direct Loan Program by hindering their rights to pursue a borrower defense claim or unduly delaying when a borrower defense claim was filed or could be filed."[123] The Department adds that without the prohibition, borrowers in distress would likely default, institutions "would be insulated from recovery actions, and the risk and liabilities would be transferred to the Federal taxpayer."[124] The proposed regulations would also include a non-exhaustive list of "what would constitute reliance" on a pre-dispute arbitration agreements with respect to a class action, including seeking

[123] 87 FR 41914.
[124] *Id.*

dismissal, deferral, or stay of a class action; excluding a person or persons from joining a class action; avoiding discovery; or filing an arbitration claim.[125]

Regarding the prohibition on class action waivers, the Department states that when students have the option to pursue class action relief, "they have the chance to recover compensation for the damages they may have suffered, including the costs related to their loans."[126] Further, the Department proposes to create an online database to store arbitration and judicial records submitted by institutions.[127]

Since the issuance of the 2019 BDR Rule, the Department reports that it has "heard from borrowers, advocates representing students, State attorneys general, and the public" about issues related to pre-dispute arbitration agreements and class action waivers, as well as the "lack of transparency" regarding arbitration records.[128]

Regarding the proposed regulations, the Department acknowledges that many existing loan agreements include mandatory arbitration provisions or class action waivers executed prior to the effective date of any final regulations. In those circumstances, similar to the Department's approach in developing the 2016 regulations, the NPRM proposes to prohibit a participating institution from attempting to exercise such agreements and would require a participating institution either to amend the agreements or notify the students who executed those agreements that the institution will not attempt to exercise those agreements in a manner proscribed by the regulations.[129] Importantly, the Department reasons that the proposed regulations would not invalidate those currently-enforceable contracts. Rather, the proposal would simply condition a school's future participation in the Direct Loan program on the institution not enforcing of certain provisions in those contracts going forward.[130]

The 2019 BDR Rule's Pre-Dispute Arbitration Agreements and Class Action Waiver Provisions

The 2019 BDR Rule relies on three Supreme Court precedents, a congressional resolution overturning an agency rule that unreasonably burdened arbitration agreements, and a "federal policy favoring arbitration" in permitting the use of pre-dispute arbitration agreements and class action waivers.[131] When crafting the 2019 BDR Rule and considering public comment, the

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[125] *Id.*

[126] 87 FR 41915.

[127] *See*, 34 C.F.R. 685.300(g) and 34 C.F.R. 685.300(h).

[128] 87 FR 41916.

[129] 87 FR 41917.

[130] *Id.*

[131] The 2019 BDR Rule cites several Supreme Court precedents. *Epic Systems Corp. v. Lewis,* 138 S.Ct. 1612 (2018); *CompuCredit Corp. v. Greenwood,* 132 S.Ct. 665 (2012); and *AT&T*

Department reasoned that arbitration agreements and class action waivers, when coupled with student protections promoting informed decision making, assisted students and institutions.[132] The Department also reasoned that arbitration proceedings would ensure that the school, rather than the taxpayer, would bear the cost of the school's misconduct.[133]

The 2019 BDR Rule also listed the significant advantages of arbitration. Those benefits include: party control over a flexible process; typically lower cost and shorter resolution time; confidentiality and privacy controls; awards that are fair, final, and enforceable; qualified arbitrators with specialized knowledge and experience; and broad user satisfaction.[134] The Department also stated that arbitration does not allow institutions to avoid liability but rather provides speedier recovery and potentially greater relief to students impacted by a school's alleged actions.[135] In some instances, the Department stated that arbitration "may frequently go further than a traditional trial in leveling out the practical, real-world legal disadvantages between the institution and the student."[136]

The 2019 BDR Rule also stated that the "primary motivation" for the reinstatement of pre-dispute arbitration agreements and class action waivers was to provide students who believe they had been wronged with "an opportunity to obtain relief in the quickest, most efficient, most cost-effective, and most accessible manner possible."[137] Further, when weighed against the costs of a trial, the Department chose "to emphasize speedy relief and accessibility."[138] The Department also explained that neither arbitration agreements nor class action waivers limit a borrower's options for redress in reporting a complaint about an institution to the Department, an accreditor, or any other governmental entity."[139] The 2019 BDR Rule makes clear that even with a pre-dispute arbitration and class action waiver in place, "a student must always be allowed to voice concerns or register complaints with the Department, if the borrower's allegations meet the criteria for such a claim."[140] The Department concluded: "Unequivocally, arbitrator determinations are not binding on the Department."[141] The 2019 BDR Rule maintains that rather than discouraging borrowers

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Mobility, LLC v. Concepcion, 131 S.Ct. 1740; Congressional Resolution cited in 2019 BDR Rule: Pub. L. 115-74 (2017).

[132] 84 FR 49840

[133] *Id.*

[134] *See*, 84 FR 49841 citing to: Edna Sussman & John Wilkinson, "Benefits of Arbitration for Commercial Disputes, Arbitration Committee of the ABA Section of Dispute Resolution."

[135] 84 FR 49842.

[136] *Id.*

[137] 84 FR 49843.

[138] *Id.*

[139] 84 FR 49842.

[140] *Id.*

[141] *Id.*

from raising claims, "arbitration provides a more cost-effective and accessible conflict resolution path than traditional court proceedings."[142]

In assessing the 2019 BDR Rule, the NPRM states that the 2019 regulations "failed to adequately balance the costs and benefits of arbitration, focusing too heavily on the conclusion that arbitration provides speedier results, and failing to take into account the protection of the interests of the United States, whose funds are at stake for borrower defense claims asserted on Federal Direct Loans."[143] Further, the NPRM states that "no study the Department is aware of has addressed arbitration in the context of higher education and student loans. Therefore, in proposing regulations regarding arbitration and class actions in the borrower defense context, the Department is relying on its experience in the student loan area."[144]

The NPRM Fails to Provide Sufficient Justifications for the Regulatory Changes in Violation of the APA

The Department does not provide a reasoned analysis supporting its proposed regulatory changes regarding prohibitions on pre-dispute arbitration agreements and class action waivers and their enforcement after any effective date of any final regulation. For example, ED states that, absent the proposed prohibition, borrowers in distress "would likely default," but provides no basis for this statement – no data, no citation, not even an anecdote to show that the Department's statement is based upon more than just conjecture. Reasoned rulemaking requires more than simple, conclusory statements to explain a policy change.[145]

In the same passage, the Department adds that, without the prohibition, institutions would be "insulated" from recovery actions. Again, this statement lacks any context or basis, as well as any indication as to what "recovery actions" the Department refers. If by "recovery actions" the Department means the BDR process, the 2019 BDR Rule said the exact opposite of the proposal's conclusions when it stated "unequivocally" that the 2019 BDR Rule would not encumber a borrower's ability to file a BDR application. The Department does not explain what changed in its analysis from the 2019 BDR Rule to the NPRM. The controlling legal authorities require the Department to explain the reasons for this policy shift.

Without any basis, the Department also contends that "risk and liabilities would be transferred to the Federal taxpayer" without the proposed prohibitions—a truly rich contention given the $85 billion price tag of this NPRM. Left unclear and unexplained by ED is how liabilities would be transferred to the taxpayer if schools are allowed to require pre-dispute arbitration clauses in their enrollment agreements. The Department must explain this contention. This is especially true when, just three years ago, the Department reasoned that allowing arbitration would better ensure that the school, rather than the taxpayer, would bear the cost of the school's action. The Department's

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[142] *Id.*

[143] 87 FR 41915.

[144] *Id.*

[145] *See*, *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2127 (2016).

failure to explain what events, data, or facts forced the Department to change its policy in such a brief period does not comport with the APA's legal requirements.

ED also cryptically states that it has "heard" from parties about the issues related to the regulatory provisions. It is unclear how ED "heard" from these advocates or what they told the Department, as the Department does not appear to refer to the public hearings or the negotiated rulemaking sessions related to this NPRM. The Department's reliance on private meetings, discussions, and email exchanges with state officials and activists sympathetic to the Department's higher education agenda is an obvious APA violation. The Department's ongoing failure to provide records responsive to DFI's long pending FOIA requests concerning these issues underscore the agency's lack of propriety on this score and its efforts to hide these communications with external organizations from the public eye.[146]

Moreover, despite the Department's attempts to assess the 2019 BDR Rule's provisions, ED fails to analyze the provisions of that rule in any meaningful manner and, as a result, fails to provide a sufficient justification for its rule changes. For example, the Department states that the 2019 BDR Rule failed to "adequately balance" the costs and benefits of arbitration but does not fully explain how that rule failed to do so and how the NPRM balances them appropriately. Further, the NPRM states that the 2019 BDR Rule "focus[ed] too heavily" on the fact that arbitration provides quicker results but does not address why the additional time and cost of a class action lawsuit is less important.

Rather than justify these policy shifts, the Department relies in conclusory fashion upon "its experience in the student loan area" and a lack of academic study on "arbitration in the context of higher education and student loans" to conclude that the 2019 BDR Rule was mistaken. Hypocritically, the Department fails to offer any academic study *in favor* of its approach – the very flaw that ED identifies with the current regulations. The Department also does not explain how agency experience "in the student loan area," with specific reference to one institution that closed seven years ago, would reasonably inform its approach to every other instance where an institution employs a pre-dispute arbitration or class action waiver agreement. Even with reference to that institution, the most the Department concludes is that, if class actions had been permitted, borrowers *may* have been able directly to pursue relief. Such speculation cannot form the basis of rulemaking in a way that complies with the APA.

Directed Questions Concerning Pre-Dispute Arbitration Agreements and Class Action Waivers

If the Department does not withdraw the NPRM, DFI asks that the Department answer fully and completely the following questions regarding the pre-dispute arbitration and class action waiver provisions of the proposed regulations.

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[146] https://dfipolicy.org/oversight/?_issues=borrower-defense

Directed Question No. 1: With regard to 34 C.F.R. §685.300(e), what statutory authority allows the Department to dictate exact language regarding pre-dispute arbitration agreements and class action waivers to institutions for inclusion in their enrollment agreements?

Directed Question No. 2: As the proposed regulations appear to allow institutions to use pre-dispute arbitration agreements and class action waivers for instances other than those with implications for borrower defense to repayment issues, how does the Department intend to distinguish permissible agreements from impermissible agreements, particularly given the NPRM's expansive definitions of BDR-eligible claims, such as the proposed definition of "educational services"?

Directed Question No. 3: With regard to proposed 34 C.F.R. §685.300(g) and (h), where will the Department locate the database? What contents will the database house? How will the Department organize the database? Who will have access to the database? Will the Department require institutions to submit already freely available, publicly available documents (such as judicial records)?

Directed Question No. 4: What mechanisms does the Department intend to use to prevent organizations and individuals from using the database to seek clients or take advantage of borrowers who attended the schools referenced in the database?

CLOSED SCHOOL LOAN DISCHARGE PROVISIONS

As discussed above, the Department does not possess clear congressional authority to promulgate a complex regulatory discharge structure based upon very limited statutory language, particularly when the relevant statute provides clear direction. In this instance, Congress has authorized borrowers to receive a closed school loan discharge ("CSLD") when they are unable to complete their program due to the closure of their school. Yet, oddly, the NPRM proposes to manufacture a discharge opportunity for students at schools that have yet to close. To compound these issues, the Department fails to provide sufficient reasons for changing the CSLD provisions of the 2019 BDR Rule or to explain its experience in administering the CSLD provisions of those regulations. The Department abuses is grant of congressional authority to the point where the CLSD statute longer serves as a statutory basis for the proposed regulation.

The NPRM's CSLD Provisions

The Department proposes a number of changes to the CSLD regulations: providing more automatic discharges within one year of a college closure and clarifying rules that limit discharges for

borrowers who enroll in a comparable program to apply only to instances where a borrower accepts and completes an approved teach-out program (the "reenrollment provisions").[147] At 87 FR 41920, the Department proposes to define a school's closure date as the earlier of the date that the school ceases to provide educational instruction "in most programs," as determined by the Secretary, or on a date chosen by the Secretary that reflects when the school had ceased to provide educational instruction "for most of its students." In addition, ED also seeks to define "program" for purposes of determining a school's closure date as the credential defined by the level and Classification of Instructional Program ("CIP") code in which a student is enrolled.[148]

The NPRM also seeks to provide the Secretary with the ability to discharge a loan without an application if the student did not complete a program pursuant to an institutional teach-out plan implemented by the school or a teach-out agreement at another school (approved by the school's accrediting agency and, if applicable, the school's State authorizing agency).[149] ED would also remove the current requirements of the 2019 BDR Rule that a student only qualifies for a closed school discharge without an application if the student does not re-enroll in an eligible title IV school within three years of the school's closure date.[150] The proposed regulations would provide an automatic discharge if the student accepts, but does not complete, an institutional teach-out plan or a teach-out agreement with another school within one year of the borrower's last date of attendance in the teach-out program.[151]

The NPRM also expands the list of "exceptional circumstances" that allow the Secretary to extend the 180-day "look back period" for teach-out eligibility.[152] The Department states that it relies on its experience to propose three additional "exceptional circumstances" to extend the "look back period" in situations that "could indicate" that the school is in danger of closing: the discontinuance of a significant share of academic programs; the permanent closure of all or most of its in-person locations while maintaining online programs; and placement of the school on heightened cash monitoring.[153] The NPRM fails to discuss ED's prior experience with those supposed scenarios.

The Department glibly justifies these changes by relying upon its policy goal to "increase access" to CSLD for borrowers who have "experienced the disruption of being enrolled in a school that closes" and who are "burdened" by student loan debt from a program that they did not finish.[154] The Department cites a General Accountability Office ("GAO") study that purportedly concluded that 70% of borrowers who received automatic closed school discharges under the three-year

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[147] 87 FR 41880.
[148] 87 FR 41920.
[149] *Id.*
[150] *Id.*
[151] 87 FR 41921.
[152] *Id.*
[153] *Id.*
[154] *Id.*

provision were in default on their loan.[155] As a result, the Department states its belief that students are "best protected" by establishing a one-year period for automatic discharges.[156]

Regarding the determination of the date of a closure, the Department reasons that the changes would not automatically apply if a small institution remained open but ends one or two programs but would capture a circumstance where an institution continues only one program while otherwise ceasing all other enrollment.[157] ED justifies this approach by stating that it would limit the ability of institutions to manipulate the CSLD process.[158]

The Department also argues that a student would only qualify for a CSLD if the student did not complete an institutional teach-out plan performed by the school or through a teach-out agreement with another school.[159] ED states that removing the re-enrollment criteria would "better reflect the legislative intent of the HEA" and avoid the significant challenges that supposedly exist in implementing the requirement.[160]

Finally, ED concludes that the HEA does not mention the possibility that enrollment in a comparable program would limit the borrower's eligibility for a discharge.[161] The Department acknowledges the intent of the requirement, but states that it "may result" in too many situations where a student loses the ability to receive a discharge even though the program in which they are enrolled is not a "true extension" of the program that in which they were enrolled at the closed institution.[162]

The NPRM's CSLD Provisions Exceed Statutory Authority

The Department cites to 20 U.S.C. § 1087(c)(1) and 20 U.S.C. § 1087dd(g) for the statutory authority to make these regulatory changes. Section 1087(c)(1) states in relevant part:

> If a borrower who received, on or after January 1, 1986, a loan made, insured, or guaranteed under this part and the student borrower, or the student on whose behalf a parent borrowed, is unable to

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[155] *Id., Citing,* Government Accountability Office (2021). "College Closures: Many Impacted Borrowers Struggled Financially Despite Being Eligible for Loan Discharges." Testimony before the Subcommittee on Higher Education and Workforce Investment, Committee on Education and Labor, House of Representatives. (GAO Publication No. 21–105373). Washington, DC: U.S. Government Printing Office.

[156] *Id.*

[157] 87 FR 41923.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] 87 FR 41923-24.

> complete the program in which such student is enrolled due to the closure of the institution . . . then the Secretary shall discharge the borrower's liability on the loan (including interest and collection fees).

Section 1087dd(g)(1) mirrors this paragraph. None of ED's proposed regulations is authorized in these statutory authorities. Moreover, ED fails to provide sufficient justifications for the regulatory changes, which are confusing and lack clarity. DFI urges the Department to withdraw the NPRM and to administer the easily understood CSLD provisions of the 2019 BD Rule, which relies on clear congressional authority and is not in excess of the authority granted by the HEA.

The sections of the HEA cited by the Department -- § 1087(c)(1) and § 1087dd(g) – do not grant ED the authority to enact the proposed regulations. As discussed elsewhere in this comment, regarding "major questions" of the sort presented by collapsing educational institutions, recent Supreme Court precedent requires that an institution point to "clear Congressional authorization" for the power it claims.[163] Congress has only authorized the Department to discharge a student loan when students cannot finish their programs **due to the closure of the institution**. Moreover, nothing in the statute indicates that Congress granted the Department the clear authority to discharge student loans without an application.

Despite this clear language, the Department's proposes a highly flexible notion of what constitutes a school's closure date:

> A school's closure date is the earlier of the date that the school ceases to provide educational instruction *in most programs* . . . or a date chosen by the Secretary that reflects when the school had ceased to provide educational instruction *for most of its students*."[164]

The NPRM would thus allow the Department to grant a CSLD at institutions that remain *open*, despite the fact that Congress has only authorized CSLDs in circumstances where the "institution closed"—not programs at the institution. Institutional closure is a statutory prerequisite for granting a CSLD. The Department cannot base its proposed CSLD provisions on a statute that provides relief to students arising from the "closure of the institution" – a phrase that has a common sense, plain language meaning—to provide relief to borrowers because of the closure of "most programs" or the cessation of educational instruction for "most" students. These regulatory proposals simply defy Congress.

The Department also appears to rely on the legislative intent of the HEA in proposing to remove the re-enrollment criteria. This is a woefully insufficient legal basis for this proposed regulation. The HEA is silent on this issue. To read a legislative intent into such a straight-forward provision is precisely the kind of agency behavior that the *West Virginia* court sought to curtail.

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[163] *See*, *West Virginia v. EPA*, 597 US __ (2022).

[164] *See*, proposed 34 C.F.R. § 685.214(a)(2)(i)(emphasis added).

The NPRM's CSLD Provisions Lack Sufficient Justification and Violate the APA

As explained above, the Supreme Court has held that an agency that seeks to enact a regulatory change must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made."[165] Under this standard, ED fails to provide a sufficient justification for the changes to the current CSLD regulations. First, the GAO study cited by the Department does not provide support for the changes proposed by ED. Second, the Department cites "significant challenges" regarding the re-enrollment provisions, but it does not explain those challenges or identifies how the proposed regulations resolve those challenges.

The Department offers the GAO study to support its proposal to reduce the three-year period for automatic discharges one year because the GAO found that over 70 percent of borrowers who received automatic closed school discharges under the three-year provision were "in default." This contention is inaccurate. The GAO study actually found as follows:

> About 73 percent of borrowers who eventually received automatic discharges—that is, eligible borrowers who did not apply for and receive a discharge—faced difficulty repaying their loans. Specifically, 52 percent of these borrowers default on their loans, and an additional 21 percent were past due on their loans by 90 days or more at some point during their repayment.[166]

Rather than misstate findings of studies, the Department must explain why this number of borrowers in default justifies the shortening of the automatic CSLD window from three to one year.

Perhaps more importantly, the Department fails to explain its challenges in administering the CSLD provisions of the 2019 BDR Rule. In order to justify this change, ED must sufficiently describe those challenges and why and how the proposed regulations would resolve those challenges. Without that explanation, the Department fails to provide sufficient justification for the proposal. DFI surmises that, like the borrower defense provisions of the 2019 BDR Rule, the Department has refused to administer the CSLD provisions of the current regulations.

The NPRM's CSLD Provisions Are Confusing and Ambiguous

Because the Department uses undefined or poorly defined terms, the NPRM fails to provide the necessary clarity and explanation to allow institutions to understand their obligations and to achieve compliance.

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[165] *Motor Vehicle Mfrs.* At 43.
[166] GAO Study, pgs. 14-15.

The Department does not provide sufficient clarity on the meaning of "most programs" and "most of its students" in proposed 34 C.F.R. § 685.214(a)(2)(i); the definitions lack basic threshold determinations that will allow educational institutions to understand their obligations and comply with any new rule. Similarly, ED fails to explain how it will reconcile its proposed regulatory language with text of the NPRM's preamble (at 87 FR 41923) regarding small institutions. Preamble guidance states that the provisions will not apply to small institutions that remain open but who end "a program or two." This "small institutions" exception is not in the regulatory language.

Finally, proposed 34 C.F.R. § 668.214(h) would add several "exceptional circumstances" that are not necessarily relevant regarding reasons for the extension of the 180 day "look back" period. The Department does not provide any reason, gained through enforcement of the current regulations, that necessitates this change. In addition, the Department fails to explain why these additional circumstances should be added to the regulatory list, especially when the 2019 BDR Rule list is non-exhaustive.[167]

These defects support the Department's withdrawal of the NPRM.

Directed Questions Concerning the CSLD Provisions of the NPRM

If the Department does not withdraw the NPRM, DFI asks that the Department to answer fully and completely the following questions regarding the CLSD provisions of the proposed regulations:

> Directed Question No. 1: How does the Department intend to implement automatic discharges regarding the application of CSLD liability against open institutions? What experience does the Department have regarding automatic CSLDs? How many automatic CSLDs has the Department issued? What systems does the Department have in place to notify it of the expiration of a borrower's one-year period prior to eligibility? How would the Department control for third-party reimbursement in the context of automatic CSLDs?
>
> Directed Question No. 2: As the Department states that Congress intended for CSLD to assist students unable to complete their programs through "no fault of their own,"[168] does the Department intend to grant CSLD relief for borrowers who are subject to an academic, disciplinary, or other "fault" dismissal during the period of the teach-out?

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[167] *See*, 34 C.F.R. § 668.214(c)(1)(i)(B).
[168] 87 FR 41921.

PUBLIC SERVICE LOAN FORGIVENESS PROVISIONS

The Department's proposed PSLF regulations suffer from the same deficiencies that plague the NPRM's BDR and CSLD provisions. First, the Department's failure to analyze the effect of *West Virginia v. EPA* on its proposed PSLF regulations is itself a fatal defect that requires the Department to withdraw the NPRM in its entirety. The public is entitled to know the Department's position on the issues presented by this historic case and to make public submissions to the agency in response to the agency's views and analysis. Despite publication of the NPRM nearly two weeks after the Court decided *West Virginia v. EPA* and the opportunity to include such an analysis in the NPRM, the Department simply ignored this historic case and rushed the NPRM to publication. Second, given the scope of PSLF discharges and the massive costs arising from these changes, the proposed PSLF regulations obviously implicate a "major question" that require that the Department base its regulatory changes on "clear congressional authorization"—authority that is notably lacking here, particularly in regard to proposed 34 C.F.R. § 685.219(c)(2)(v). For these reasons alone, the agency must withdraw the NPRM.

These defects are particularly egregious as they relate to proposed Section 685.219(c)(2)(v), wherein the agency proposes to count as a "payment" for PSLF purposes each month that the borrower is in a deferment or forbearance period while in a PSLF qualifying employment for the period of time covered by the deferment or forbearance. In effect, the agency proposes to accept as qualifying payments those months when the borrower makes no payments on his or her student loan debt.

This is a remarkable proposal even in the context of this NPRM, which takes every opportunity to "stack the deck" against institutions and taxpayers. Nothing in the PSLF authorizing statute, 20 U.S.C. § 1087e(m), grants the Department the statutory authority to qualify "no payment" as a "payment" for borrowers who are in forbearance or deferment; the proposed regulation lays outside of ED's statutory authority. Absent withdrawal of the NPRM, the Department should remove this provision from any final rule.

LACK OF A MEANINGFUL PUBLIC COMMENT PERIOD

The breadth of this comment underscores the highly complex regulatory framework proposed by the Department in the NPRM. A public comment period of only 30 days is insufficient for the public appropriately, sufficiently, and meaningfully to participate in this rulemaking process. As a result, we request an additional 30 days to provide a full opportunity to respond to the NPRM.

A simple list of the topics included in the 2022 BDR NPRM – Borrower Defense to Repayment; Total and Permanent Disability; Closed School Loan Discharges; False Certification Discharges; Public Service Loan Forgiveness; Pre-dispute Arbitration and Class Action Waiver Bans; and Interest Capitalization Events – demands that the public receive a much longer period to submit robust, thorough, and comprehensive comments. The NPRM is exceptional in the diverse number of topics included in its provisions. Such an unprecedented proposal demands a similarly unprecedented opportunity for the public to provide comment.

Past practice supports an extension of the comment period. The 2016 NPRM[169] had a comment period of 45 days, and the 2008 PSLF NPRM[170] had a comment period of 45 days. The 2018 BDR NPRM[171] carried a 30-day period; however, the 2018 BDR NPRM did not include revisions to PSLF, and the changes to the BDR provisions in the 2022 NPRM are more akin to the 2016 NPRM due to the quantity of changes made, the magnitude of the changes, the previous regulations that form the basis of the changes, and the need for the schools to consider how the changes impact them.

In the NPRM, the Department also relies upon authority that suggests a longer time period for public comments. For example, the NPRM cites Executive Orders 12866 and 13563 ("EOs"). The Department invites the public to assist the Department "in complying with the specific requirements" associated with the EOs. Executive Order 13563, *Improving Regulation and Regulatory Review*, states that "each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."[172] Executive Order 12866 includes similar language:

> Each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.[173]

The Department ought to observe the key orders that it cites. An additional 30 days for interested parties to submit comments is fully appropriate, particularly where, as here, the Department published on July 12, 2022, and July 28, 2022, proposed rules regarding Title IX[174] and other title-IV related matters,[175] respectively.

CONCLUSION

DFI requests from the Department a complete, thorough, and deliberate study of its arguments, criticisms, suggestions and directed questions. For the reasons set forth above, we urge the Department to withdraw the NPRM. Failing its withdrawal of the NPRM in its entirety, DFI urges the Department to answer fully and completely its directed questions, to consider deeply its arguments and criticisms, and to incorporate into any final rule its suggestions and revisions. A proper application of the controlling legal authorities dictates nothing less.

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[169] 81 FR 39330
[170] 73 FR 37694
[171] 83 FR 37242
[172] *See*, EO 13563, Sect. 2(b).
[173] *See*, EO 12866, Sect. 6(a)(1).
[174] 87 FR 41390
[175] 87 FR 45432.

Sincerely,

Robert Eitel

Robert S. Eitel
President
Defense of Freedom Institute for Policy Studies

cc: Mr. Jonathan Helwink