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May 16, 2024

**VIA Docket ED-2023-OPE-0123-26398**

The Honorable Miguel A. Cardona, Ph.D.
Secretary of Education
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

*Re: Comment by States of Missouri, Kansas, and eighteen other States on Student Debt Relief for the William D. Ford Federal Direct Loan Program (Direct Loans), the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program (89 Fed. Reg. 27,564)*

Dear Secretary Cardona,

We write to express our significant concerns about the notice of proposed rulemaking published in the Federal Register on April 17, 2024, titled "Student Debt Relief for the William D. Ford Federal Direct Loan Program (Direct Loans), the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins) Program, and the Health Education Assistance Loan (HEAL) Program" (the "Proposed Rule"). *See* 89 Fed. Reg. 27,564.

This is the third time your Department has tried to shift the expense of student loans from those who willingly took them out to the American taxpayers. Everyone from the Supreme Court[1] to former Speaker of the House Nancy Pelosi[2] has told you

[1] *See Biden v. Nebraska*, 143 S. Ct. 2355 (2023).
[2] Press Conference, Office of Speaker of the House Nancy Pelosi (July 28, 2021) ("People think that the President of the United States has the power for debt forgiveness. He does not. He can postpone. He can delay. But he does not have that power. That has to be an act of Congress.").

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that you do not have the authority to forgive debt except in the limited ways Congress clearly outlined. You must adhere to these warnings and *follow the law*.

The Department's first attempt at loan forgiveness relied on purported authority under the HEROES Act to broadly forgive between $10,000 and $20,000 for nearly every borrower. The Department's claimed authority was challenged in federal court by six states—including many States represented by signatories here—and was roundly rejected by the Supreme Court in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023). The Supreme Court stressed the "staggering" "economic and political significance" of the executive action and noted that not only did the Department lack any "clear" textual authority for its action; it did not even have plausible textual authority. *See id.* (citing *West Virginia v. EPA*, 597 U.S. 697 (2022)).

Ten days after that ruling, on July 10, 2023, the Department launched its second attempt, publishing a final rule titled "Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program," (the "SAVE Final Rule"). The Department's second attempt relies on purported authority under the Higher Education Act (the "HEA") to provide broad-based loan forgiveness and offer a new income-driven repayment ("IDR") plan called "SAVE," to reduce—and for many borrowers, outright eliminate—monthly payments and forgive the remaining balances. *See* 88 Fed. Reg. 43,820. The SAVE Final Rule has now been challenged in two separate federal lawsuits, one led by Kansas and one led by Missouri. In total, eighteen States are challenging that rule. *See Kansas v. Biden*, 24-cv-01057 (D. Kan. Mar. 28, 2024); *Missouri v. Biden*, 24-cv-00520 (E.D. Mo. Apr. 9, 2024). At the time of writing, those lawsuits remain pending and could result in swift injunctions.

Now, in the Department's third attempt at mass debt forgiveness, the Department has published the new Proposed Rule relying on separate purported authority under the HEA: section 432(a)(6). According to the Department, this section gives the Secretary the power to "waive all or part of any debts owed to the Department." 89 Fed. Reg. 27,565. The Proposed Rule directs the Secretary to make use of that purported authority to establish and effectuate nine new waivers for the balances—including both principal and interest—for various borrowers.

The undersigned States urge the Department to withdraw the Proposed Rule. The Proposed Rule is flawed in that (1) it, like every other attempt at blanket loan forgiveness, is bad public policy; (2) it seizes authority for the Secretary that is not statutorily prescribed by the HEA; (3) it violates separation-of-power principles under the major questions doctrine; (4) it includes potentially flawed cost estimates; and (5) it is based on a statutorily deficient negotiated rulemaking process

**Bad Public Policy**

It is bad enough that the Department is forcing taxpayers who (1) did not attend college, (2) paid their way through college, or (3) already paid off their loans to pay off the debt of others. What is worse is that the Proposed Rule would forgive loans for people who might be eligible for existing forms of relief but did not bother to apply for forgiveness. 89 Fed. Reg. 27,579. That should be the bare minimum.

Further, across-the-board student loan forgiveness results in a transfer of wealth from those who have the least to those have the most. About 750,000 households making an average household income of $312,000 would be eligible for debt cancellation under this Proposed Rule. The Department justifies this by saying it would reduce the "risk of delinquency or default." *Id.* at 27,565. But that would justify always cancelling debt. Cancelling debt *always* reduces the "risk" of default—even where, as with those making $312,000, the risk is tiny to begin with. The Proposed Rule cannot be justified on this basis.

Elsewhere, the Proposed Rule justifies blanket forgiveness because some borrowers took out loans but did not ultimately earn a degree. *Id.* at 27,588. While there are certainly many reasons a student may, through no fault of their own, leave college early, there are also many students who do not complete a degree because better opportunities arose or, in some cases, because they chose to violate codes of conduct or the law. The recent news contains many examples of students at "elite" universities who have been expelled or are in the process of being expelled for violating the universities' rules of student conduct despite repeated warnings. It is not fair to force teachers, truckers, and farmers to bail out students who chose to violate the law during their anti-Israel demonstrations. The Proposed Rule makes no serious attempt to distinguish between students who dropped out of college to, for example, deal with an illness and those who were forced out or voluntarily left. Any proposed forgiveness must at a minimum assess individualized circumstances of each student's circumstances.

The least the American people should be able to expect is that people receiving debt cancelation actually apply for it and that the Department makes a determination on an individual basis. Instead, the Department is twisting the law to forgive as many loans as possible. This is wrong.

The Proposed Rule also singles out those who attended college for special benefits while doing nothing to address the economic issues faced by other Americans. Many over 25 have never obtained a degree, and yet this program offers them nothing.

**<u>Actions Beyond Statutory Authority</u>**:

The Proposed Rule, also unlawfully seizes power for the Secretary in excess of his statutory authority. Section 432(a) of the HEA does not authorize the Secretary to waive borrowers' balances and interest at his sole discretion. That section gives the Secretary the authority to "compromise, waive, or release any right, title, claim, lien, or demand" within the FFEL program. That language is similar to the language the Supreme Court held in *Biden v. Nebraska* was insufficient to confer authority to mass cancel student loans.

Even if that language were sufficient for the FFEL program, it would not be sufficient for the Direct Loan program, which does not include any similar statutory language. The Proposed Rule contends otherwise, claiming (in a footnote) that "Congress established parity between the FFEL and Direct Loan program, providing that Federal Direct Loans 'have the same terms, conditions, and benefits as loans made to borrowers'" under the FFEL program." 89 Fed. Reg. 27,566 n.4 (quoting 20 U.S.C. § 1087a(b)(2)). There is no textual basis for this view.

The "terms, conditions, and benefits" language refers to interest rates, fees, and the like, not any authority to cancel loans. The Proposed Rule omits critical language. Section 451(b)(2) of the HEA—*i.e.* 20 U.S.C. § 1087a(b)(2)—provides that Direct Loans will "have the same terms, conditions, and benefits as loans made to borrowers *under section 428*," not section 432, the provision on which the Secretary relies to assert authority. Section 428, in turn, contains the specific terms, conditions, and benefits of loans provided under the FFEL program. The Direct Loan program imports just one aspect of section 432, subsection 432(*l*), which directs the Secretary to establish "uniform claims and administrative procedures." The clear reading is that the Direct Loan program imports only those provisions in section 428, which concern borrower-side "terms, conditions, and benefits," and the claims procedures of section 432(*l*), not the Secretary's purported authority to waive loan obligations (section 432(a)). The Proposed Rule seeks to permit the Secretary to assert authority that he does not have.

Similarly, the Proposed Rule (at § 30.82) seeks to "waive" the entire amount of interest accumulated between when a loan originates and when the loan enters repayment. Although the Proposed Rule does not say so, this has the same effect of subsidizing interest for the period of time after loan origination but before loan repayment. Congress knows how to do that and has specifically created loan programs that subsidize interest. *E.g.*, 20 U.S.C. § 1087e(f). The Secretary cannot use regulations to subsidize interest where Congress has expressly chosen not to.

**<u>Questionable Cost Estimates</u>:**

The cost estimates included in the Proposed Rule are flawed. The nine waiver provisions have an estimated cost of $162.4 billion dollars. *See* 89 Fed. Reg. 27,565–66. That number surpasses the SAVE Final Rule's estimated cost of $156 billion. And like the SAVE Final Rule, the cost estimates in the Proposed Rule are based on flawed assumptions. The Proposed Rule proceeds as though the SAVE Final Rule will be in effect and incorporates that assumption into the calculation of costs. If that assumption proves to be incorrect, the cost estimate will not reflect reality and will serve to mislead the American public.

The Department should produce a second, alternative set of cost estimates that project the costs of these provisions in the event that the Department does not prevail in both suits challenging the SAVE Final Rule. When the SAVE Final Rule was being deliberated, a commenter made the same suggestion in the event the Department lost the lawsuit challenging the Secretary's purported authority under the HEROES Act. 88 Fed. Reg. 43,875. The Department refused to do so, stating that it was "confident in [its] authority" on the issue. *Id.* That confidence was misplaced, as the Supreme Court rejected the Secretary's interpretation. When the Department's HEROES Act interpretation was rejected by the Supreme Court, the expected costs for the IDR provisions were rendered grossly incorrect underestimates. The Department has again published a proposed rule that does not account for the possibility that another rule (the SAVE Final Rule) may be enjoined. This misleads the public, which deserves accurate and transparent estimates of how much the Proposed Rule will cost.

**<u>The Major Questions Doctrine</u>**:

The Proposed Rule also violates the major questions doctrine. An agency action involving a matter of "vast economic and political significance" will stand only if the agency can identify "exceedingly clear language" authorizing its actions. *Ala. Assn. of Realtors v. Dep't of Health and Human Servs*, 594 U.S. 758, 764 (2021); *see also West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (per curium) (requiring "clear congressional authorization" rather than a "plausible textual basis"). This is because "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *West Virginia*, 597 U.S. at 722 (cleaned up). The Supreme Court applied this doctrine just last year to strike down the Department's first unlawful mass student loan cancellation scheme. *Biden v. Nebraska*, 143 S. Ct. at 2375. It also applies here.

The Proposed Rule is of significant economic concern. The various new provisions carry a combined cost of $162.4 billion dollars, according to the Department's estimate. *See* 89 Fed. Reg. 27,565–66. But the Department has a history of underestimating the cost of mass loan cancellations and appears to have done so this time as well. Other estimates suggest the cost of this rule may in fact range from $250 to $750 billion. *See* Committee for a Responsible Federal Budget, *Student Debt Plan Would Add Hundreds of Billions to Deficit* (Apr. 16, 2024).[3] Even assuming the Department's cost estimate of $162.4 billion is correct, that number is far more than sufficient to trigger the doctrine, as it is triple the $50 billion that triggered the doctrine just three years ago. *Alabama Realtors*, 141 S. Ct. at 2489.

It is also of substantial political significance. Mass loan forgiveness had "staggering" political significance last year—as the Supreme Court held—and still does today. "'More than 80 student loan forgiveness bills and other student loan legislation' were considered by Congress during its 116th session alone." *Biden v. Nebraska*, 143 S. Ct. at 2373 (citation omitted). Student loan cancellation is a salient political topic "that Congress would likely have intended for itself." *Id*. at 2375.[4]

Because the Proposed Rule triggers the major questions doctrine, the agency action must demonstrate "clear congressional authorization." *Id.* It also must justify the full "breadth of the authority that the agency has asserted." *West Virginia*, 597 U.S. at 721 (cleaned up); *see also BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, 17 F.4th 604, 617 (5th Cir. 2021) ("assertion of virtually unlimited power" raised separation of powers principles concerns over agency mandate). The Proposed Rule comes nowhere close to satisfying that rigorous standard.

The Department has asserted staggering powers to waive debt under the HEA. The Department relies on a dubious two-step textual basis asserting that the authority to "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption," under the FFEL program, 20 U.S.C. § 1082(a)(6), is attributable to all Direct Loans, as they "have the same terms, conditions, and benefits as loans made to borrowers" under the FFEL program, 20 U.S.C. § 1087a(b)(2). The Department asserts that through this grant of power, there is no limit to what repayments it can waive. This assertion of limitless authority would mean the Department could cancel all debts for all borrowers at its sole discretion. This is absurd, as it would give carte blanche to the Department and Secretary to waive debt repayment writ large. The Proposed Rule does not identify any plausible textual hook for this massive authority grab, much less "exceedingly clear language."

Moreover, departure from longstanding practice without new authorization from Congress is strong evidence the agency is acting without Congressional authorization. *See Biden v. Nebraska*, 143 S. Ct. at 2372 ("The Secretary has never

[3] https://www.crfb.org/blogs/student-debt-plan-would-add-hundreds-billions-deficit

[4] The Department of Justice agrees that these are "important issues of nationwide significance." Def.'s Resp. to the Court's Scheduling Notice and Proposed Interim Scheduling Ord. at 3, *Kansas, et al., v. Biden, et al.*, Case No. 24-cv-01057-DDC-ADM (Apr. 12, 2024).

previously claimed powers of this magnitude under the HEROES Act."); *Nat'l Fed'n Indp. Bus. v. Dep't of Labor*, 595 U.S. 109, 117 (2022). Until this administration, the Department has never interpreted section 1082(a)(6) and 1087a(b)(2) as authority to waive debts at its sole discretion. In so doing, the Department is trying to effectuate "fundamental revision of the statute" from one program to another. *West Virginia*, 597 U.S. at 701 (citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994)). Congress did not provide the Department with clear authorization under the HEA to undertake these actions. The Proposed Rule is a clear violation of separation of powers principles under the major questions doctrine.

**Flawed Negotiated Rulemaking Process**:

The Department's negotiated rulemaking process prior to the publication of the Proposed Rule—which was required by the HEA—was deficient as a matter of law. Section 1098a requires the Secretary to undertake a negotiated rulemaking process with respect to regulations pertaining to the HEA. *See* 20 U.S.C. § 1098a. The statute provides that among the participants selected for this process, "[t]he Secretary *shall* select individuals . . . reflecting the diversity of the industry." *Id.* § 1098a(b)(1). A review of those individuals who participated in the negotiated rulemaking, 89 Fed. Reg. 27,567–68, demonstrates that the Secretary failed to meet his statutory obligations.

Five members of the United States Senate wrote to the Secretary on October 9, 2023, before negotiated rulemaking began, with concerns of ideological conformity among the participants. *See* Letter from Senator Chuck Grassley to Dr. Miguel Cardona (Oct. 9, 2023).[5] There can be no diversity of opinions when the negotiated rulemaking process only includes participants who agreed that the Secretary and Department necessarily have otherwise contested authority to act. In fact, the very idea of negotiating requires people with different views on the subject. Similarly, the Department failed to invite representatives of groups that would be harmed by the Proposed Rule, such as taxpayers who did not take out student loan debt. The Department engaged in nothing more than the appearance of negotiated rulemaking. This violates the HEA.

**Conclusion**

The Department should withdraw the Proposed Rule. The undersigned also state that the complexity and enormity of the issues presented in the Proposed Rule require extending the comment period to 60 days.

[5] https://www.grassley.senate.gov/imo/media/doc/grassley_colleagues_to_ed_-_student_debt_transfer.pdf

Sincerely,

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