BDR Comment Period Filings: Period Ending August 12, 2022

Family Business Coalition Comments

August 11, 2022

submitted via the Federal eRulemaking Portal at Regulations.gov
The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

ATTN: Jean-Didier Gaina

RE: Docket ID: ED-2021-OPE-0077

Dear Secretary Cardona:
I write on behalf of the Family Business Coalition (FBC) and the millions of family owned businesses across the country. FBC is a diverse collection of organizations and industry groups united for the common purpose of protecting America's family businesses across the country. We are the voice of America's main economic engine – family businesses – working together towards a better business climate that promotes private business expansion and job growth.

As an organization that is dedicated to protecting family businesses, we are deeply concerned with the Biden Administration's proposed Borrower's Defense to Repayment Rule ("BDR"). The continued massive discharge of government loans, funded by the taxpayers with the potential to cost $1.6 trillion, is unsustainable for hard-working Americans already confronted with record inflation, rising consumer costs, and economic uncertainty. BDR was a little-known and rarely used policy to protect students who were taken advantage of when seeking a higher education degree. As originally enacted by Congress, the rule was envisioned as a defense against loan repayment in situations in which an institutions act or omission constituted such action. It has evolved to be used as a backdoor for broad student loan discharges that do not require approval by Congress. The current proposed BDR rule is the fourth iteration of the rule. This latest rule blows open the back-door and takes any burden of oversight, accountability, and responsibility off the shoulders of the U.S. Department of Education and places that burden squarely on the shoulders of taxpayers, including small businesses, to bail out.

It is our position that BDR was developed by Congress to protect students and ensure they are receiving a quality product for their investment in their future. The way this rule is now being contorted takes the focus away from honest and hard-working students and their families who responsibly saved and prepared. Several analyses have found that the benefits skew towards the top, with the wealthy benefitting more than the middle class. At a time of high inflation, this policy is a backdoor spending spree that will further accelerate the problem. Small businesses are already paying record prices for inputs of all kinds, any policy that exacerbates inflation makes life worse for America's small businesses.

As a voice for small business, we object to the currently proposed draft rule. We describe our concerns in the paragraphs below:

First, the HEA does not authorize *affirmative* BDR claims, only defenses. The statutory section of the HEA regarding borrower defenses to repayment to federal direct loans, 20 U.S.C. § 1087e(h), provides only:

> **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 [20 U.S.C. §§ 1087a, *et seq.*], except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part [20 U.S.C. §§ 1087a, *et seq.*], an amount in excess of the amount such borrower has repaid on such loan.

This section of the HEA refers only to a borrower's "defense to repayment of a loan," not to an affirmative right of the borrower to discharge their remaining debt. The plain text of the HEA's borrower defense provision directs the Department to specify what grounds may be asserted as a borrower's "defense to repayment," which language does not expressly authorize affirmative claims by borrowers for loan discharges.

Accordingly, the Department's proposed regulations permitting borrowers to assert affirmative claims of borrower defenses (and including the group process regulations for affirmative claims that were not yet even asserted by presumed members of a borrower group, *see* § 685.402) exceed the scope of statutory authority under the HEA. *See* 20 U.S.C. § 1087e(h); 34 C.F.R. § 401(b) ("A borrower . . . will be determined to have a defense to repayment . . . if at any time. . . .") (emphasis added.). The proposed regulations should be amended to require that "borrower defenses to repayment" may only be asserted in defense to collection action by the Department.

Second, the proposed rules improperly allow retroactive application. Under the proposed § 685.400, the Department would apply the new proposed standards effective July 1, 2023, for borrower defense applications received on or after July 1, 2023 (or still pending on that date), even though the loans at issue could have been disbursed under any other prior set of standards. So, for example, the Department could delay adjudicating currently pending applications, which would be barred by the statute of limitations under current regulations (*see, e.g.*, *id.* at 685.206(e)(6)), until the new regulations take effect, and then grant the applications because the newly applicable regulations lack a limitations bar. This rule cannot have such retroactive effect. It is well-established precedent that regulations, like statutes, cannot be applied retroactively absent express direction to do so.

We note that many claims currently pending with the Department should be adjudicated under the 1994 BDR rule which requires borrowers to identify a state cause of action. In addition, the claim must meet statute of limitation requirements. By applying the new standard, the Department will essentially resurrect invalid claims that should be denied. From a taxpayer perspective, we must ask the Department to explain the statutory authority for this change.

Third, the Department's proposed regulations in Subpart D fail to set adequate standards for a borrower defense application. Unlike the provisions in section 685.206(e)(8)(v) requiring, for example, that the borrower identify his or her financial harm, the provisions in Subpart D for borrower defense applications pending or received as of July 1, 2023, require only that the application be submitted "on a form approved by the Secretary" and that it "[provide] evidence that supports the application claims." 34 C.F.R. §§ 685.403(b)(1) and 685.402(c)(1) (third-party requestor applications to form a group of borrowers). Given the significant impact on taxpayers and small businesses, fairness would demand that

the Department require student borrowers to provide a basis for their claim, evidence of any harm, and evidence of detrimental reliance. Again, Congress did not intend the BDR rule to be a student loan forgiveness program, it was intended for students defrauded by their institutions.

Fourth, the Department's proposed regulation at 685.406(f)(7) would provide automatic loan discharges by proclaiming loans that are the subject of stale discharge applications to be "deemed unenforceable," without any connection to the student's underlying borrower defense allegations or to the merits of such claims. This automatic discharge proposal is contrary to the statute authorizing borrower defenses to repayment, which provides only for the discharge of loans on the basis of prescribed acts or omissions by the school. 20 U.S.C. § 1087e(h). If the Department relies on different statutory authority for this distinct and arbitrary "staleness" measure of loan cancellation, the Department should identify the authority. Further, the automatic nature of discharges under section 685.406(f)(7) does not preserve the right for an institutional response.[1]

Fifth, the Department's proposed regulations permitting borrower defense loan discharges on a group basis exceeds statutory authority. *See* 34 C.F.R. § 685.402. The HEA's borrower defense provision, 20 U.S.C. § 1087e(h), requires the Department to specify the acts or omissions that "a borrower" may assert as a defense to repayment. The plain text of the statute refers to a single borrower, "a borrower," and not to a group of borrowers. Similarly, the statute specifies that "a borrower may assert" such defenses to repayment, not so-called "State requestors" as defined in section 685.401(a). The plain text of the statute does not permit the discharge of loans on a group basis, especially not where the borrowers holding the loans did not even apply for discharges. Therefore, the Department's entire process allowing for borrower defense discharges on a group basis exceeds statutory authority under the HEA.

Overall, the proposed rule expands the discharge provisions beyond the statutory authority at the taxpayers' expense. By statute, any BDR discharge must be grounded in findings of fact establishing particularized forms of misconduct. Section 455(h) of the HEA states that "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." 20 U.S.C. § 1087(e)(h). The statute gives the Secretary the discretion to identify what forms of misconduct will authorize a discharge of a student's loan. However, it gives the Secretary no discretion to discharge loans in the absence of any adequate fact-finding or individualized determination as to whether such misconduct occurred or whether the purported misconduct caused harm to the student commensurate with the discharge.

The NPRM departs from this HEA requirement because it provides for the issuance of discharges (and for the initiation of recoupment proceedings) without adequate fact-finding, without any adequate determination (individualized or otherwise) that the standards in question were violated, and without any finding that the alleged misconduct resulted in harm to the student that would justify the amount discharged.

[1] The proposed provisions for providing notice to schools attended by borrower defense claimants at section 685.405 make no provision for notice to the schools of a pending automatic discharge.

The Family Business Coalition urges the Department to go back to the drawing board and develop rules that are more focused on protecting students, rather than simply bailing out graduate school loans for the already-affluent, and opening doors to new opportunities in career and technical education. America's small businesses need graduating students to contribute to a thriving and successful business community. The proposed BDR rule, and the never-ending extensions of student loan payments, should be reconsidered with the larger economic context in mind.

Sincerely,

Palmer Schoening

Chairman, Family Business Coalition