National Council of Higher Education Resources

NCHER

July 12, 2017 Submitted Electronically at http://www.regulations.gov

Ms. Wendy Macias
U.S. Department of Education
400 Maryland Avenue, SW, LBJ, Room 6C111
Washington, DC 20202

Docket ID ED-2017-OPE-0076

Dear Ms. Macias:

On behalf of the National Council of Higher Education Resources (NCHER), thank you for the opportunity to provide our comments to the notice announcing the formation of two negotiated rulemaking committees to develop proposed regulations to revise the final rules on borrower defenses to repayment of federal student loans and gainful employment. NCHER is a national, nonprofit trade association that represents higher education service agencies (such as state and nonprofit lenders, loan servicers, loan holders and secondary markets, guaranty agencies, collection agencies, financial literacy providers, and postsecondary institutions) that help families and students develop, pay for, and attain their educational goals so they can pursue meaningful and rewarding work and become contributing members of society. Our members provide a range of college access and success services to students, parents, and schools to help individuals gain access to and succeed at postsecondary education.

NCHER and its members have been active participants in negotiated rulemaking sessions impacting federal student aid programs for decades, and we believe the process provides an invaluable opportunity to engage stakeholders in the development of clear, transparent, and balanced rules and regulations. We know from past experience that active, in-person negotiations allow for real input and better federal regulations and expectations for students, families, institutions of higher education, the higher education finance community, and taxpayers. For this reason, we commend the Department for undertaking a revision to the final rules through the negotiated rulemaking process.

The Department plays an important role in increasing access and success to postsecondary education as well as holding institutions and other stakeholders accountable for waste, fraud, and abuse in federal financial assistance programs. Student loan borrowers who are the victims of fraud should have recourse, schools should have due process to tell their side of the story, and taxpayers should be protected from having to cover the costs of unscrupulous practices. At the same time, the nation's higher education system is burdened with complicated rules and regulations that drive up compliance costs for schools and contribute to increased costs and frustration for students and their families. The upcoming negotiated rulemaking session offers an opportunity to reexamine the borrower defense to repayment and gainful employment rules, in an effort to reach this middle-ground, as well as other ideas to improve the federal student aid programs.

From NCHER's vantage point, the financial responsibility standards of the borrower defense to repayment rules are too broad, perhaps because the negotiators did not include financial experts, institutional Chief Financial Officers, and others with knowledge of the subject. Our institutional members believe that the final rule will have unintended consequences, particularly for smaller, tuition-dependent nonprofit institutions where compliance could be unduly costly and confusing messages are sent to prospective students. On federal standards for borrower defense to repayment, the conditions under which borrowers may seek discharge should be made as clear as possible so that immaterial contract disputes do not ensnare institutions in costly proceedings. As noted above, institutions of higher education must be provided due process.

The notice announcing the Department's intent to establish a negotiated rulemaking committee on borrower defense to repayment also mentions that the committee will develop proposed regulations on the authority of guaranty agencies in the Federal Family Education Loan Program (FFELP) to charge collection costs under 34 CFR 682.410(b)(6) to a defaulted borrower who enters into a repayment agreement within 60 days of receipt of the initial notice of default from the guaranty agency. On July 10, 2015, the Department issued a Dear Colleague Letter (DCL) on this topic. The Department proposed to add the issue to the 2016 negotiated rulemaking agenda, but NCHER and the guaranty agency community objected because the proposed rule would have had a retroactive application. In response, the Department removed the issue from the rulemaking agenda. Because the DCL would have had a retroactive effect, it was challenged in the U.S. District Court for the District of Columbia. Following critical comments by Judge Amit Mehta that the DCL was new policy that should have been proposed through the federal rulemaking process, on March 16, 2017, the Department withdrew the DCL. NCHER commends the Department for its March decision and for recognizing that guaranty agencies were simply following the rules and requirements outlined under the Higher Education Act of 1965, which were upheld through program reviews by the Department. At the time, NCHER stated that guaranty agencies were not currently assessing collection costs on borrowers who agree to rehabilitate their loans within 60 days of receiving notice of default, and would continue the practice. In light of this history and given that the FFELP is winding down, we question the need to address this topic in negotiated rulemaking. Nonetheless, NCHER has no objections to including the issue of whether a guaranty agency can or cannot charge collection costs to a defaulted borrower who agrees to a repayment agreement with the guaranty agency within 60 days of notice of default, and then complies with the agreement, on the rulemaking agenda as long as it is understood that this constitutes a new policy change that must be prospective in effect.

NCHER also recommends five additional agenda items to help clarify certain Income-Driven Repayment (IDR) issues, including correcting two technical errors - one in the REPAYE payment application regulations and another in the new defense to repayment regulations specific to when a borrower does not return a closed school application within 60 days. The following are the proposed additions, which are discussed in greater detail in the attached.

1) Administrative forbearance to collect and process supporting information (§§ 682.211 and 685.205)
2) Administrative forbearance for timely recertified and recalculated IDR payments (§§ 682.215 and 685.221)
3) IDR after day 270 of delinquency (§§ 682.215, 685.221 and 685.209)
4) Payment application order and omission of REPAYE (§ 685.211 – Technical Correction)
5) Closed school provisions and not returning a completed application within 60 days (§§ 682.402(d)(7)(ii) and 685.214(f)(f) – Technical Correction)

Thank you again for the opportunity to provide these comments. NCHER looks forward to continuing to be a part of the process as this next round of negotiated rulemaking moves forward. If you have any questions or need additional information, please feel free to contact me at jbergeron@ncher.us or 202-822-2106.

Sincerely,

James P. Bergeron
President

cc: Acting Assistant Secretary for Postsecondary Education Kathleen Smith

National Council of Higher Education Resources (NCHER) 2017 Negotiated Rulemaking Recommendations - Additional Agenda Items

#	Topic	Cite	Current Obligation	Issue	Proposed Resolution
1.	Administrative forbearance to collect and process supporting information	682.211 685.205	Current regulations allow use of administrative forbearance for up to 60 days when necessary to collect and process documentation supporting the borrower's request for a deferment, forbearance, change in repayment plan, or consolidation loan. Interest that accrues during this period is not capitalized at the end of the forbearance.	If an IDR plan borrower provides incomplete, missing, or untimely information by the required annual recertification deadline, the delay can cause unnecessary interest capitalization and payment elevation.	1) Expand the conditions for the use of the 60-day administrative forbearance to include the collection and processing of information for recertification and recalculation of an annual IDR payment request. 2) Clarify that interest that accrues during the 60-day administrative forbearance period is not capitalized at the end of the forbearance, but that interest may be capitalized if a subsequent capitalization event either replaces the forbearance period, or occurs after the forbearance period.
2.	Administrative forbearance for timely recertified and recalculated IDR payments	682.215 685.221	Current regulations permit administrative forbearance for past-due IDR payments if the new PFH payment is lower than the previous PFH payment or zero, but only if the borrower submitted untimely documentation (i.e., has transitioned to permanent-standard).	Borrowers who provide timely documentation for recertification or recalculation experience the same difficulty making existing IDR payments and can be delinquent when recertifying or recalculating the IDR payment. The current regulations applicable to untimely IDR applicants can provide relief to timely IDR applicants.	1) Expand the existing authority to permit administrative forbearance to eliminate delinquency for all IDR applicants when a new IDR payment is lower or $0.

3.	IDR after day 270 of delinquency	682.215 685.221 685.209	Current regulations reflect that a borrower becomes ineligible for an IDR plan after default which occurs when a borrower fails to make payment for 270 days.	Guidance has been provided to encourage servicers to continue working with borrowers between day 270 of delinquency and the date of default claim payment or transfer to ED's Default Management Collection System (DMCS). Such efforts include granting new IDR plans and renewing existing IDR plan payments.	1) Clarify that a borrower may obtain and continue an IDR plan up to the date of guarantor default claim payment or transfer to DMCS.
4.	REPAYE payment application (T.C.)	685.211	States that PAYE and IBR plans are excluded from the standard payment allocation order (i.e., charges, collection costs, interest, principal).	REPAYE is not addressed, but follows the same payment application order as PAYE and IBR.	Amend 685.211(a)(1): "(a) Payment application and prepayment. (1) Except as provided for the income-contingent repayment plan under §685.209(a)(3), §685.209(c)(3) or the income-based repayment plan under §685.221(c)(1),the Secretary applies any payment first to any accrued charges and collection costs, then to any outstanding interest, and then to outstanding principal."
5.	Closed school – sending another discharge application (T.C)	682.402 685.214	If the borrower does not submit a completed closed school discharge application to the loan holder within 60 days, the loan holder must resume collections and send another discharge application to the borrower along with an explanation of the requirements and procedures for obtaining discharge.	The intent of this provision was to send borrowers a "second" closed school application if a borrower fails to submit an application within 60 days of the date the first application was sent in order to provide another opportunity to encourage borrowers who may be eligible for the closed school discharge to apply. The language should specify that one additional discharge application is to be provided to eliminate any uncertainty whether the word "another" could imply that this provision creates an endless loop to provide discharge applications to the borrower.	Amend sections 682.402(d)(6)(ii)(I), 682.402(d)(7)(ii) and 685.214(f)(5) to clarify that one additional discharge application is provided after the borrower fails to respond to the initial discharge application