Comments of
National Consumer Law Center
(on behalf of its low-income clients)

to the

Department of Education
on Notice of Proposed Rulemaking
78 Fed. Reg. 45618 (July 29, 2013)

Docket ID ED-2013-OPE-0063

Submitted: August 28, 2013

The following comments are submitted on behalf of the National Consumer Law Center's low-income clients. The National Consumer Law Center (NCLC) is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys and their clients, as well as community groups and organizations that represent low-income and older individuals on consumer issues. NCLC's Student Loan Borrower Assistance Project provides information about student rights and responsibilities for borrowers and advocates and provides direct legal representation to student loan borrowers. Most of the clients we represent are low-income borrowers living in Massachusetts. We also work with other advocates across the country representing low-income clients. In addition, we seek to increase public understanding of student lending issues and to identity policy solutions to promote access to education, lessen student debt burdens and make loan repayment more manageable.[1]

Deanne Loonin, Director of NCLC's Student Loan Borrower Assistance Project, was the primary negotiator representing legal aid clients at the negotiated rulemaking sessions in which these regulations were developed. We were part of the consensus reached on this package of proposed regulations. We support the proposed regulations and applaud the Administration for taking important steps to provide broader relief to student loan borrowers. The comments below highlight a few points that we believe are not clear or need additional attention. We also provide responses to the questions posed by the Department in the notice as well as our comments on the proposed Reasonable and Affordable Rehabilitation form.

Regulation on Rehabilitation

We support the proposed regulations and applaud the Department for taking steps to improve the rehabilitation program even prior to finalizing these proposed regulations. Thus far, we have noticed that collectors are quicker to use the IBR formula in determining a reasonable

[1] See the Project's web site at www.studentloanborrowerassistance.org. NCLC also publishes and annually supplements practice treatises which describe the law currently applicable to all types of consumer transactions, including *Student Loan Law* (4th ed. 2010 and Supp.).

and affordable payment amount. This is a huge improvement, apparently due not only to new instructions to collectors, but also important changes in commission structure. These changes have made a big difference to the borrowers we represent and other financially distressed borrowers.

However, it has come to our attention that there are multiple interpretations of the proposed regulations. We urge the Department to clarify its intent, particularly in the following areas.

1. Mandatory Use of the Financial Status form. We interpret the proposed regulations to require servicers, loan holders, and debt collectors to use the reasonable and affordable form every time a borrower seeks to rehabilitate his or her loan. The proposed regulations state that the borrower's reasonable and affordable payment amount must be based solely on information provided on a form approved by the Secretary and, if requested, supporting documentation. The proposed regulations describe a process in which a borrower who objects to the payment amount determined through use of the form will then be offered a rehabilitation repayment amount based on the IBR formula.

   We have learned that some loan holders, including a number of industry servicers and collectors, interpret the proposed regulation to allow the form to be completed over the phone. Still others believe that the regulation only requires the use of the reasonable and affordable form when a payment plan cannot be agreed upon.

   We urge the Department to clarify its intent in this area. We do not believe that the form should pose an unnecessary barrier for borrowers. For this reason, it may make sense to allow loan holders to take the borrower's information over the phone and send a completed form to the borrower for approval or use other methods to assist the borrower in completing the form. However, it should be clear that loan holders must use the form and that borrowers must approve the information as filled out on the form.

   In addition, it should be clear that in cases where borrowers are unable to complete the form the loan holder should keep the process going by moving quickly to determine a payment amount based on the IBR formula. This might occur if the borrower is unable to document some expenses, for example.

   It would be helpful for the Department to clarify circumstances in which the form will most commonly be used in lieu of the IBR formula. It is important to note that, for some borrowers, the IBR monthly payment may not be reasonable and affordable. The IBR formula does not work for all borrowers because, among other reasons, it does not consider other expenses; thus, the resulting monthly payment is unaffordable for some borrowers. For example, we often have clients with high medical expenses

who cannot afford the IBR payment. However, there are important reasons to discuss with borrowers that the IBR payments are likely to be the lowest payments available after the rehabilitation is completed. If a borrower and agency agree to a rehabilitation payment that is less than the IBR amount, we urge the Department to instruct collectors to provide counseling to borrowers to help them stay out of default post-rehabilitation.

Ultimately, this is why, during negotiated rulemaking, we recommended that borrowers initially should be offered the IBR formula amount. Determining this amount could be done over the phone with minimal documentation required. If the borrower objects, the loan holder could then begin the process of working with the borrower to complete the form. We ultimately agreed to the consensus and understand that this limits our ability to comment, but we are open to further discussion or questions.

We do not believe that the process should be overly onerous for borrowers. However, we are also concerned about re-default. This is why it is so important to ensure that the payments during the rehabilitation period are truly reasonable and affordable AND that the borrower understands how the process will work after rehabilitation. We know that many of our clients re-default despite our best efforts to work with them to avoid this result. This is extremely troubling, but the causes of high re-default rates are not well known or studied. Among other recommendations, we have urged the Department for years to research the performance, including re-default rates, of the various "get out of default" programs.[2] Yet there is little or no recent, objective study of this issue.

We emphasize that we supported the consensus based upon the understanding that it provides a standardized way to ensure that rehabilitation amounts are determined solely by looking at the borrower's financial circumstances. As discussed below, this also means that collectors and loan holders will be strictly prohibited from offering a borrower a monthly rehabilitation payment that is based upon the balance sensitive repayment formula or 10-year amortization schedule prior to receiving the form.

2. Initial Payment Amount and Balance Sensitive Formula. We have been informed by Department staff that the Department of Education's private collection agencies are still being instructed to use the balance sensitive repayment method for making an initial determination of the borrowers repayment amount. This is troubling for a variety of reasons including that the proposed regulations prohibit this practice.

[2] *See* National Consumer Law Center, "The Student Loan Default Trap: Why Borrowers Default and What Can Be Done" (July 2012).

As we stressed at the negotiated rulemaking session, many low-income borrowers have been unable to rehabilitate their loans because the debt collectors have demanded rehabilitation amounts greater than what the borrower can afford. We are concerned that if the rehabilitation repayment amount offered is based upon anything besides the information collected on the standardized form or the IBR formula, borrowers will not know that they have the right to object to the amount being offered. They will feel pressure to agree to an amount that is unaffordable, and ultimately, the rehabilitation will be unsuccessful.

We recommend that the Department instruct its collectors to stop using this balance sensitive method as soon as possible, prior to the effective date of the final regulations. Further, the Department should issue guidance to clarify that initial offers must be based solely on the information provided in the form or on the IBR formula amount, depending on the progression provided in the final regulations.

3. Conflict with Department Instructions.

As discussed above, Department staff have told us that the Department is instructing its collectors to first offer a balance sensitive payment (based on loan balance) and then use the IBR formula to determine a reasonable and affordable amount. This will no longer be acceptable if these proposed regulations go into effect, prohibiting the use of balance sensitive payment amounts. Presumably, this means that collectors will automatically use the IBR formula. Although this is method that we recommended during negotiated rulemaking, we are concerned about the discrepancy between the regulations and the Department's instructions to its collectors.

NCLC has been attempting to learn the nature of the Department's instructions for over a year. NCLC submitted a number of FOIA requests to the Department last summer and this spring requesting this information. We have received only minimal responses to date. The Department redacted nearly all of the relevant information from the collection agency handbook and other materials.

There are a number of reasons that it is important for borrowers and their advocates to know the nature of the Department's instructions to collectors. First, collectors often claim that they are required to offer certain alternatives and not others. Having access to the Department's instructions enables borrowers and their advocates to verify the accuracy of these statements. Second, it is important as a matter of government transparency for the public to be able to determine whether the Department's instructions deviate from the regulations.

We are extremely troubled by the lack of transparency in this area. Information about instructions to collectors and commissions to collectors should be publicly available.[3] Much of this information was available in the past and is necessary in order for borrowers to enforce their rights and for policymakers to understand the true costs of collection.

Even if this information is made available, instructions to collectors are not enforceable in the same way as regulations promulgated under the Higher Education Act. If the Department believes that there is a better way to approach this issue, we urge it to do this publicly rather than behind closed doors in an inaccessible way that is ultimately unenforceable.

Reasonable and Affordable Form

As stated above, we support the proposed regulation which requires the use of a financial disclosure form to determine an affordable repayment amount for borrowers seeking to rehabilitate their loans. Unfortunately, the proposed form will be burdensome for borrowers to complete. Overall, the form is unnecessarily long and inefficiently arranged. It is even more difficult to use than the current financial status form. We urge the Department to reconsider this version of the form. Section 2 of the National Council of Higher Education Loan Resources' proposed form provides a good template for how to format the income and expenses information in a concise and manageable format.

Among other problems, sections 3, 4, 6 and 7 contain redundant content regarding income. These sections separate taxable and non-taxable income but it is not clear how non-taxable income will be treated. If it is treated the same as taxable income then there is no reason to report them separately. However, if non-taxable income is not considered, then borrowers should not need to report it. Additionally, it is not clear whether SNAP benefits should be reported on this form. We hope that the Department will clarify how different sources of income will be considered.

The current draft form is not just long but also complex. For example, it asks borrowers to list "amounts paid toward insurance premiums, but do not include any amount that is deducted from your paycheck and reflected in Sections 3 or 6." Borrowers are also asked about their spending on "legally required child care" and are expected to know whether they are subject to "Treasury offset." For many borrowers, such detailed financial questions are simply unnecessary

[3] *See* Deanne Loonin, "Government Secrecy on Student Loan Collections Hurts Borrowers", New America Higher Ed Watch (April 15, 2013), available at: http://higheredwatch.newamerica.net/blogposts/2013/guest_post_government_secrecy_on_student_loan_collections_hurts_borrowers-82311.

and may be a substantial roadblock to rehabilitating their loans. While these categories are included in the consensus language, they should be presented in a clearer way to borrowers.

In Section 8, borrowers will likely be confused by the requirement to provide their Adjusted Gross Income after providing so much other income documentation. This form should make it clear that AGI and household size is being requested so that if a borrower objects to the proposed rehabilitation payment amount, then the repayment amount will be recalculated based upon the IBR formula.

The borrower's right to object should be displayed more prominently on the income and expense form. The borrower's right to object to the payment amount offered and to choose an IBR formula payment amount instead, must be specified at the beginning of the form. Burying that information in small print on the bottom of page 4 reduces the number of borrowers who will understand and exercise their rights.

The Department asks whether it is appropriate to require borrowers to submit documentation needed for the calculation of reasonable and affordable payments twice if they choose to object to the first payment offered. It is not. There is no reason to ask borrowers to submit the same information twice to the same entity. As such, we agree to modify the regulation to clarify that borrowers need not submit documentation of income or expenses if the servicer already has the information.

Finally, we decline to comment on whether the form should use the IRS national standards as a basis for determining the reasonableness of borrower's expenses because we believe that it is outside of the consensus agreement. However, if the IRS national standards are used, then all of the categories in the national standards must be reflected on the form. Currently, of the IRS national standards categories, only food is represented on the proposed form. The other categories: housekeeping supplies, apparel and services, personal care products and services, and miscellaneous, are missing. In order to effectively use the IRS national standards, the categories on the form must match. Additionally, if the national standards are to be used, borrowers should be allowed an opportunity to explain if their expenses are greater than the national standards.

Administrative Wage Garnishment

The Department asked about the consensus language at § 682.410(b)(9)(i)(F)(2)(iv) regarding AWG hearings (FR 45641-45642). In response, we do not believe that it is necessary to amend this language further.

Thank you for your consideration of these comments. Please feel free to contact Deanne Loonin or Persis Yu if you have any questions or comments. (Ph: 617-542-8010; E-mail: dloonin@nclc.org, pyu@nclc.org).