VIA: *Regulations.gov*

August 11, 2022

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

Re: Comments to Docket ID ED: 2021-OPE-0077

Dear Secretary Cardona,

As Executive Director of the California Association of Private Postsecondary Schools ("CAPPS"), I write you on behalf of our members to present our public comment submission to the proposed regulations published by the U.S. Department of Education (the "Department" or "USDE") in the 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 comment focuses on the borrower defense to repayment ("BDR") and closed school loan discharge ("CSLD") provisions as well as the ban on pre-dispute arbitration agreements and class action waivers.

CAPPS is the only California state association that represents all of the diverse range of private postsecondary schools in California. CAPPS has a membership of more than 200 institutions, including for-profit, non-profit, and religious institutions. Our schools are either institutionally accredited or approved by California's Bureau of Private Postsecondary Education ("BPPE") to offer educational services. CAPPS works to ensure that the needs of the entire sector – from small schools to large publicly traded institutions – are met from a policy, educational, and business perspective.

CAPPS appreciates the opportunity to respond to the 2022 BDR NPRM. Further, we acknowledge the time and effort that the Department has untaken to review this comment and all comments submitted as part of this rulemaking. As part of the rulemaking process, we submit this comment in the spirit of collaboration. Toward that end, we offer the below comments, directed questions, and proposed regulatory changes.

I. *The Department's Justification for the 2022 BDR NPRM Does Not Satisfy the Statutory Requirements for a Permissible Rule Change*

Beginning on 87 FR 41881, 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 assesses the 2019 BDR Rule promulgated and posits the likely outcomes of the BDR process under that rule. However, the Department's analysis in the NPRM does not satisfy the minimum statutory requirements set forth under the Administrative Procedure Act ("APA"), as interpreted by the courts, and, thus, is insufficient to justify the changes to the BDR regulations proposed. We contend that the Department should, first, enforce the 2019 BDR Rule as properly enacted, and, second, conduct reasoned rulemaking based upon the experience of that enforcement rather than, as the Department currently seeks to do, base significant rulemaking on conjecture, assumption, and speculation.

The Department begins its analysis of the 2019 BDR Rule by stating that USDE "believes" that the regulations 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."[1] In particular, the Department expressed concern that expecting a borrower to independently document and corroborate the misrepresentation and specifically show the amount of financial harm suffered, would require 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."[2] At another point in the NPRM, the Department states its belief that a borrower would "have to act as a labor economist" to show that they were harmed by an institution's misrepresentations.[3] Therefore, the Department concludes that, under the 2019 BDR Rule, borrowers face an "unreasonable set of requirements" that would 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."[4]

Further, the Department states that its "experience" reviewing borrower defense applications showed that many of the school's misrepresentations were made orally or related to high pressure sales tactics, which would deny borrowers written evidence of misrepresentations and

[1] 87 FR 41883
[2] *Id.*
[3] 87 FR 41890.
[4] 87 FR 41883.

"result in the Department denying borrowers' claims due to lack of documentation, despite the fact that many borrowers do not and cannot keep such documents over years."[5]

The Department goes on to cite the 2019 BDR Rule's Regulatory Impact Analysis ("RIA") for the proposition that the current regulations would only result in 7.5% of BDR claims being approved, whereas the 2016 BDR Rule would result in a 65% approval rate.[6] The Department concluded that such a significant drop-off of approvals "suggests that the 2019 regulation would result in denials for too many claims that should have a reasonable prospect of being meritorious."[7]

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."* [*emphasis added*][8]

The Department explains this lack of adjudications by pointing to: 1) USDE is still processing claims covered by the 1994 and 2016 regulations; and 2) repayment of and interest accrual on all Federal loans has been paused since 2020, "so borrowers…may not have felt the need to apply yet."[9]

The Department concludes that, over the last several years, USDE "has gained significant experience and expertise" adjudicating claims, which includes "identifying areas for improvement and refinement" that would not have been previously apparent.[10] As a result of that experience, the Department proposed 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 stated that the "current 2019 rules are too limiting to fairly and accurately adjudicate claims, and that further regulations are needed to address issues that have continued to arise during the Department's claim review."[11] Finally, USDE states the current rules need to be changed, in part, because they "exclude" evidence of school activity in the Department's possession, gleaned from other Department activity, that would support borrowers' claims.[12]

With regard to the relevant statutory framework, one of the most basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.[13] The Administrative Procedure Act, 5 USC §551 *et seq.* ("APA"), permits the setting aside of agency

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] 87 FR 41884.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016).

action that is "arbitrary" and "capricious" under the statute.[14] 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."[15] 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.[16]

In *FCC v. Fox Television Stations, Inc.*, the Supreme Court stated 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.[17] The *FCC* court explained that the requirement that an agency provide a "reasoned explanation" for its action and show that the new policy is permissible under the statute, good reasons for it exist, and that the agency believes it to be better.[18]

However, 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."[19] 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."[20]

In *Encino Motorcars*, the Supreme Court did not apply agency deference to a Department of Labor regulation. In that case, the agency "said almost nothing" when explaining the "good reasons for the new policy."[21] The agency did state that it believed the "interpretation [was] reasonable" and "sets forth the appropriate approach."[22] The Court found that the agency did not do a sufficient job in explaining its policy change and held that "conclusory statements do not suffice to explain its decision."[23]

When applying this statutory and interpretive framework to the 2022 BDR NPRM, it becomes clear that the Department's proposed rulemaking does not meet the statutory requirements under the APA. The Department does not "examine the relevant data" nor does it rest its

[14] 5 USC § 706(2)(A).
[15] *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).
[16] *Id.* at 42-43.
[17] 129 S.Ct. 1800, 1810 (2008).
[18] *Id.*
[19] *Id.* at 1811, quoting: *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742, 116 S.Ct. 1730 (1996).
[20] *FCC* at 1811.
[21] *Encino* at 2127.
[22] *Id.*
[23] *Id.*

conclusions on "factual findings" or a "reasoned explanation." In fact, the Department admits that it has not adjudicated *a single claim* under the 2019 BDR Rule. The "experience" the Department references as justification for the proposed changes is without merit and undermined by the Department's own admission. The Department, quite simply, cannot speak with authority on how the 2019 BDR Rule would work in practice. The Department's explanation for the failure to act upon applications subject to the current regulations is insufficient. If USDE is still processing claims covered by the 1994 and 2016 regulations, it is unclear what serves as the basis for the critique of the 2019 BDR Rule. The problems that the Department encountered enforcing the provisions of the 1994 and 2016 have little to no bearing on the 2019 BDR Rule and cannot serve as a legitimate basis for changing current regulations. Second, the Department offers no evidence, beyond speculation, that borrowers have not "felt the need" to apply for BDR relief due to the repayment pause on Federal student loans. If the Department has evidence for this conclusion, USDE should make that information available to the public.

Therefore, any statements that the Department makes with regard to what USDE believes the consequences of the 2019 BDR Rule necessitating this rulemaking – i.e., excessive burdens on borrowers; an "unreasonably high standard" for relief; denial of too many claims that have a "reasonable prospect of being meritorious" – are pure conjecture and not based upon any relevant facts or experience.

The Department seems content to only rely upon a "review" of the 2019 regulation. Such an unspecified and unexplained exercise does not satisfy the Supreme Court 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 the "experience" that the Department points to, the Department admits to *never* having enforced the 2019 BDR Rule with regard to a BDR application. The "experience" that the Department relies upon to make changes to the 2019 BDR Rule is time spent enforcing the 1994 and 2016 BDR regulations. USDE never explains how its experience enforcing two other rules – and identifying areas for "improvement and refinement" associated with those rules – would appropriately and sufficiently inform its analysis of, and proposed changes to, the 2019 BDR Rule. As a result, the Department does not 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."

For the proposition that the 2019 BDR Rule would result in "denials for too many claims that should have a reasonable prospect of being meritorious," the Department points to the 2019 BDR Rule's RIA that suggests that the regulations would result in 7.5% of BDR claims being approved. This is offered in contrast to the 2016 BDR Rule's RIA which suggested an approval rate of 65%.

Despite the appearance of relying upon factual analyses, the Department's statements are based solely upon conjecture here as well. First, RIA's are intended to be speculative; the Department's projection is based upon models that the Department develops that may, or may not, comport with reality. Second, the Department does not need to base its analysis on conjecture; the Department could have conducted its own analysis of the 2016 BDR Rule to inform the public of the actual approval rate, but chose not to. The Department fails to answer basic questions based upon its experience with the 2016 BDR Rule: Is the 65% success rate correct? If not, what is the success rate? Answers to these questions would assist the public in responding to the NPRM.

Similarly, had it properly enforced the 2019 BDR Rule, the Department could have provided the public concrete proof of an actual approval rate. Instead, it chose not to enforce the 2019 BDR rule and rely, instead, purely on speculation on the consequences of the current regulations. Like the agency in *Encino Motorcars,* the Department states its conclusions, believes them to be reasonable, and wrongfully passes up the opportunity to appropriately explain itself.

Further, the Department's statement regarding whether the 2019 BDR regulations "exclude" evidence in the Department's possession is simply incorrect. As part of the 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*]

It is unclear how the Department concluded that the 2019 BDR Rule would exclude evidence of school activity in the Department's possession. This is important because it points to a significant flaw in the BDR provisions of the NPRM: the Department has not conducted a reasoned analysis that, at a minimum, could even correctly identify what the 2019 BDR Rule contains.

As a result, the NPRM's BDR provisions are arbitrary and capricious under the APA and should be set aside. Rather than engaging in a speculative rulemaking, the Department should enforce the 2019 BDR Rule, as properly enacted, and, if necessary, at some point in the future, conduct appropriate, reasoned rulemaking based upon USDE's specific experience with that enforcement. Anything less would constitute arbitrary and capricious rulemaking and would expose the rule to a litigation challenge under the APA.

II. *The Department's Proposed Expansion of the Grounds for Granting Discharge Violates the Appropriations Clause of the Constitution*

The Department's proposed regulations expanding the methods and grounds for discharging loans beyond the limited scope of statutory authority for borrower defense claims (e.g., by permitting automatic forgiveness under section 685.406(f)(7) and group discharges under section 685.402) implicates appropriations issues and the Antideficiency Act. *See* U.S. Const., art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); 31 U.S.C. § 1341, *et seq.* As was noted by the Department's former General Counsel in a memorandum to the former Secretary on this topic, loan programs are funded by Congress and "are conditioned on the Department's faithful execution of the laws authorizing that loans be made available to eligible borrowers and then repaid or collected."[24]

Group student loan discharges, as proposed in the NPRM, would violate Congress' explicit requirements and of the constitutional requirement that taxpayer funds shall not be drawn and expended absent lawful appropriations. As a result, the NPRM's group discharge provisions should be set aside.

III. *The Department Does Not Have the Statutory Authority to Promulgate the Proposed Regulations Under the Higher Education Act*

The Department does not possess the required statutory authority to promulgate the proposed regulations, especially with regard to the BDR provisions.

In addition, since the publication of the 2022 BDR NPRM, the Supreme Court published an opinion, entitled *West Virginia v.* EPA,[25] that directly engages with the types of statutory construction issues that we raise with regard to the 2022 BDR NPRM and concludes that an agency "must point to 'clear congressional authorization' for the power it claims.[26]

We understand that the Department could not have anticipated the Supreme Court's decision. However, after a thorough review of the 2022 BDR NPRM's statutory justifications and the *West Virginia* case*,* we have concluded that the Department has no choice but to rescind the NPRM and reconsider the proposed regulations. By only relying upon vague statutory language and general grants of authority, the Department simply does not possess the ability to create a voluminous, convoluted, and byzantine regulatory framework that Congress did not specifically authorize.

Statutory Authority Cited by the Department –

The statutory authority for borrower defense regulations is a "wafer-thin reed."[27] The *only* specific statutory authority for the Department's BDR regulations is the following:

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[24] Memorandum to Secretary of Education Betsy Devos from U.S. Department of Education General Counsel Reed Rubinstein regarding Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority (Jan. 12, 2021), available at https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemo healoans.pdf ("OGC Legal Opinion").
[25] 597 US __ (2022).
[26] *Id.*, at 19.
[27] *Id.*, at 17.

"(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…"[28]

In the introductory section of the 2022 BDR NPRM Preamble – where statutory authority is listed – the Department can only cite to § 1087e(h) as the authority for BDR's general provisions.[29] Section 1087e(h) is also the only authority listed for the specific provisions of: the BDR adjudication process;[30] the elimination of the disbursement date schedule and the creation of the uniform process;[31] the new Federal Standard;[32] the creation of a State law standard upon reconsideration;[33] the limitations period;[34] the return of the Group BDR process;[35] the evidentiary standard;[36] the forms of evidence;[37] the change in the institutional response process;[38] the new process based upon prior Secretarial actions;[39] timelines to adjudicate;[40] the adjudication process for BDR claims;[41] the borrower reconsideration process;[42] and the determination of discharge amounts.[43]

Notably, in the 2022 BDR NPRM Preamble section on "Borrower Defense to Repayment – Recovery from Institutions," the Department cites to § 1087e(h) and § 1087d(a)(3). The latter states that a participation agreement must:

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

The 2016 BDR Rule's discussion of the authorities underlining borrower defense regulations points to the above provision, as well as 20 U.S.C. §1094 and 20 U.S.C. §1087d(a)(6), which states that an agreement with an institution of higher education shall:

"(6) include such other provisions as the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of this part."

[28] 20 U.S.C. §1087(e)(h).
[29] 87 FR 41883.
[30] 87 FR 41885.
[31] 87 FR 41887.
[32] 87 FR 41888.
[33] 87 FR 41896.
[34] *Id.*
[35] 87 FR 41898.
[36] 87 FR 41900.
[37] *Id.*
[38] *Id.*
[39] 87 FR 41901.
[40] 87 FR 41904.
[41] *Id.*
[42] 87 FR 41906.
[43] 87 FR 41908.

Commenters to the 2016 BDR NPRM questioned whether the Department possessed sufficient authority to create a BDR framework.[44] The Department responded that Congress granted the Department authority to include "*any provisions* that are necessary to protect the interests of the United States and to promote the purposes of the Direct Loan Program."[*emphasis added*][45] Further, the Department concludes that, far from exceeding its statutory authority in developing procedures for borrower defense, §1087e(h) "presumes that the Department must recognize in its existing administrative collection and enforcement proceedings the very defense that section directs the Department to establish, or create new procedures to better address these claims."[46]

Similarly, the Department identified §410 of the General Education Provisions Act ("GEPA"), which the 2016 BDR Final Rule concluded, provides the Department "with authority to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operations of, and governing the applicable programs administered by the Department."[47]

USDE also cited to Section 414 of the Education Organization Act ("EOA") for the proposition that the Department is authorized to "prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department."[48]

The 2016 BDR NPRM concluded that the general provisions, taken together and with common law principles applied,[49] authorizes the Department to promulgate regulations that govern defense to repayment standards, process, and institutional liability.[50]

The 2022 BDR NPRM bluntly states, without statutory citation, that the discharge programs addressed by the proposed regulations were "all authorized by Congress."[51] USDE stated that it does not believe it would be reasonable to presume that when Congress created those 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."[52] In conclusion, the Department holds that the proposed changes would make those discharge programs "more successful at delivering [the] promised benefits under the HEA."[53]

Recent Supreme Court Precedent Undermines the Justifications for the NPRM –

[44] 81 FR 75932.
[45] *Id.*
[46] *Id.*
[47] 81 FR 75932, *citing* 20 U.S.C. §1221e-3.
[48] *Id.*, *citing* 20 U.S.C. §3474.
[49] *Note*: The 2016 BDR NPRM cites the common law for the following positions: 1) a school that commits an act or omission that gives a borrower a defense to repayment that causes the Department loss thereby violates its common law fiduciary duty to act loyally for the interests of the Department; and 2) the Department possesses a "right to recover" from a school for the loss incurred as a result of an act or omission of the school. *See* 81 FR 75932.
[50] 81 FR 75932.
[51] 87 FR 41881.
[52] *Id.*
[53] *Id.*

On June 30, 2022, the Supreme Court issued its decision in *West Virginia.* The Court held that Congress did not grant a federal agency the authority necessary to create a regulatory scheme that the agency had attempted to enact. Under a body of law, known as the "major questions doctrine," the 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 authority it claims.[54]

The Court found that the "major questions doctrine" was applicable to the facts in *West Virginia*. The agency claimed to discover "unheralded power" that allowed it a "transformative expansion in [its] regulatory authority.[55] That power allowed the agency to adopt a regulatory program that Congress had declined to enact itself.

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.[56] Given the circumstances, the Court found that there was every reason to "hesitate before concluding that Congress" meant to confer on the agency the authority it claims.[57]

The Court further discussed the relationship between regulatory assertions and textual bases. 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.[58] Further, "extraordinary grants of regulatory authority are *rarely accomplished* through "modest words," "vague terms," or "subtle device[s]."[59]

Analysis and Application of the Cited Statutory Provisions and the Application of West Virginia *to the NPRM –*

As stated above, the Department has not been provided the authority by Congress to enact the 2022 BDR NPRM as proposed. As a result, the Department should rescind the NPRM and reconsider the proposed regulations in light of *West Virginia*.

Specifically, looking at the statutes identified in the 2022 BDR NPRM, the provisions are the type of "vague terms" and "modest words" that the Court in *West Virginia* questioned.

Section 1087e(h), the font by which the entire BDR regulatory flows, does not provide the Secretary with the authority to take the kind of actions contemplated; it 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 include creating a pseudo-litigation process for adjudicating

[54] *West Virginia* at pg. 4, quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).
[55] *Id.*
[56] *West Virginia* at pg. 24.
[57] *Id.* at pg. 24; quoting *FDA v. Brown & Williamson, Tobacco Corp.*, 529 U.S. 120, 159-160 (2000).
[58] *Id.* at pg. 18, quoting *Brown & Williamson* at 133.
[59] *Id.* at pg. 18, quoting *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001).

highly-complex and fact-specific borrower claims with potentially billions of dollars at stake. Further, while § 1087d(a)(3) does provide 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.

With regard to the 2016 BDR Final Rule statutory authority, §1087d(a)(6), GEA, and EOA are *exactly* the types of "vague words" that the Court in *West Virginia* was cautioning federal agencies about relying upon. The *West Virginia* case has permanently closed any element of the Department's argument that those statutes provide that USDE may include "any provisions" that it deems necessary to protect the title IV, HEA program. Any future Department reliance on those statutory provisions should be immediately reconsidered and abandoned.

In applying the opinion in *West Virginia* to the NPRM, it becomes clear that what USDE is attempting to do with the NPRM would trigger a "major questions" doctrine analysis and, therefore, would insist on a clear statement of congressional authority before the Court would assume that the agency has the statutory authority it claims.

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 USDE'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 USDE action.

As a result, there is a legitimate issue of whether, per *West Virginia,* Congress really intended the provision to grant the power that USDE is attempting to wield and expand. Indeed, the 2016 BDR Final Rule Preamble is based upon a patchwork of interferences drawn from cryptic statutory provisions. There would also be little difficulty showing that what USDE 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.[60]

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.

[60] *Note*: Justice Gorsuch's concurrence argue that a major question can arise if the agency action requires billions of dollars in spending by private parties, which the 2022 BDR NPR may ultimately require. *See*, *West Virginia*, Gorsuch (concurrence) at pg. 10.

As a result, the Department should rescind and reconsider the 2022 BDR NPRM in light of the *West Virginia* case. To do otherwise would expose the NPRM to significant litigation challenges and risk the entire regulatory framework.

IV. *Comments Regarding the Proposed Prohibition on Pre-Dispute Arbitration Agreements and Class Action Waivers*

Introduction –

On 87 FR 41914, the NPRM begins its discussion of the proposed changes to the regulations regarding the prohibitions against pre-dispute arbitration agreements and class action waivers. For the reasons set forth below, we express our dissatisfaction with the Department's proposal and request that USDE rescind the proposal and maintain the current regulations, as promulgated under the 2019 BDR Rule, with regard to pre-dispute arbitration agreements and class action waivers.

If the Department decides not to rescind the proposal, we offer the following comments of the relevant provisions of the NPRM. After a thorough review of the proposed regulations, we conclude that the Department's proposal suffers from significant limitations. First, USDE does not sufficiently explain the reasoned analysis conducted for this regulatory change. Second, and similarly, the Department does not fully engage with the arguments in the 2019 BDR Rule and explain why those conclusions are being abandoned. Third, as currently written, the proposed regulations will result in confusion in the industry and must be clarified. In addition, this comment provides Directed Questions to the Department and kindly requests considered responses.

Summary of 2022 BDR NPRM Provisions –

The 2022 BDR 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."[61] 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."[62] 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 dismissal, deferral, or stay of a class action; excluding a person or persons from joining a class action; avoiding discovery; and/or filing an arbitration claim.[63]

[61] 87 FR 41914.
[62] *Id.*
[63] *Id.*

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."[64] Further, the Department proposed to create an online database where USDE will keep arbitration and judicial records submitted by institutions.[65]

Since the issuance of the 2019 regulations, 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 arbitral records.[66]

Regarding the application of the proposed regulations, the Department acknowledged that many existing loan agreements include mandatory arbitration provisions or class action waivers may be executed prior to the effective date of the final regulations. In those circumstances, similar to the Department's approach in developing the 2016 regulations, the NPRM would prohibit a participating institution from attempting to exercise such agreements and would require a participating institution to either 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.[67] Importantly, the Department reasoned 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.[68]

Summary of 2019 BDR Rule Provisions –

By way of background, the 2019 BDR Rule, through reliance on three Supreme Court precedents, a Congressional resolution overturning an agency rule that unreasonably burdened arbitration agreements, and a "federal policy favoring arbitration," permitted the use of pre-dispute arbitration agreements and class action waivers, overruling the 2016 BDR Rule's prohibition.[69] At that time, the Department asserted that arbitration agreements and class action waivers, when coupled with student protections promoting informed decision making, were a net positive for both students and institutions.[70] 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.[71]

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[64] 87 FR 41915.
[65] *See*, 34 C.F.R. 685.300(g) and 34 C.F.R. 685.300(h).
[66] 87 FR 41916.
[67] 87 FR 41917.
[68] *Id.*
[69] *Note:* Supreme Court precedents cited in 2019 BDR Rule: *Epic Systems Corp. v. Lewis,* 138 S.Ct. 1612 (2018); *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012); and *AT&T Mobility, LLC v. Concepcion,* 131 S.Ct. 1740; Congressional Resolution cited in 2019 BDR Rule: Pub. L. 115-74 (2017).
[70] 84 FR 49840
[71] *Id.*

The 2019 BDR Rule also listed the significant advantages of arbitration, as cited by the American Bar Association. 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.[72] The Department also stated that, contrary to the commenter's suggestions, arbitration does not assist institutions in avoiding liability, but rather provides speedier recovery and potentially greater relief to students impacted by a school's alleged actions.[73] 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."[74]

Regarding transparency, the 2019 BDR Rule 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, "an opportunity to obtain relief in the quickest, most efficient, most cost-effective, and most accessible manner possible."[75] Further, when weighed against the costs of a trial, the Department chose "to emphasize speedy relief and accessibility."[76]

In addition, the Department explains that neither arbitration agreements nor class action waivers limit borrowers' options for redress in reporting a complaint about an institution to the Department, an accreditor, or any other governmental entity."[77] 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."[78] The Department concluded: "Unequivocally, arbitrator determinations are not binding on the Department."[79]

In sum, the 2019 BDR Rule maintains that rather than discouraging borrowers from raising claims, and as a result hiding illegal conduct, "arbitration provides a more cost-effective and accessible conflict resolution path than traditional court proceedings. Neither arbitration agreements nor class action waivers limit borrowers' options for redress in reporting a complain about an institution to the Department, an accreditor, or any other governmental entity."[80]

2022 BDR NPRM's Summary of 2019 BDR Rule –

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[72] *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," available at https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.
[73] 84 FR 49842.
[74] *Id.*
[75] 84 FR 49843.
[76] *Id.*
[77] 84 FR 49842.
[78] *Id.*
[79] *Id.*
[80] *Id.*

In assessing the 2019 BDR Rule, the 2022 BDR 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."[81] 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."[82]

Indeed, the NPRM states that the "institutions' ability to force students into arbitration removed a significant deterrent threat" and "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."[83]

Comments on the 2022 BDR NPRM –

As stated above, the Department's proposal suffers from significant limitations.

First, USDE does not sufficiently explain the reasoned analysis conducted for the proposed regulatory change. For example, USDE 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.[84]

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 is referring to. 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's provisions 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 2022 BDR NPRM. In order to conduct a reasoned rulemaking, USDE must provide an explanation for this shift in policy.

Also, in that same passage, the Department – once more without any basis – states that without the prohibition the "risk and liabilities would be transferred to the Federal taxpayer." It is *entirely* unclear and unexplained how liabilities would be transferred to the taxpayer if schools are allowed to require pre-dispute arbitration in their enrollment agreements. The Department must provide an explanation for this calculation. 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 needs to explain how

[81] 87 FR 41915.
[82] *Id.*
[83] *Id.*
[84] *See*, *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2127 (2016).

the calculation changed in such a short period of time and what events, data, or facts forced the Department to change its policy. The public cannot be reasonably informed about the justifications for an agency's rulemaking if the agency refuses to provide anything more conclusions.

The Department also states that USDE has "heard" from parties about the issues related to the regulatory provisions. It is unclear what forum the USDE "heard" from these advocates, but it does not appear that the Department is solely referring to the public hearings or negotiation sessions related to this NPRM. Relying upon non-public conversations with allied policy advocates to justify a 180-degree policy shift is an affront to the demands of reasoned rulemaking and is a *prima facie* violation of the statutory requirements of the Administrative Procedure Act.

We request for clarification on what this passage means. Did the Department request communications from "borrowers, advocates representing students, State attorneys general, and the public" regarding these issues? Or did the parties offer the communications unsolicited? What was the nature of the communications and what experiences do the parties rely upon? While it is safe to assume that USDE spoke with parties and individuals opposed to the use of pre-dispute arbitration and class action waiver agreements, did the Department communicate similarly with parties in favor of such agreements? We request clarification from the Department on these questions. We remind the Department that a "reasoned explanation" is required when such a policy change is enacted.[85]

Second, despite the Department's attempts to assess the 2019 BDR Rule's provisions, USDE fails to engage with the current regulation's justifications in a meaningful manner and, as a result, the public is not provided with a sufficient basis to justify the rule change. 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 the NPRM balances them appropriately. Further, the NPRM states that the 2019 BDR Rule "focus[ed] too heavily" on the fact that arbitration provides speedier results, but does not address why the additional time and cost of a class action lawsuit was acceptable.

Indeed, the Department now relies 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. At the same time, the Department does not offer any academic study *in favor* of its approach – the very flaw USDE identified 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 an 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 to directly pursue relief. Such speculative revisionism should not form the basis of rulemaking. While it is appropriate for the Department

[85] *Id.*

to refer to knowledge gained from previous experiences, to glean an entire regulatory proposal from one very extreme instance does not constitute a reasonable basis for rulemaking under the Administrative Procedure Act.

Requests for Further Information and Clarification –

With regard to the regulatory language, we request further information and clarification on the following provisions.

First, at 34 C.F.R. §685.300(e)(2), the Department provides a non-exhaustive list of examples of prohibited reliance upon a pre-dispute arbitration agreement. The regulatory language indicates that, where an institution has an agreement in place, any action seeking dismissal, deferral, exclusion, etc., will be viewed by the Department as prohibited reliance. As a result, we request clarification regarding an instance where, an institution that otherwise satisfied the requirements of the proposed section (i.e., sends notification to students that complies with (e)(3)), moves to dismiss, defer, or stay a class action lawsuit, without reference to the agreement. We request clarification from the Department regarding whether such action by an institution would be a violation of the proposed regulation.

Second, we request further information regarding the provisions of 34 C.F.R. §685.300(g) and (h). Without much discussion in the NPRM, we ask that the Department provide additional detail on the proposed database of arbitral and judicial records. Specifically, where the database will be located, what the contents of the database will be, and how the Department proposes to organize the database. Similarly, we request clarification from the Department on the policy bases for this proposal, who the Department believes will access the database and why, and why publicly available documents (such as judicial records) will need to be submitted to the Department when they are freely available elsewhere. Finally, we request clarification from the Department regarding any consideration USDE has given to individuals using the database to "troll" for clients and take advantage of students who attended the schools named in the database documents.

Directed Questions –

Finally, we submit Directed Questions to the Department regarding the proposed regulations. We appreciate, in advance, the Department's full responses to these questions.

> Directed Question #1 – With regard to 34 C.F.R. §685.300(e), where does the Department find the statutory authority in the Higher Education Act, as amended, to dictate exact language, regarding pre-dispute arbitration agreements and class action waivers, to institutions for inclusion in their enrollment agreements?
>
> Directed Question #2 – The regulations appear to allow institutions to have a pre-dispute arbitration agreement and/or class action waiver for instances other than those with implications for BDR. How will USDE distinguish those permissible agreements from impermissible agreements? Especially in light of the proposed

regulation's expansive definitions of BDR-eligible claims, i.e., the definition of "educational services"?

Directed Question #3 – While we appreciate the Department's citation to *California Ass'n of Private Postsecondary Sch. v. DeVos*, 436 F.Supp. 3d 333, (D.D.C. 2020), the NPRM does not make clear why the proposed regulations would not violate the court's holding in that case. Further, we request clarification on the application of the prohibition to an agreement that covers an incident prior to the effective date of the final rule. In such a hypothetical, would the Department determine that a violation of the regulation had occurred, even though at the time of the incident, the agreement was compliant and plainly covered the alleged action in question?

V. *The Department's Proposal Regarding Aggressive and Deceptive Recruitment is Impermissibly Vague and Not Supported by Statute*

Introduction –

On 87 FR 41893, the Department proposes to add a new basis for the granting of borrower defense claims. The Department's proposed regulations regarding the definition of "aggressive and deceptive recruitment tactics or conduct" are vague, overbroad, and arbitrary[86]. A standard based on a student's "lack of knowledge about, or experience with" does not give the *school* any guidance[87]. Further, the proposed standard based upon a failure "to respond to the student's or prospective student's requests for more information" is vague and overbroad; this standard would include *any* requests for information without any requirement that the requests be related to the subject school or program[88].

Despite the Department's attempts, the proposal is impermissibly vague and does not provide reasonable clarity to students, institutions, or the public. Further, the aggressive and deceptive recruitment category is not provided in statute and, therefore, lacks support in the Higher Education Act, as amended ("HEA").

As a result, we request that the Department rescind the proposed addition. In the alternative, if the Department decides to promulgate an unclear and statutorily dubious regulation, we have provided a list of Directed Questions that we hope that the Department will answer to provide much needed clarity to schools. We have also drafted alternative language for sections 34 C.F.R. §§ 668.500 and 668.501, if the proposal is not rescinded.

Summary of the 2016 BDR NPRM and Final Rule Provisions –

[86] 34 C.F.R. § 668.500, *et seq*
[87] 34 C.F.R. § 668.501(a)(3)
[88] *Id.* at § 668.501(a)(5).

The 2022 BDR NPRM correctly states 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."[89] As a result, the 2016 BDR 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."[90] Despite comments advocating for a stronger provision, the 2016 BDR Rule did not change its position from the proposal and concluded that the unchanged 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."[91]

Summary of the 2022 BDR NPRM Provisions –

In the 2022 BDR NPRM, the Department's previous concerns are no longer an issue. The Department states that, after "thoroughly analyzing" Federal and State laws on Unfair, Deceptive, or Abusive Acts or Practices ("UDAP") and consultation with the Federal Trade Commission ("FTC"), USDE had achieved "clarity" in the definition that would avoid "isolated instances of well-intentioned recruiter behavior" would not result in an approved BDR claim.[92] Indeed, because "many existing State consumer protection laws" include this sort of claim "in different forms," the Department reasoned that including it in the Federal standard would ensure a "more comprehensive Federal standard and ensure equitable treatment for borrowers regardless of where they live."[93]

Further, the Department reasoned 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."[94] Additionally, USDE mentioned that the Department has "seen" that institutions engage in aggressive tactics "through program reviews, audits, and other investigations." The Department also points to an FTC settlement for documentation of "findings" against an institution.[95]

Finally, the Department requests input on how USDE can identify the extent to which an institution "engages in any form of aggressive recruitment and the means to document this misconduct through program reviews and audits."[96]

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[89] 81 FR 39343.
[90] *Id.*
[91] 81 FR 75952.
[92] 87 FR 41894.
[93] *Id.*
[94] 87 FR 41895.
[95] *Id.*
[96] *Id.*

Despite the Department's attempt, the proposed regulations do not provide the clarity that USDE promises and, as a result, are impermissibly vague. Additionally, the Department does not cite, and cannot cite, any statutory authority under the HEA to create a new basis for borrower defense relief. Due to these deficiencies, the Department should rescind the proposed sections 34 C.F.R. §§ 668.500 and 668.501.

Most importantly, the proposed regulations introduce a level of subjectivity that is unreasonable and impermissible. The Department should strive for clarity as well as a high level of predictability of interpretation and enforcement. Instead, as identified below, the proposal raises more compliance questions than it answers.

First, the Department does not provide an explanation for what parties would be considered "representatives" for purposes of §34 C.F.R. §§668.500(a) and 668.501(a). If the Department does not rescind these provisions, we have provided alternative language as follows:

> **§668.500 Scope and purpose.**
>
> (a)…An eligible institution has engaged in aggressive and deceptive recruitment tactics or conduct when the institution itself, ~~one of its representatives,~~ an individual paid by the institution with funds associated with the institution's participation in title IV, HEA programs, …

Second, it is entirely unclear what the Department means by the following phrase in § 668.500(a): Aggressive and deceptive recruitment tactics or conduct are prohibited in all forms "including the effects of those tactics or conduct reflected in the institution's advertising or promotional material." We admit to being baffled by this phrase and we are unclear on the Department's intentions. We request the Department's response to the following: a) How are aggressive recruitment tactics reflected in the institution's advertising? and b) If maintained, we ask the Department to provide an explanation and revised language for this phrase.

Third, how does the Department intend to define "immediately" for purposes of § 668.501(a)(1)? This is especially important with USDE's caveat: "including on the same day of first contact." Additionally, § 668.501(a)(4) could be combined with (a)(1) because of the similarity between the paragraphs. As before, if maintained, we have provided alternative language that combines the two provisions, as follows. We have deleted "an adviser" from the proposed language as such an individual would be covered by "other resource or individual."

> **§ 668.501 Aggressive and deceptive recruitment tactics or conduct.**
>
> (a)…
>
> (1) Demand or pressure the student or prospective student to make enrollment or loan-related decisions ~~immediately,~~

~~including~~ on the same day of first contact and without allowing for an opportunity for the student or prospective student to consult with a family member, or other resource or individual prior to making enrollment or loan-related decisions;

…

~~(4) Discourage the student or prospective student from consulting an adviser, a family member, or other resource or individual prior to making enrollment or loan-related decisions;~~

Fourth, the Department does not indicate what the meaning of "unreasonable emphasis" is in §668.501(a)(2). The commenter requests an explanation of what the differences are between reasonable and unreasonable emphasis as well as examples of what actions would constitute "unreasonable emphasis."

Fifth, we request that the Department rescind § 668.501(a)(3). It is entirely unclear, from the regulatory language, what it means for an institution to "take advantage" of a student's lack of knowledge about or experience with postsecondary programs. Additionally, USDE does not provide any indication of how an institution would know about the amount of, or lack thereof, experience of a prospective student. The provision would lead to an unresolvable "he said, she said" situation between the student and the institution that would result in a quagmire of adjudication. Absent additional clarifying details, the paragraph should be deleted.

Next, in § 668.501(a)(5) it is not clear how an institution failing "to respond to the student's or prospective student's requests for more information" would constitute an "aggressive and deceptive recruitment" tactic. We propose the deletion of this paragraph. In the alternative, if the Department maintains the provision, we request that the Department clarify the concern expressed above.

Seventh, absent the deletion of the provision – as we would prefer – we request that the Department provide concrete examples of the "threatening or abusive language or behavior" referenced in § 668.501(a)(7).

Finally, we request the deletion of § 668.501(a)(8). The provision does not sufficiently define or explain the terms "repeatedly engage" and "unsolicited contact," nor does the Department state what would constitute a student's request "not to be contacted further." The boundaries of this provision are undefined and could even 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 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 their title IV participation, or being denied participation at the next opportunity for recertification.

Directed Questions –

In the absent of the complete rescission of 34 C.F.R. § 668.500 and 668.501, we submit Directed Questions to the Department regarding the proposed regulations. We appreciate, in advance, the Department's full responses to these questions.

> Directed Question #1 – In 34 C.F.R. § 668.500(a), if the Department "determines" that an eligible institution has engaged in prohibited behavior, USDE may take specific adverse actions. These actions are identical to the actions that the Department may take in relation to a finding of substantial misrepresentation. *See,* 34 C.FR. § 668.71(a). The HEA provides specific authority for adverse actions to be taken against an institution if, after reasonable notice and opportunity for a hearing, the Department determines that the institution engaged in a substantial misrepresentation of its educational program, its financial charges, or the employability of its graduates. *See*, 20 U.S.C. §1094(c)(3)(A). However, the HEA does not provide similar specific authority for actions the Department determines to constitute "aggressive and deceptive recruitment." We request identification from the Department as to the specific statutory authority that USDE relies upon for this proposed regulation. Additionally, we request clarification from the Department as to how USDE intends to protect an institution's right to "reasonable notice and opportunity for a hearing" with regard to findings of aggressive and deceptive recruitment.
>
> Directed Question #2 – We request clarification from the Department as to how an institution would disprove an allegation of "aggressive and deceptive recruitment." We ask that this explanation be specific and apply to each of the elements provided in the proposed 34 C.F.R. § 668.501(a)(1-8). Specifically, we are interested in guidance regarding what evidence the Department would find persuasive, how an institution would rebut the allegations made by the student, and how the Department would weigh the provided evidence against the allegations.
>
> Directed Question #3 – To support its proposed regulations in this section, the Department references or cites to State and Federal UDAP statutes, Consumer Financial Protection Bureau actions, as well as FTC guidance and precedents. In fact, the NPRM places special emphasis on a specific FTC settlement from 2019. However, the Department does not mention that, in the settlement referenced, the institution did not admit to any wrongdoing. It is unclear how settlement without a finding of wrongdoing supports the Department's proposed regulations. Further, the 2022 BDR NPRM does not make clear what the nexus is between the Department's statutory authority under the HEA and other consumer protection laws – UDAP, State consumer protection statutes, FTC laws and regulations – that

the Department does not enforce nor possesses the authority to enforce. As a result of these challenges, we request that the Department answer the following:

3a) How does the Department justify the invocation of these authorities outside the HEA?

3b) Where does the Department find the authority, under the HEA, to use unrelated statutes to justify action under the HEA?

VI. *The Department's BDR Relief Examples Do Not Provide Clarity Necessary for Institutions, Borrowers, and the Public to Understand the Proposed Regulations*

On 87 FR 41910, the Department offers examples to clarify how partial and full relief discharges would be considered under the proposed regulations. We provide comment to a selection of the examples below. We request that the Department either revise the examples, where appropriate, or delete the examples entirely.

Example #2 – Acceptable Misrepresentations

In the second example, the Department tosses out the entire framework of the NPRM in order to find a borrower, who was subject to a misrepresentation, that the student relied upon, was not entitled to a discharge or should only receive a small discharge. We request that the Department clarify this example or remove it entirely.

The Department states that, despite the misrepresented information in the school's marketing materials, the borrower still attended a "highly ranked and highly selective program" and "programs in that category can move around in annual rankings anyway."[97] In light of the recent revelations and lawsuit regarding Columbia University and the potentially false U.S. News ranking data, we would suggest that this example is invalid and further suggests a favorable bias toward "highly ranked and highly selective" institutions that is unwarranted and undeserved. We request clarification from the Department on 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 – or, at least, insulated – 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."[98] 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."[99] However, it appears that in Example #2, the borrower needed to show reliance *and* harm in order to be awarded full relief.

[97] 87 FR 41910.
[98] *Id.*
[99] 87 FR 41890.

We are perplexed by the potential impact of the Department pointing out 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." We can find no other place in the NPRM, except in a different example, where such a concern is carved out.

Instead, we point out that the proposed 34 C.F.R. § 685.206(e)(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. We request clarification from the Department regarding why it is important that the school reported the fraudulent information to a rankings organization.

With these concerns in mind, we pose the following Directed Questions to the Department regarding Example #2.

> Directed Question #1 – Does the Department believe that institutions that produce "effective, well-regarded" credentials are immune, or at the very least insulated, from BDR Claims? We ask this Directed Question in light of the Department's Example #6 in the 2016 BDR Final Rule, where a "selective, regionally accredited liberal arts school" escaped BDR liability despite providing inflated data to a ranking organization.[100] The NPRM does not provide an avenue for this type of enforcement. As a result, the Department's positions raise serious issues regarding potential USDE bias in-favor and against certain institutions or programs. We are concerned about selective enforcement of the proposed provisions and request clarity on how the Department will ensure that the rule is equally applied to all institutions. The resolution in Example #2 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."
>
> Directed Question #2 – The Department states that the borrower may be entitled to a "small discharge," but does not offer any clarity on the process of how that determination would be made (other than in a short reference to "a few factors"), what the amount of the discharge would be, and whether a formula, or methodology, would be employed by the Department to determine what an appropriate amount of relief would be. We request clarity on all three of these concerns and express our specific interest in any internal methodology that the Department may employ to determine the appropriate amount of partial relief.

Example #3 – Job Placement Rate Claims

[100] 81 FR 76087.

In Example #3, 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.[101]

As in Example #2, we request clarification as to 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).

Curiously, Example #3 does not address the same issue as Example #2: the borrower enrolled in a "highly selective graduate program," which was a factor in determining why relief in Example #2 was not granted. We wish to learn from the Department why the same deference to the program was not provided in Example #3.

Further, Example #2 allowed the Department to consider the fact that annual rankings move around from year to year. The same allowance is not provided in Example #3. We request an explanation as to why.

With these concerns in mind, we pose the following Directed Questions to the Department regarding Example #3.

> Directed Question #1 – Job placement rate data is subject to wild swings over time. In certain circumstances, the change is due to actions taken by the institution. The job placement rate is also subject to economic factors far beyond the control of the individual institution, for example, an economic recession or a global pandemic. For a multi-year program, the change in rate could be significant. In a circumstance where an institution provides job placement rate data to students on a yearly or semi-yearly basis, we request clarification as to how the Department would approach 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.

VII. *The Department's Proposed Changes to the Institutional Response Process Mistakenly Relies Upon a Fallacy, Disturbs the Institution's Ability to Meaningfully Respond to BDR Claims, and Lacks Sufficient Due Process Protections for Institutions*

Introduction –

[101] 81 FR 41910.

We disagree with the Department's proposed changes to the institutional response and recovery provisions in the 2022 BDR NPRM. After a thorough review of the proposed regulations, we have concluded that the changes create an institutional response process that does not offer institutions an opportunity to fairly participate in the proceedings. By focusing USDE's efforts on providing faster relief on claims, the Department abandons its responsibility to create a fair and equitable process for institutions that is not burdened by the Department's unbalanced policy choices. The response framework is based upon the fallacy that the adjudication of a BDR claim *can be divorced from* a recovery process against an institution. Finally, we reiterate our earlier questions as to how USDE determined that the institutional recovery processes needed to be revised if the Department has never employed those regulations in an attempt to recoup losses associated with BDR claims.

For these reasons set forth below, we request that the Department rescind its proposed 34 C.F.R. § 685.409 and restore and revise 34 C.F.R. § 668.87 to respect the due process rights of institutions and provide institutions with a fair opportunity to challenge BDR claims. This comment also provides directed questions to the Department as well as proposed language for the revisions to 34 C.F.R. § 668.87

The 2022 BDR NPRM Institutional Response and Recovery Provisions –

The Department proposes a number of significant changes to the institutional response and recovery regulations. This sub-section of the comment identifies those changes and, where appropriate, identifies the Department's justification for each of the changes.

First, on 87 FR 41900, USDE 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 are held to the same standards as what is expected of borrowers.[102] The Department also states its concern that the prior regulations included an institutional response process that "did not provide sufficient clarity about how the response would factor into the Department's adjudication process."[103] If the Department requires additional information from the school, the school must respond to the request within 90 days.[104]

Second, the Department establishes, for the first time, a process where USDE could consider prior Secretarial actions to determine whether to form and approve a group borrower defense claim.[105] 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.[106] Because the actions in this context are

[102] 87 FR 41901.
[103] *Id.*
[104] 87 FR 41905.
[105] 87 FR 41901.
[106] *Id.*

already "final," the institution would not have another opportunity to provide an additional response to the allegations.[107] 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."[108] The 2022 BDR NPRM does not offer a timeline for what prior Secretarial actions the Department may rely upon to activate this provision.

The most significant changes are proposed for the Department's process to recover from institutions. USDE proposes to delete 34 C.F.R. 668.87, which contains the current BDR recovery process. Due to the Department's concern about delaying borrower discharges and conflating the processes between the Department and the borrower and the Department and the institution, USDE proposes to separate the adjudication process and the recovery process, while also "preserving" the due process rights of institutions.[109] The regulations would then allow an institution to contest the liabilities associated with the borrower's discharge through a Program Review Report ("PRR") based upon the evidence in the Department's possession, the BDR application, any institutional response, any other relevant information, and the discharge amount.[110] The Department states that this process would provide "faster" answers on group applications and preserve a process for seeking recovery.[111] Institutions would only face recovery for conduct that would have been approved under the BDR regulations at the time it occurred in the amount that would have been granted under that regulation.[112]

Finally, the Department proposes a six year statute of limitations on recovery actions.[113] The period would start on the date that the borrower graduated or withdrew. If the BDR claim was the result of a judgment against a school, the Department imposes no limitations period.[114] The limitations period will be tolled if, during the 6-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.[115]

Comment on the NPRM Provisions –

We offer the following comments on the proposed provisions to the institutional response and recruitment regulations. Rather than offer "clarity" to institutions, the proposed regulations create an institutional response process does not offer institutions an opportunity to fairly participate in the proceedings.

[107] 87 FR 41901-02.
[108] 87 FR 41902.
[109] 87 FR 41912.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] 87 FR 41913.
[114] *Id.*
[115] *Id.*

The Deletion of 34 C.F.R. § 668.87 is Not Sufficiently Explained –

The Department does not sufficiently explain why the deletion of Section 668.87 is necessary. Rather, the Department concludes that the Section "conflates" the interaction between the Department and the borrower and the interaction between the Department and the institution, especially in regard to the group process.[116]

The section meant to "replace" 34 C.F.R. § 668.87 – 34 C.F.R. § 685.409 – provides almost no guidance on the process and procedures that institutions must follow and satisfy to appropriately respond to a recovery action by the Department. As a result, the proposed section is wholly inadequate.

As identified below, we oppose this "bifurcated process," but even if we supported it, the proposed deletion does not meet the statutory requirements of a regulatory change. To our knowledge, the Department has never attempted to recoup BDR liabilities from an institution. As a result, the Department cannot draw upon *any* experience with 34 C.F.R. §668.87 to conclude that the regulation is no longer appropriate or needs to be revised. Therefore, no sufficient basis for the proposed deletion exists.

As fully explained elsewhere in this comment, significant regulatory changes must be accompanied by a sufficient basis for the change; conclusory statements do not justify such drastic changes. Here, the Department expresses a policy concern, but does not provide facts, evidence, or experience to support that change. Nor does the Department state that the current regulations have *actually* resulted in delays in the group processes, only offering that the new regulations would in "faster answers on group applications."[117] Such conjecture is insufficient under the APA.

§ 668.87 Should Be Restored and Revised –

The proposed deletion of § 668.87 results in the removal of institutional due process rather than appropriate protection of such. Further, the language in the proposed § 685.409 offers no guidance to institutions on the internal procedures of a recovery action and, instead, provides only a statement of the Secretary's ability to collect, an explanation of circumstances where USDE may not pursue recovery, and an identification of the applicable limitations period. While not perfect in its current form, at the very least, § 668.87 offered some instruction to schools about the expected process. Section 685.409 provides none.

As a result of the identified deficiencies, the proposed regulations, at § 685.409, should be rescinded and § 668.87 should be restored and revised.

Following the narrative of this comment section, we provide proposed revisions to § 668.87. The changes protect institutions while also affording the Department the ability to resolve claims with sufficient speed. As a result, the proposal offers a sufficient and appropriate balance between the interests of the Department, the borrower, and the school.

[116] 87 FR 41912.
[117] *Id.*

The Bifurcated Process Compromises the Fairness of the Adjudications and Burdens an Institution's Due Process Rights –

The Department's separation of the two BDR processes – the borrower claim adjudication and the recovery action, often referred to as the "bifurcated process" – compromises the fairness of BDR adjudications and burdens an institution's due process rights. Regardless of whether separated in reference to an individual claim or a group claim, the institution has a role to play in the adjudication of a borrower defense claim *throughout the entire process*, from start to finish. To limit, constrain, or restrict an institution's participation does violence to the institution's due process rights with the Department.

Limiting an institution's meaningful participation to the recovery procedures is akin to allowing a defendant to mount a defense only after guilt has been determined. We strongly oppose any attempt by the Department to restrict an institution's ability to meaningfully participate in the adjudication of a BDR claim, both in the context of an individual claim and a group claim.

While we can understand the Department's interest in an expeditious process for borrower discharges, such an interest is not a justification for compromising an institution's due process rights. Institutions should not bear the brunt of the Department's inability to resolve claims over the past years. The Department's emphasis on the speed of adjudications, stated explicitly in 34 C.F.R. § 685.406(f), is no reason to cast aside necessary opportunities for an institution to be fully heard and be given an appropriate opportunity to rebut the borrower's claims.

This comment is made even more important in light of the Department's own actions. While USDE states that the institution's process is separate from the borrower's process, the Department undermines this separation by publicly announcing the adjudication of borrower claims prior to providing an institution an appropriate opportunity to respond.[118] Such actions carry significant risk of reputational damage and to the fairness of the process. It strains reasonableness that an institution that has been subject to a Department announcement would be afforded appropriate due process protections in a secondary recovery procedure.

The Use of Pre-Existing Processes Should Be Revised –

While we appreciate the Department's efforts to leverage currently-existing procedures, such as the FPRD and FAD, we oppose the use of these processes in the BDR-context. The processes identified at 34 C.F.R. § 685.404(a)(1-5) were not designed for inclusion in the BDR adjudication process and may prove inappropriate for purposes outside of their original intent. Further, it is unclear whether some of the provisions are applicable. For example, the Department does not

[118] *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.

sufficiently identify why, or how, an institution's loss of eligibility due to its cohort default rate, at § 685.404(a)(3), is a potential borrower defense issue that could give rise to claims. We request clarification on this point.

We also request clarity on the limits of § 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 traditional BDR claims. This is especially problematic because these are BDR claims *without actual claims* from students.

Additionally, we request an explanation from Department on whether USDE intends to carry over the time limitations from the regulations on FPRDs and FADs. As the NPRM states, an institution is normally provided between 30 and 90 days to respond to a PRR.[119] For example, an appeal is normally due, and any funds a school owes as a result of an FPRD must be repaid within, 45 (forty-five) days of the school's receipt of the FPRD. We are aware of institutions that are subject to tens-of-thousands of claims. It is unreasonable for the Department to require an institution to respond to each and every claim within that timeline.

Further, we propose a time limitation on the types of actions subject to 34 C.F.R. § 685.404. As identified in regulatory language immediately following, the Department should only be allowed to use Secretarial actions initiated after the effective date of the final rule associated with this NPRM. We have reservations about the retroactive application of the proposed regulations and the use of Secretarial actions that we not intended for purposes of creating BDR liability. As a result, we propose changes to 34 C.F.R. § 685.404 as follows:

> **§ 685.404 Group process based on prior Secretarial final actions.**
>
> …
>
> (c) Only Secretarial final actions initiated, finalized, and resolved after the effective date of these regulations, [effective date], are subject to being employed as a basis to initiate a group process. Under no circumstances can the Department use Secretarial final actions initiated, finalized, or resolved prior to the effective date to initial a group process under this section.

Recoupment Actions Are Only Subject to Regulations on Claims under Previous Rules –

On 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."

[119] 87 FR 41901.

Further, the Department states on 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 that certain types of conduct could later lead to financial consequences."

The Department repeats a similar refrain throughout the 2022 BDR NPRM.[120] However, the provision is never explicitly codified in the regulatory text. As a result of this oversight, we include language with this provision in our proposed revisions to 34 C.F.R. § 668.87 below.

Tolling of the Limitations Period Should Not Be Based Upon Non-Final Actions or Result in Permanent Liability –

Under 34 C.F.R. § 685.409(c)(2), the limitations period may be tolled for a number of reasons. Such provisions should be modified to: 1) reflect final actions, not speculative actions; and 2) reflect outside limits on liability.

Firstly, the proposal allows for the simple filing of a class action complaint or a written notice of an investigation from a Federal or State agency to toll the limitations period.[121] Such speculative or incomplete actions should not form the basis of tolling the limitations period. In fact, the provision could result in the filing of frivolous lawsuits only to toll the limitations period to maintain access to the borrower-friendly BDR process at the Department. Indeed, those provisions also require a subjective determination to be made regarding whether the complaint "may include" facts that could form the basis of a claim. To avoid this consequence, propose the following changes. We have also incorporated this language into our proposed revisions to 34 C.F.R. § 668.87 below:

> **§ 685.409 Recovery from institutions.**
>
> …
>
> (c)
>
> …
>
> (2)
>
> …
>
> (ii) the institution receives a final non-default adverse judgement regarding a class action complaint asserting relief for a class that ~~may~~ includes the borrower for underlying facts that may form the basis of a claim in accordance with this subpart; or

[120] *See*, 87 FR 41887, 41893, 41896, 41902 (twice), 41912
[121] *See*, 34 C.F.R. § 668.409(c)(2)(ii-iii).

(iii) the institution receives written notice of any final adverse action or non-appealable findings of a~~, including a~~ civil investigative demand ~~or other written demand for information,~~ from a Federal or State agency that were the result of ~~has power to initiate~~ an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower, for underlying facts that may form the basis of a claim under this subpart.

Second, the tolling of the limitations period should not result in permanent, potential liability on BDR claims. Fairness dictates that the tolling should, at some reasonable point, come to an end and allow the institution to maintain its business without the fear of receiving BDR claims at some indeterminate date in the future. To reflect this comment, we have proposed the following changes to 34 C.F.R. § 685.409 and incorporated the language in our proposed changes to 34 C.F.R. § 668.87 below:

§ 685.409 Recovery from institutions.

…

(c)(1)

…

(iv) Tolling Period. The tolling of the limitations period should last no longer than 2 years after the event giving rise to the pause in the limitations period, as provided in paragraph (c)(1) of this section. After the expiration of the 2-year tolling period, any time remaining in the original limitations period would commence.

Directed Questions Regarding Institutional Responses and Recovery Actions –

Finally, we submit Directed Questions to the Department regarding the proposed regulations. We appreciate, in advance, the Department's full responses to these questions.

Directed Question #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." In USDE's view, how would an institution establish such "offsetting value?" What types of evidence, factual information, and/or data would the Department need to see in order for an institution to successfully demonstrate such value?

Directed Question #2 – Please clarify the procedures that the Department has in place for the initial review of claims. Specifically, we are interested in how the Department, under 34 C.F.R. § 685.403, initiates the process to determine whether the individual has a borrower defense. For example, we request further information on the Department's process for accepting BDR claims, how the

Department weeds out frivolous claims, and what review of the claims the Department undertakes before submission to an institution.

Directed Question #3 – What circumstances does the Department envision will require additional information from the school under 34 C.F.R. § 685.406(d)?

Directed Question #4 – We request an explanation from the Department on how it plans to operationalize the application of the previous BDR standards during a recovery action. Does the Department plan on conducting an entirely separate and secondary adjudication? If so, has the Department conducted an analysis of the delaying effects of the secondary adjudication?

Proposed Revisions to 34 C.F.R. § 668.87 –

We propose the following changes to § 668.87 consistent with our comments and statements above. The changes also include the proposed language above. We believe that the incorporated changes finely balance the due process protections for institutions while not upsetting the Department's need to timely adjudicate claims.

§ 668.87 Borrower defense ~~and~~ recovery proceedings.

(a) ***Procedures.***

(1) A designated department official begins a borrower defense ~~and~~ recovery proceeding against an institution by sending the institution a notice by certified mail, return receipt requested. This notice -

(i) Informs the institution of the Secretary's intent ~~I~~ to recover from the institution by offset, by claim on a letter of credit, or other protection provided by the institution, ~~or otherwise,~~ for losses on account of borrower defense claims asserted on behalf of the group and borrower defense claims already approved, as applicable;

~~**(A)** To determine the validity of borrower defense claims on behalf of a group under § 685.222(h), to demonstrate the validity of borrower defense claims already approved, or both, as applicable; and~~

~~**(B)**~~

(ii) includes a statement of facts and law sufficient to show that the Department is entitled to grant any borrower defense relief asserted within the statement, and recover for the amount of losses to the Secretary caused by the granting of such relief;

(iii) includes an explanation from the Department regarding which borrower defense regulatory framework applies to the claims included in the notice. The Department may only collect on a claim if the claim would

have been granted under the applicable regulatory framework. The potential regulatory framework included may be one or more of the following:

(A) Claims for loans first disbursed prior to July 1, 2017, as set forth in 34 C.F.R. § 685.206(c) and 34 C.F.R. § 685.222, as appropriate;

(B) Claims for loans first disbursed on or after July 1, 2017 and before July 1, 2020, as set forth in 34 C.F.R. § 685.222;

(C) Claims for loans first disbursed on or after July 1, 2020; or

(D) Claims for loans first disbursed after [the effective date of the NPRM].

(iv) Specifies the date on which the Secretary intends to take action to recover the amount of losses arising from the granting of such relief, which date will be at least ~~20~~ 90 days from mailing of the notice of intent and informs the institution that the Secretary will not take action to recover the amount of such loss on the date specified if the designated department official receives, by that date, a written response from the institution indicating why the Secretary should not recover. The notice shall also inform the institution that if it wishes to request a hearing pursuant to this subpart, the institution must include such a request with its written response.~~; and~~

~~**(v)** Informs the institution whether the designated Department official intends to proceed with –~~

~~**(A)** A single action; or~~

~~**(B)** An action in two phases –~~

~~***(1)*** The determination whether the institution's act or omission gave rise to valid borrower defense claims; and~~

~~***(2)*** The determination of the amount of borrower defense relief.~~

~~**(2)** Although the hearing official shall have the discretion to bifurcate proceedings with, or without, a motion of either party, any decision by the designated department official to bifurcate the proceeding in accordance with paragraph (a)(1)(iv)(B) of this section may only be modified on motion with good cause shown.~~

(~~3~~2) A hearing official conducts a hearing in accordance with § 668.89.

(b) ***Effect of a response by the institution.***

(1) If the institution submits a written response, but does not therein request a hearing, the designated department official, after considering that material, notifies the institution whether the Secretary will take the proposed recovery

action for borrower defense claims and, if so, the date of such action and the amount of losses.

(2) If the institution submits a response and requests a hearing by the time specified in the notice under paragraph (a)(1)(~~iii~~iii) of this section, the designated department official may, in that official's sole discretion, withdraw the notice or transmit the response and request for hearing to the Office of Hearings and Appeals, which sets the date and the place for the hearing. The date of the hearing is at least 15 days after the designated department official receives the request. No liability shall be imposed on the institution prior to the hearing.

(c) ***Limitations on participation.*** The parties in any borrower defense ~~and~~ recovery proceeding are the Department and the institution(s) against which the Department seeks to recover losses caused to the Department as a result of borrower defense relief. Borrowers are not permitted to intervene or appear in this proceeding, either on their own behalf or on behalf of any purported group, except as witnesses put forth by either party. ~~However, nothing in this section limits the rights available to borrowers under other regulations, including 34 CFR 685.206 and 685.222.~~

(d) ***Effect on the borrower.*** ~~No proceeding under this subpart imposes liability on any borrower who has already obtained a discharge in an individual proceeding under 34 CFR 685.206(c) or 34 CFR 685.222(e). A borrower defense and recovery proceeding may determine whether and how much relief is due to, and whether and how much of a loan remains owing by, a borrower participating in a group process proceeding as defined in 34 CFR 685.222(f) through (h).~~ A proceeding under this subpart imposes no liability upon any borrower who has already obtained a discharge.

(e) ***Secretary's decision not to collect.*** The Secretary may choose not to collect from the school, any liability to the Secretary for any amounts discharged or reimbursed to borrower under applicable discharge processes, under the following conditions:

(1) The cost of collecting would exceed the amounts received; or

(2) The claims were approved outside of the limitations period in paragraph (f) of this section.

(f)(1) Limitations period to recover from a school. The Secretary may initiate a proceeding to collect from the school the amount of discharge or reimbursement resulting from a borrower defense under § 685.408 no later than 6 years after the borrower's last date of attendance at the institution;

(2) The limitations period described in subparagraph (f)(1) of this section shall not apply if at any time prior to the end of the limitations period—

(i) the Department official notifies the school of the borrower's claim in accordance with § 685.405(b)

(ii) the institution receives a final non-default adverse judgement regarding a class action complaint asserting relief for a class that includes

the borrower for underlying facts that may form the basis of a claim in accordance with this subpart; or

(iii) the institution receives written notice of any final adverse action or non-appealable findings of a civil investigative demand from a Federal or State agency that were the result of an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower, for underlying facts that may form the basis of a claim under this subpart.

(iv) Tolling Period. The tolling of the limitations period should last no longer than 2 years after the event giving rise to the pause in the limitations period, as provided in paragraph (c)(1) of this section. After the expiration of the 2-year tolling period, any time remaining in the original limitations period would commence.

(3) For a borrower defense under § 685.401(b)(5), the Secretary may initiate a proceeding to collect at any time.

VIII. *The Department's Closed School Loan Discharge Proposal Fails to Provide Necessity Clarity and a Statutory Justification for the Proposed Changes*

Introduction –

The Department does not possess the congressional authority to promulgate a complex regulatory discharge structure based upon very limited statutory language. Especially when that statute provides clear direction: borrowers are entitled to a closed school loan discharge ("CSLD") when they are unable to complete their program due to the closure of the school. In fact, the proposal erroneously creates a discharge opportunity for students at schools that are *not even closed* by any reasonable definition. To compound the issues with the NPRM, the Department does not sufficiently explain the changes from the 2019 BDR Rule, including the reasons and/or experience relied upon to make those changes.

As a result, the Department – as is often the case in the NPRM – expands its grant of congressional authority to the point where the proposed regulation can no longer be supported by the statute.

The 2022 BDR NPRM Closed School Loan Discharge Provisions –

The Department proposes a number of changes to the CSLD regulations including: 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 only apply to instances where a borrower accepts and completes an approved teach-out program (the "reenrollment provisions").[122]

[122] 87 FR 41880.

On 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 a date chosen by the Secretary that reflects when the school had ceased to provide educational instruction "for most of its students."

In addition, the proposal would 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.[123]

The 2022 BDR NPRM also seeks to provide the Secretary the ability to discharge a loan without an application if the student did not complete 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.[124]

The proposal would remove the current requirements 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.[125] 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 1 year of the borrower's last date of attendance in the teach-out program.[126]

The proposal also includes an expanded list of exceptional circumstances that allow the Secretary to expand the 180-day "look back period" for teach-out eligibility.[127] The Department relies upon its experience to propose three additional exceptional circumstances examples that "could indicate" that the school is in danger of closing: the discontinuing of a significant share of academic programs; permanent closure of all or most of its in-person locations while maintaining online programs; and placement of the school on heightened cash monitoring.[128] The NPRM does not elaborate on the experience cited.

The Department 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 they were unable to finish through no fault of their own.[129] The Department cites the U.S. General Accountability Office ("GAO") study that purportedly concluded that 70% of borrower who received automatic closed school discharges under the three-year provision were in default on their loan.[130] As a result, the

[123] 87 FR 41920.
[124] *Id.*
[125] *Id.*
[126] 87 FR 41921.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *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.

Department states its belief that students are "best protected" by establishing a one-year period for automatic discharges.[131]

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 a program or two, but would capture a circumstance where an institution continues only one program while otherwise ceasing all other enrollment.[132] USDE justifies this approach by stating that it would limit the ability of institutions to manipulate the CSLD process.[133]

USDE 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.[134] The Department states that removing the re-enrollment criteria would "better reflect the legislative intent of the HEA" and avoid the significant challenges that exist in implementing the requirement.[135]

Finally, USDE concludes that the HEA does not mention the possibility that enrollment in a comparable program would limit the borrower's eligibility for a discharge.[136] 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 they are enrolled in is not a "true extension" of the program that they were in at the closed institution.[137]

Statutory Authority for CSLD Regulations –

The Department cites to 20 U.S.C. § 1087(c)(1) and 20 U.S.C. § 1087dd(g) for the statutory authority granting USDE the ability to propose 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 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 the above paragraph.

Comment on the 2022 BDR NPRM Provisions –

[131] *Id.*
[132] 87 FR 41923.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] 87 FR 41923-24.

We offer the following comments on the proposed CSLD provisions. After a thorough review of the proposal, we have concluded that the proposed regulations are not provided for in statute, not sufficiently explained by the Department, and do not provide the necessary clarity. As a result, we request that the Department rescind and revise the CSLD proposal to better comply with statutory authority.

The Proposed Regulations Are Not Supported by the Statute –

The sections of the HEA cited by the Department -- § 1087(c)(1) and § 1087dd(g) – do not grant USDE the authority to enact the regulations as proposed. As a result, the Department should revise the proposed regulations to bring them more in line with what Congress intended.

As discussed elsewhere in this comment, recent Supreme Court precedent requires that an institution point to "clear Congressional authorization" for the power it claims.[138] The cited statutes stand only for the proposition that Congress intended for student borrowers to have their loans discharged when they were unable to finish their programs *due to the closure of the institution*.

Nothing in the statute indicates that Congress intended for the Department to have the authority to grant automatic CSLDs without an application.

While the Department concludes that removing the re-enrollment criteria would "better reflect the legislative intent of the HEA," USDE does not specifically state what legislative intent the Department is referring to. Rather, the statute is silent on this issue and to read a legislative intent into such a straight-forward provision is precisely the kind of agency behavior that the *West Virginia* court was attempting to curtail.

Further, the HEA clearly states that the provision applies to instances where the "institution closed." However, the Department's proposal allows for possibility that CSLD could be provided to students at institutions that remain *open*. Such authority is not provided to the Department by the terms of the HEA.

For example, the Department's proposal for a school's closure date is as follows:

> "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*." [emphasis added][139]

We request clarification from the Department regarding how a statute that provides relief to students when they are subject to "closure of the institution" – a phrase that has a common sense, plain language meaning – can be interpreted by USDE to allow for discharges for the closure of "most programs" and the cessation of educational instruction for "most" students. If the Department cannot justify this provision under the statute, this specific provision, and the

[138] *See*, *West Virginia v. EPA*, 597 US __ (2022).
[139] *See*, proposed 34 C.F.R. § 685.214(a)(2)(i).

CSLD proposal as a whole, should be revised to more closely reflect the authority provided by Congress in the statute.

The Department Does Not Sufficiently Justify the Proposed Regulations –

As stated elsewhere in this comment, 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."[140] Under this standard, USDE does not sufficiently justify the changes to the CSLD regulations. Firstly, the Department misconstrues a GAO study for a proposition that the study does not provide support for. Second, the Department cites "significant challenges" regarding the re-enrollment provisions, but does not explain what challenges the Department face nor does it specifically identify how the proposed regulations would avoid and/or solve those challenges.

The GAO study cited by the Department is offered for the proposition that the 3-year period for automatic discharges must be reduced to 1-year because the GAO found that over 70 percent of borrower who received automatic closed school discharges under the 3-year provision were "in default." A quick review of the GAO report proves that claim to be inaccurate and misleading. Instead, the GAO study concluded that:

> "About 73 percent of borrower 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."[141]

The Department's clear misstatement must be corrected, and an explanation provided for why the reduced number of borrowers in default justifies the shortening of the automatic CSLD window from 3-years to 1-year.

As stated elsewhere in this comment, a federal agency requires more than just conclusory statements to justify a regulatory change. The Department does not identify – at all – the challenges that the Department has faced since the implementation of the 2019 BDR Rule. In order to justify this change, USDE must provide more specificity regarding the challenges that the Department has encountered that require USDE to propose this change. Without that explanation, the Department fails to provide sufficient justification for the proposal.

The Proposed Regulations Do Not Provide Necessary Clarity –

The proposed regulations do not provide the necessary clarity or explanation to offer sufficient direction to institutions about the provisions. The Department employs undefined or weakly

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

defined terminology for key aspects. USDE also adds exceptional circumstances without explaining the relevance of the provisions.

Firstly, as referenced above, 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). We request clarity regarding whether the Department will employ thresholds to these determinations. It would be insufficient for the Department to rely upon a case-by-case basis to determine when "most" programs or students are impacted. Institutions require concrete thresholds in order to make business decisions that could be impacted by the regulation. We ask that the Department include such benchmarks in the final regulations.

Second, USDE does not explain how it will operationalize the language in the Preamble, on 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." Such imprecise language simply does not provide sufficient clarity to institutions. Also, this exception for small institutions is not included in the regulatory language. We ask that the Department clarify this exception and include regulatory language in the final rule.

Under 34 C.F.R. § 668.214(h), the Department adds exceptional circumstances that are not necessarily relevant regarding reasons for the extension of the 180 day "look back" period. The Department also 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.[142]

Directed Questions

Finally, we submit Directed Questions to the Department regarding the proposed regulations. We appreciate, in advance, the Department's full responses to these questions.

> Directed Question #1 – We request clarity on how the Department proposes to operationalize automatic discharges, especially in light of the proposed language, should it remain in the final rule, 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 1-year period prior to eligibility? How would the Department control for third-party reimbursement in the context of automatic CSLD?
>
> Directed Question #2 – We also request clarification on the treatment of intervening events in the CSLD provisions. While the Department states that CSLD is intended for students who were unable to complete their programs through "no fault of their own,"[143] in the past, the Department has granted CSLD without consideration of intervening events that undermine a student's claim for relief.

[142] *See*, 34 C.F.R. § 668.214(c)(1)(i)(B).
[143] 87 FR 41921.

For example, would the Department grant relief on a borrower's CSLD when the borrower was subject to an academic, disciplinary, or other "fault" dismissal during the period of the teach-out? In that case, a borrower would not be entitled to relief because the reason they did not complete their program was due to their own actions and was unrelated to the closure of the institution.

IX. *The BDR Provisions of the NPRM are Arbitrary and Capricious under the APA, Impermissible under the HEA, and Result in Reduced Clarity and Increased Complexity*

Introduction –

We submit this comment regarding the general BDR provisions of the NPRM as well as the BDR adjudication provisions. After a thorough analysis of the proposed regulations, we have concluded that the HEA, as amended, does not provide sufficient statutory authority for the provisions. We request that, where appropriate, the Department either revise, rescind, or delete the proposed regulations.

The 2022 BDR NPRM General Borrower Defense and Adjudication Provisions –

In the 2022 BDR NPRM, the Department expresses concern that "too many borrowers have been unable to access loan relief" and, in some situations, the denial has been "due to regulatory requirements that have created unnecessary or unfair burdens for borrowers."[144] In response, the Department proposes to "expand the current basis for a borrower to receive a discharge."[145] USDE 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."[146] 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."[147]

The Department also seeks to "address longstanding" concerns regarding student loan debt by "improving, streamlining, expanding, and strengthening regulations governing title IV, HEA programs."[148] 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.[149] To that end, the Department argues that the proposal would also result in more borrowers receiving discharges. USDE also seeks to eliminate the need for individual applications, wherever possible.

[144] 87 FR 41879.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] 87 FR 41881.
[149] *Id.*

Additionally, USDE proposes to construct a borrower defense process "that is simpler and fairer for all affected parties."[150] The Department characterizes the 2022 BDR NPRM as attempting to maintain what was available to borrowers between 1994 and 2016, building upon clearer processes in the 2016 BDR Rule, and incorporating further refinements from the 2019 BDR Rule. To that end, USDE 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.[151] The proposed regulations also seek to leverage existing procedures and retool them for BDR adjudication purposes.

Regarding specific proposals, 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.[152] The 2022 BDR NPRM would allow for both affirmative and defensive claims, filed individually or as a group. The Department would allow for State requestors – most often State Attorneys General offices but could also include State regulatory agencies – to file group claims. The proposal redefines and adds new bases for BDR claims as well as establishing a "rebuttable presumption of full relief." If a borrower receives partial or no relief, they would be able to request reconsideration from the Department. BDR claims would not be subject to any statute of limitations and could be filed at any time.

The Department provided the public a 30-day period to provide comments on the 2022 BDR NPRM.

Comments –

We submit the following comments regarding the general BDR and the BDR adjudication process provisions.

The Public Comment Period is Insufficient and Burdens the Public's Ability to Meaningfully Participate in the Rulemaking Process –

A public comment period of only 30 days is insufficient for the public and interested parties to appropriately, sufficiently, and meaningfully participate in the rulemaking process. As a result, we request an additional 30 days to provide a full opportunity to respond to the NPRM. Such an extension is consistent with USDE past practice on the NPRM's topics and with authorities that the NPRM cites to.

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 and interested parties be provided a much longer period to submit robust, thorough, and comprehensive comments. The changes to

[150] 87 FR 41884.
[151] *Id.*
[152] 87 FR 41885.

BDR section alone – including all of the subtopics that include a significant amount of new and/or revised provisions – provide sufficient reason to lengthen the public comment period. When added to all the other topics, extending the public comment period becomes absolutely necessary.

In fact, the 2022 BDR NPRM is exceptional in the diverse number of topics included. Such an unprecedented proposal demands a similarly unprecedented opportunity for the public to provide comment.

When considered together, past practice indicates that such an extensive package of new regulations demands additional time to respond to the proposal. For background, the changes to the BDR regulatory framework included in the 2016 BDR NPRM[153] had a comment period of 45 days. The 2018 BDR NPRM[154] carried a 30 day period. However, the changes to the BDR provisions in the 2022 BDR NPRM are more akin to the 2016 BDR 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. The 2022 BDR NPRM's provisions on the PSLF program also provide precedent to extend the period; the 2008 PSLF NPRM[155] had a comment period of 45 days.

In the 2022 BDR NPRM, the Department relies upon authority that suggests a longer time period for public comments. For example, in the "Invitation to Comment" Section, 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 those two EOs.

In Executive Order 13563, "Improving Regulation and Regulatory Review," the EO 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."[156]

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."[157]

We simply request that the Department observe the very documents that the 2022 BDR NPRM cites.

When considering the above, together with the 2022 Title IX NPRM[158] and the other title-IV related NPRM on expanding Pell grants for incarcerated individuals, the 90/10 Rule, and the change in ownership resulting in a change of control regulations,[159] it is appropriate for the Department to allow a reasonable extension of the comment period – an additional 30 days, for

[153] 81 FR 39330
[154] 83 FR 37242
[155] 73 FR 37694
[156] *See*, EO 13563, Sect. 2(b).
[157] *See*, EO 12866, Sect. 6(a)(1).
[158] 87 FR 41390
[159] 87 FR 45432.

a total of 60 days – for interested parties and members of the public to draft, review, and submit comments to the 2022 BDR NPRM.

The HEA Neither Contemplates nor Authorizes Affirmative BDR Claims –

The statutory provisions of the HEA do not provide any authority to facilitate affirmative claims from borrowers to discharge either their paid or outstanding student loan debt. In relevant part, the HEA provides as follows:

> "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." [*emphasis* added][160]

By the plain language of this provision, the statute refers *only* to defenses to repayment. The provision does not contemplate a byzantine regulatory structure that offers certain borrowers the affirmative right to discharge remaining amounts of the loan and to be refunded already paid amounts. The regulations proposed – now and in the past relevant rulemakings – do not pair with the statute and, when a regulation is "facially inconsistent" with the underlying statute, the administrative interpretation must be set aside.[161] The statutory text stands for the proposition that the Department may "specify" the grounds for a defense; no text in § 1087e(h) expressly, definitively, or unambiguously provides authority for USDE to create a pathway for affirmative claims from borrowers.

The Department's interpretation of the statute permitting affirmative claims is so far beyond the statute that it activates the "major questions" doctrine, recently endorsed by the Supreme Court.[162] Under that doctrine, it is entirely unclear where the Department would find "clear congressional authorization" for the expansion of specifying bases for defense claims into the approval of affirmative claims.[163] We request clarification from the Department on the "major questions" doctrine.

As a result, USDE's proposed regulations regarding the allowance of affirmative claims must be rescinded and revised for a lack of basic statutory authority.

The Proposed Regulations Fail to Provide Appropriate Due Process Protections –

The 2022 BDR 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 Constitutional protections. Current procedures – which often leave institutions without notice of and information about

[160] 20 U.S.C. § 1087e(h).

[161] *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.")

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

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

internal Department procedures – are not revised or improved upon in the NPRM. As a result, the fundamental and long-standing issues with the BDR process are made worse.

As a federal agency, the Department is required to observe the due process rights of institutions, 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."[164] In interpreting this Constitutional protection and applying it to the title IV program, courts have held that institutions possess both liberty and property interests in continued program eligibility.[165] Additionally, courts have found that institutions have a fundamental property right to title IV, HEA funds that they have already received.[166] The Department, therefore, has a duty to respect the due process rights of institutions and to construct regulatory frameworks that observe that duty.

For example, as discussed later in this comment, the proposed 34 C.F.R. § 685.405(d) only provides a severely limited process for institutions to respond to BDR claims. While the institution is notified of the existence of the claim, the contents of the notification are unidentified, contain no observance of a timely notification parameter, and raise the possibility that an institution will be in the dark about the contents of the claims, the evidence provided by the borrower, or other significant elements that the institution may wish to consider when responding to a BDR claim. This is made even more egregious when considering the Department's practice to dump hundreds, if not thousands, of claims on an institution at one time. A federal agency properly interested in the fair adjudication of BDR claims would not behave in a manner that results in a prejudicial process that forces institutions to engage without the benefit of full knowledge of the claims against it. Additionally, when considered in the light that potential liabilities associated with BDR claims could be well in excess of millions of dollars, the Department's proposed institutional response regulations fall well short of the procedural due process protections afforded by the Constitution.

We request that the Department rescind regulations that fail to observe and protect institutional due process rights.

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.

For example, the Department gratuitously confuses the timeframes for BDR claims by applying a retroactive basis for a discharge. For all previous regulatory frameworks, the Department has relied upon "loans first disbursed" language to delineate between regulatory timeframes.[167]

[164] U.S. Constit. Amend. V, § 3.

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

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

[167] *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

Without sufficient justification, the Department changes the framework to now 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."[168] USDE further complicates this matter by also proposing provisions that would adhere to the prior language standards. For example, 34 C.F.R. § 685.206(e) states that it applies to BDR "for loans first disbursed on or after July 1, 2020, and before July 1, 2023" and 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 is concocting a framework that would apply the 2022 BDR NPRM to applications made *long* before the effective date of the proposed regulations. This incentivizes the current Administration to delay the processing of claims *in order to* adjudicate outstanding claims under their preferred regulatory framework. This problem is aggravated by the 2022 BDR NPRM's proposal to impose *no* statute of limitations on BDR applications.

The consequence of this approach is the retroactive application of the proposed regulations. It is long established that regulations, simply, *cannot have retroactive effects*, especially when not expressly provided for in statute.[169] Retroactive application has been particularly disfavored when as with the 2022 BDR NPRM, a rule changes an established regulatory framework.[170]

Not only does this proposed provision burden institutions, it also burdens 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 or if they will be wasting their time in filling out the BDR application. Between the new Federal standard, the inclusion of a State law standard (in certain circumstances), and the role of State requestors (discussed later in this comment), a borrower is not provided sufficient explanation or guidance on whether or not they would have a legitimate BDR claim.

These overlapping, crisscrossing, and contradictory standards needlessly muddy up the BDR adjudication process. Together with the retroactivity concerns, the Department should rescind and revise its proposed regulations to simplify, not complicate, the BDR process.

The Department Lacks Congressional Authorization to Create a Group BDR Claims Process –

USDE's proposal to resurrect the group BDR process rests upon an interpretation of the HEA that is not sustained by the language of the statute. Further, the Department does not even *attempt* to justify the provision by identifying some – *any* – language that specifically grants even a scintilla of authority upon which a group BDR claims process could be justified. This is made even more important given the position that the group process will constitute the Department's "default"

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).

[168] *See*, 34 C.F.R. § 685.401(b).

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

[170] *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."

approach.[171] As a result, the Department must rescind and revise the proposed regulations to eliminate the unlawful, unwarranted, and unjustifiable group BDR process.

Creating a group process – out of whole cloth – is the exact type of agency behavior that the *West Virginia* case was attempting to curtail. 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), it cannot escape the conclusion that the Department is relying upon the thinnest of reeds to build a multi-billion-dollar regulatory albatross. Indeed, even if the Department were to invoke 20 U.S.C. § 1082(a)(6),[172] such authority could, at most, provide for discharge or forgiveness on a "case-by-case" basis and then "only under those circumstances specified by Congress."[173] Similarly, the *West Virginia* case made clear that such "ancillary provision[s]" of authority are not sufficient for "extraordinary grants" for regulatory authority.[174] Stated simply, the HEA simply does not provide evidence of any Congressional intent to grant the Department the ability or authority to conceive of a group BDR claims process.

Further, proposed regulations, at 34 C.F.R. § 685.402(b), provide 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.[175] Essentially, the Department can use *any* reason to create a group BDR process, even if no reasonable basis for one exists and without any feedback or a meaningful opportunity for the Department to respond. This provision should be revised to make clear that some evidentiary threshold must be achieved before an institution can be subject to a BDR claim based upon *only* the allegations put forward by a self-interested borrower.

It is also curious why the proposed regulations do not provide a borrower an opportunity to opt-out of a group BDR process. At the very least, a borrower should be provided notice and an opportunity to opt-out of such a group. There are a number of justifications – tax consequences, income thresholds for government benefits, etc. – 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. Further, the Department lacks statutory authority – under *any* provision of the HEA – to provide a discharge when *a borrower has not even asked* for such relief.

The proposed regulations also provide the opportunity for the Department to consolidate multiple group claims, formed through the State Requestor process, into a single group process, potentially to include claims against multiple schools.[176] This "blanket discharge" is yet another example of regulatory overreach in the 2022 BDR NPRM. While there is no authority to adjudicate

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

[172] *Note:* Section 1082(a)(6) states that the Secretary may: "enforce, pay, compromise, waiver, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption."

[173] *See*, "Memorandum to Secretary of Education Betsy DeVos; Re: Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority," January 12, 2021, available at: https://static.politico.com/d6/ce/3edf6a3946afa98eb13c210afd7d/ogcmemohealoans.pdf

[174] *West Virginia* at 18.

[175] *See*, § 685.402(b)(1-3).

[176] *See*, 34 C.F.R. § 685.402(c)(3).

borrower defense through a group process, there *certainly* is no reading of the HEA that provides for a group process against *multiple* schools *at the same time.* Further, we request clarification from the Department regarding the issue of how USDE would find a conceivable basis for discharges based upon a commonality at different schools. While consolidating claims where possible – and even where *not* possible – might make the Department's adjudicative role easier to administer, the statute does not offer that possibility.

As a result, unless the Department can muster "clear Congressional authority" for the group BDR claims process, the proposal should be abandoned in favor of a regulatory framework that Congress intended.

The Proposal to Employ State Requestors is Unlawful and Should Be Rescinded –

The plain language in the HEA, at 20 U.S.C. § 1087e(h), provides no modicum of support for the introduction, at 34 C.F.R. § 685.402(c), of 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[177] nor can it add something to the statute that, simply, is not there.[178]

It is unclear where the Department finds the authority or reason – other than predicted bureaucratic efficiency – to include a BDR process by which a *borrower* is not even a necessary part. Indeed, the regulatory proposal would not require a *borrower* at all. The 2022 BDR NPRM carries the very real possibility that a borrower would not even know that it is part of a class of individuals seeking BDR discharges. Any borrower defense to repayment process should, at the very least, include the borrower. Further, a State AG review is no reason to relax, loosen, or diminish the standards for discharge or rely upon a presumption that the claims share common facts or circumstances.

To make matters worse, the Department provides no substantial reason why the State requestor process is necessary. USDE offers 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."[179]

The Department adds that it is not proposing to "simply accept" the State AG's evidence unquestioned.[180] By its proposal, the Department deputizes friendly State AGs and farms out the adjudication process to them. Such a transfer of authority goes beyond anything contemplated by the HEA or even the Regulatory Triad.

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[177] *See*, *Grupo Industrial Camesa v. U.S.*, 85 F.3d 1577, 1579 (Fed. Cir. 1996).
[178] *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.")
[179] 87 FR 41886.
[180] 87 FR 41887.

Also, there is no limit on what claims a State AG can incorporate. We request information from the Department regarding whether the contemplated process would allow a State AG to amass claims from across the country or if the State AG claims will be limited to the state that the State AG represents.

The proposed role for State AGs is also impermissibly vague in that it may result in a State requestor intervening in a group process to request a second bite of the apple under the State law standard upon reconsideration.[181] If the Department chooses to maintain the proposed role for State AGs, USDE must provide clarity on the role such actors will play regarding who may intervene or request one – or multiple! – state law standard reviews.

The Proposed Reconsideration Process is Unnecessary, Unjustified, and Will Interfere with the Disposition of BDR Claims –

The proposed reconsideration process, at 34 C.F.R. § 685.407, is a redundant pseudo-appeal process that is not justified by evidence, policy, or the statute. The 2022 BDR NPRM provides no basis for why a reconsideration is necessary, nor does it provide any evidence suggesting that BDR claims under the 2019 BDR Rule suffered from a lack of reconsideration. Indeed, no evidence of such harm could be produced, since the Department has not adjudicated any claims that lack the ability to request a reconsideration.

Further, it is unclear why a reconsideration process is even necessary when the deck is stacked in favor of the borrower. Indeed, the Department fails to explain why a reconsideration would be needed if the borrower is not required to provide any evidence, where reliance on the misrepresentation and harm is presumed, and the borrower benefits from 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[182] – where a borrower would not be granted full relief, making reconsideration redundant, inefficient, and unnecessary.

Significantly, institutions are not provided an opportunity to request reconsideration.

Further, the reconsideration process has to potential to create unlimited BDR liability for institutions. At 34 C.F.R. § 685.407(f)(1), the Department states:

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

This paragraph is not time barred, meaning that any BDR claim that is partially or fully denied is never *truly* closed, but simply awaiting an opportunity to be "reopened." This provision, when coupled with the Department's retroactive application of the 2022 BDR NPRM, creates a regulatory "loophole" for the Department to revisit *every BDR claim ever adjudicated* to grant full relief. Because of regulatory silence, such a Department action would not be governed by any predictable or reliable standard upon which this Administration, or a future one, would be

[181] 34 C.F.R.§ 685.407(a)(2)(i)

[182] *See*, 87 FR 41910. *Note:* We provide comment on these examples below.

required to meet in order to open a claim. Such a regulatory framework simply cannot be sustained by the statute and must be rescinded.

The Proposed Regulations Are Deficient for Failing to Recognize or Incorporate State Statutes of Limitation –

The 2022 BDR NPRM, at 34 C.F.R. § 685.400, removes all time limitations for BDR claims, without any statutory authority or evidence necessitating the change. This action by the Department adds more confusing and arbitrary provisions.

Indeed, the Department's proposed regulations provide no statute of limitations on BDR claims and open up claims to be filed since the beginning of the Direct Loan program. The proposal also does not discuss the application of State law statutes of limitation.[183] This expansion of claims is an abuse of agency discretion and sets up claims to be un-judicable due to the staleness of the evidence, lack of individuals with knowledge of the facts involved, lack of records relevant to the claims, and other un-mitigable factors. As a result, claims would be granted *solely* on the basis of the accusations made by the borrower. To ensure that a complete record exists upon which a borrower's claim can be fairly adjudicated – with or without a recoupment element – the Department must re-impose a fair statute of limitations that considers these concerns. Otherwise, the lack of limitations period makes a mockery of the process and guarantees that the process is unfair, arbitrary, and capricious.

The Proposed Subpart F is Unsupported by the HEA and Should Be Rescinded –

The proposed Subpart F definitions of "misrepresentation," "substantial misrepresentation," and "omission" are fundamentally flawed and must be revised. The decoupling of these definitions from the legal concept of "reliance" is an unnecessary step backward from the 2019 BDR Rule. The Department often says in the NPRM that borrowers could not be expected to possess the necessary evidence to prove reliance.

Instead, USDE imposes a "presumption of reliance for both individual and group claim[s]"[184] 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,[185] whether justified or not.

Further, although § 1087e(h) does contemplate the include of "omissions," the Department's NPRM expands the regulatory framework too greatly by including parties that do not fall under the definition of "an institution of higher education," as included in the statute. The creation of an "omission of fact" basis goes well beyond anything provided by § 1087e(h). The definition would capture – and punish – unintentional omissions and, with the inclusion of third-party conduct, create a requirement for institutions to constantly monitor universal compliance to prevent *all* individuals, even those tangentially related to the institution. Such a standard creates

[183] *See*, 34 C.F.R. § 685.401(c).
[184] *See*, 87 FR 41889.
[185] *See*, 87 FR 41881.

a near impossibility of compliance. The Department does not have the statutory authority to create this type of framework. The 2022 BDR NPRM should not include the acts of third parties as a basis for borrower relief against institutions.

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

On August 24, 2021, the Department enacted a policy – at the time, without *any* statutory, regulatory, sub-regulatory, or otherwise authority – to rescind the previous Administration's Partial relief methodology for approved borrower defense to repayment claims.[186] In its place, the Department enacted an unlawful, arbitrary, and capricious "rebuttable presumption of full relief." In the announcement, the Department stated that the rebuttable presumption "gives the Department discretion to determine the appropriate relief for borrowers in a case-specific manner consistent with applicable regulations."[187] The Department failed to identify what regulations USDE was referring to in this passage.

In the 2022 BDR NPRM, the Department incorporates the rebuttable presumption of full relief.[188] However, it flips the standard of evidence on its head in 34 C.F.R. § 685.408(a)(1):

> "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."

In other words, to avoid the Department's supposed concern that borrower would "have to act as a labor economist,"[189] USDE 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 appropriate burden of proof. This outcome has no basis in law, cannot be sustained by the statute, and is contrary to long-standing principles of jurisprudence.

The Department must carry the burden to investigate and determine the appropriate amount of discharge and should not be permitted to shirk that responsibility for an unlawful, arbitrary, and capricious burden-shifting rebuttable presumption of full relief. The presumption will encourage borrowers, State AGs, and other mass filers to submit thin-on-details applications, not to upset the rebuttable presumption and to provide institutions with as little to work with as possible.

We also are concerned about the impact that the rebuttable presumption of full relief could have on issues like duplicate payments and secondary or add-on payments for BDR relief. For example, in California, institutions approved or registered through the California Bureau of Private Postsecondary Education (the "*Bureau*") are required to participate in the Student Tuition Recovery Fund ("*STRF*"). The STRF is a fund administered by the Bureau that relieves or mitigates economic loss suffered by a student while enrolled at a qualifying institution. We encourage the

[186] *See*, Office of the Under Secretary "Rescission of Borrower Defense Partial Relief Methodology (EA ID: GENERAL-21-51), August 21, 2021, https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2021-08-24/rescission-borrower-defense-partial-relief-methodology-ea-id-general-21-51
[187] *Id.*
[188] *See*, e.g., 87 FR 41884.
[189] *See*, 87 FR 41890.

Department to develop processes and procedures to avoid confusion regarding potentially overlapping payments of discharges, including a system by which the Department proves non-duplication of State payment of claims after USDE has determined that a claim is valid under the appropriate regulations. Such a process should maintain the primacy of federal discharges before States, or other parties, provide reimbursement, discharge, relief, etc. In addition, we propose that the Department produce a total record showing all Department, State, and other relief for each adjudicated claim.

The rebuttable presumption should be rescinded in full and replaced with a discharge metric that places the burden of proof where it belongs – on the claimant – and matches the borrower's discharge to the harm endured. Any other arrangement is insufficient, arbitrary, capricious, and wildly inconsistent with the HEA.

X. *Conclusion*

In closing, we thank the Department for its review and consideration of our comment. While we support a rulemaking process and a BDR rule that protects students, CAPPS requests that the regulatory framework is compliant with the underlying statutes and does not exceed the authorities provided by Congress in the HEA.

Thank you for your consideration of these comments.

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Respectfully submitted,

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