

Discretionary Cancellation of Federal Student Loans for Older Borrowers and For-Profit Borrowers

Section 432(a) of the Higher Education Act (HEA), codified at 20 U.S.C. § 1082(a)(6), authorizes the Secretary of Education to “compromise, waive, or release any right, title, claim, lien, or demand” of the Department of Education. Department regulations specify certain circumstances under which this compromise or waiver¹ authority may be exercised. *See* 34 C.F.R. § 30.70. This memo details debt relief pathways for targeted groups of borrowers – specifically, older borrowers and borrowers who attended for-profit schools – in spite of current legal challenges. Such group-based discharges would be a lawful and permissible exercise of the Secretary’s authority under existing law.

In short:

- The HEA provides for discretionary debt cancellation;
- The Department has consistently understood this statutory authority to authorize cancellation on a categorical basis;
- This type of cancellation is consistent with Department regulations and the Federal Claims Collection Act and its regulations;
- This provision of the HEA is distinct from the authority relied on for the debt relief program blocked by the Supreme Court in *Biden v. Nebraska*;
- The Department proposed but did not finalize modifications to existing regulations under this provision of the HEA. The proposed modifications were enjoined, but the regulations as they exist allow for the cancellation of debt for older borrowers and borrowers who attended for-profit schools.

Earlier this year, the Department published two notices of proposed rulemaking. The first, known as “Plan B,” elaborated on borrower and loan attributes likely to warrant the appropriate exercise of discretionary cancellation.² The second, known as “Hardship,” further elaborated on the exercise of discretionary cancellation due to individual circumstances of financial hardship.³ The Department solicited public comment on both proposed rules, but has not published a final version of either. Notwithstanding the lack of finality, the Plan B regulation is subject to a nationwide injunction.⁴

¹This authority is sometimes referred to as the “settlement and compromise authority.”

²Department of Education, Notice of Proposed Rulemaking, Student Debt Relief for the William D. Ford Federal Direct Loan Program (Direct Loans), the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program, 89 Fed. Reg. 27,564 (Apr. 17, 2024). ³Office of Postsecondary Education, Department of Education, Notice of proposed rulemaking, Student Debt Relief Based on Hardship for the William D. Ford Federal Direct Loan Program (Direct Loans), the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program, 89 Fed. Reg. 87,130 (Oct. 31, 2024).

⁴https://storage.courtlistener.com/recap/gov.uscourts.moed.215155/gov.uscourts.moed.215155.57.0_1.pdf. The Defendants have moved to dismiss the case without prejudice for lack of venue. The injunction prohibits “mass cancellation” under “the Rule,” which was identified in the Complaint as the “Third Mass Cancellation Rule” published at “89 C.F.R. 27,564,” assumedly a failed reference to the Plan B NPRM.

Discretionary cancellation of federal student loans owed by borrowers over a certain age is not foreclosed by litigation surrounding Plan B. The Plan B proposed rule considered categorical waiver of *loans* of a certain age.⁵ Age of the borrower or receipt of Social Security benefits was identified in the Hardship NPRM as a factor that an individual borrower could conceivably raise in an application for discretionary cancellation. Age of the borrower was not identified in either rule as categorical basis for cancellation. Under that proposed rule 27.6 million borrowers (nearly half of all student loan borrowers) would qualify for cancellation.⁶ In contrast, there are 9 million student debtors over age 50, 2.8 million of whom are over age 62.⁷ These debtors represent a much smaller subset of debtors; thus, discharging these accounts don't raise the same legal challenges as Plan B litigation, nor do they invoke “major questions doctrine” concerns represented by broad-based relief.

The policy rationale set forth in the Plan B and Hardship proposed rules provide sound and compelling justifications for cancellation of federal student loans for borrowers over a certain age:

- Cancelling debt in appropriate circumstances benefits the Department because it would “no longer incur[] costs to service or collect on loans that are unlikely to be otherwise repaid in full in a reasonable period.”⁸
- In certain circumstances, discretionary cancellation “would be consistent with the general principles of Federal debt collection, which permit agencies to provide relief to borrowers when there is evidence the agency would not otherwise be able to collect the debt in full within a reasonable time.”⁹
- Assessment of the cost of continued cancellation can “include financial and nonfinancial costs to the Department directly related to loan collection, such as compensating student loan servicers or debt collectors, and, because the Department’s resources are limited, operational and administrative costs associated with outreach to high-risk borrowers unlikely to repay loans, rather than more beneficial outreach to other borrowers who may be more likely to be able to fully repay. In assessing the costs of collection, the Department may also consider whether collection advances the principles of the title IV programs.”¹⁰
- Assessment of the benefits of cancellation may include benefits realized under federal programs beyond Title IV, “such as Social Security,” where federal student loan cancellation would mean “no longer having those amounts at risk of being offset” for payment of a federal student loan debt, thereby “allow[ing] broader Federal benefits to better achieve their intended purposes, such as keeping senior citizens out of poverty.”¹¹

⁵ Plan B, 89 Fed. Reg. at 27,573 (“[T]he vast majority of loans that are that old and are still outstanding belong to borrowers who have had long-term struggles repaying. For instance, Department data in the RIA that accompanies this NPRM show that 83 percent of borrowers whose loans are at least 20 (undergraduate debt) or 25 (graduate debt) years old have previously experienced a default.”).

⁶ Plan B, 89 Fed. Reg. at 27,603.

⁷ Federal Student Loan Portfolio, by Borrower Age, 2024 Q3

⁸ Plan B, 89 Fed. Reg. at 27,565.

⁹ Plan B, 89 Fed. Reg. at 27,572.

¹⁰ Hardship, 89 Fed. Reg. at 87,137-38.

¹¹ Hardship, 89 Fed. Reg. at 87,154.

The Department provided evidence, drawn from analysis of data about the federal student loan portfolio, that supports discretionary cancellation of federal student loans for older borrowers:

- “The older the borrower, the greater the likelihood that they will stop working prior to successful repayment. Forty-one percent of non-Parent PLUS borrowers 62 years of age and older with an open loan have held their student loans for more than 20 years, and 30 percent of borrowers 62 years of age and older with an open loan have held their student loans for more than 25 years. Waiving such loans would not create significant costs in the form of transfers for the Government because it is unlikely to get significant additional payments from a retired borrower.”¹²
- The budgetary impact of cancellation for older borrowers is modest, because the student loan model (used to estimate the net budgetary effects of changes in administration of the program) already factors in a borrower’s age in determining expected revenue from a federal student loan: “The DDB [Death, Disability, and Bankruptcy] assumption is used in the Student Loan Model (SLM) to determine the rate and timing of loan discharges due to the death, disability, bankruptcy, or other discharge of the borrowers.”¹³ In actuarial terms, older borrowers are assumed closer to death or disability than other borrowers.

This rationale remains available as a basis for action, notwithstanding the lack of a finalized Plan B or Hardship Rule. In proposing those rules, the Department stated that proposed and existing regulations “neither limit the Secretary’s discretion to waive debt in other circumstances permitted under Section 432(a) nor do they require the Secretary to undergo rulemaking before taking any action authorized under Section 432(a).”¹⁴

Similarly, the proposed Hardship rule recognized that “students who attended for-profit institutions are more likely to default. For example, among a cohort of borrowers who first entered undergraduate education in 2003–04, borrowers who entered a for-profit institution were 10 percentage points more likely to default than those who enrolled at other types of institutions.”¹⁵

Removing the proposed rules from the equation, the Department has, and likely will again in the coming days, exercised authority under section 432(a) of the HEA to cancel federal student loans on a group basis in instances of school misconduct.

For example, in June 2023, the Department acted to discharge the federal student loans of a group of borrowers. This action, based on reasoned policy decisions and legal analysis, was reviewed by General Counsel Lisa Brown, approved by Under Secretary James Kvaal, and documented in a decision memo. A whistleblower alleged that this action was not legally authorized, in that it (allegedly) failed to comply with the requirements of 34 C.F.R. § 30.70 and the Federal Claims

¹² Plan B, 89 Fed. Reg. at 27,596.

¹³ Plan B, 89 Fed. Reg. at 27,604.

¹⁴ Plan B, 89 Fed. Reg. at 27,569.

¹⁵ Hardship, 89 Fed. Reg. at 87,143.

Collections Standards (FCCS) implementing regulations. In the whistleblower's view, the Department was required by those provisions to make an individual determination of each debtor's ability to pay, the government's ability to collect within a reasonable time, the costs of collection, or the prospects of recovery through litigation.

At the request of the Office of Special Counsel, the Department conducted an investigation of the whistleblower's complaint. It observed:

- *The Department has long interpreted [the settlement and compromise authority at 20 U.S.C. § 1082(a)(6)] as allowing the Secretary to provide relief to categories of persons or entities. (noting 1986 adoption of guidelines by Secretary for waiver of right to recovery from guarantee agencies and lenders in the FFEL program);*
- *[T]he Federal Claims Collection Act (FCCA) and the FCCS regulations do not limit the Secretary's authority to apply Education-specific standards to the compromise of claims;*
- *[T]he Department's own regulations do not strictly bind the Secretary to the FCCS. (noting history of revisions to 34 C.F.R. § 30.70 have consistently recognized the Secretary's broad authority to compromise student loan debts "in any amount");*

Further, the Department reasoned, *even if* FCCS do govern the Secretary's exercise of its authority to compromise or waive debt, "nothing in the FCCS itself precludes an agency from compromising or waiving claims on a group basis in appropriate circumstances." The FCCS regulations identify considerations (ability of the debtor to pay within a reasonable time; inability of the government to collect the debt in full within a reasonable time; cost of collecting the debt; litigation risk) that "may apply in like manner across a group of similarly situated individuals" (referencing 31 C.F.R. § 902.2). Specifically in the case of borrower defense—discharge based on institutional misconduct— "where a widespread or pervasive practice of a school or company affected *a population* of students," litigation risk or uncertainty regarding the government's ability to legally collect the loans is a "basis for compromise [that] could exist for identical reasons as to a group of borrowers."

The Department's thorough "review of the FCCS regulations and the discussions of those standards by the issuing agencies has not identified any language or discussion limiting agencies from applying this standard on a group basis."

The Department's investigation thus did not find evidence supporting the whistleblower's allegations.¹⁶ On November 1, 2024, the Office of Special Counsel informed the President that the whistleblower's complaint was "totally unsubstantiated" and the issue closed.¹⁷

Thus, exercising group-wide discharges was deemed lawful and permissible. As such, group-wide discharges can and should be exercised by the Department of Education for targeted groups, including older borrowers and for-profit borrowers.

¹⁶ <https://osc.gov/Documents/Public%20Files/FY25/DI-000101/Agency%20Report%20-%20DI-24-000101.pdf>

¹⁷ <https://osc.gov/Documents/Public%20Files/FY25/DI-000101/President%20Letter%20-%20DI-24-000101.pdf>