

**Written Testimony of Deanne Loonin, Director of National Consumer Law Center's Student Loan Borrower Assistance Project in Response to the May 5, 2011 U.S. Department of Education Notice of Establishment of Negotiated Rulemaking Committees and Notice of Public Hearings**

**Submitted: May 20, 2011**

**I. Introduction**

The following testimony is 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 rights and responsibilities for student borrowers and advocates. We also seek to increase public understanding of student lending issues and to identify policy solutions to promote access to education, lessen student debt burdens and make loan repayment more manageable.<sup>1</sup>

**II. Relief for Financially Distressed Borrowers and Borrowers Harmed by Abusive School Practices**

The following recommendations for consideration at the upcoming negotiated rulemaking focus on strengthening relief for borrowers who are harmed by school abuses or who cannot repay due to personal circumstances, such as disability. We also recommend a number of actions to strengthen the safety net and create a fairer collection process. We highlight issues that we believe can be addressed through the regulatory process.

The Department has taken numerous actions these past few years to restore integrity to the financial aid system. These changes should help prevent future students from attending schools that provide them with nothing but insurmountable debt. However, our experience unfortunately has shown that there will always be some schools that try to take advantage of borrowers. In addition, there are countless borrowers who have already been harmed by abusive practices and are subject to the government's draconian collection powers. The problems are particularly prevalent in the for-profit higher education sector where all too often, schools prey on vulnerable students' dreams of betterment through education. As a result, the financial assistance that was intended to help these students does little more than bury them in debt.

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<sup>1</sup> See the Project's web site at [www.studentloanborrowerassistance.org](http://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* (4<sup>th</sup> ed. 2010.).

The efforts to date to rein in abuse have done nothing to provide relief for those harmed by these practices. This should be the focus of this round of rulemaking.

## **A. Strengthen School-Related Cancellations**

The three cancellations (or “discharges”) intended mainly to address fraud are closed school, false certification, and unpaid refunds. It is important to emphasize that not one of these programs provides general remedies for borrowers who attended a fraudulent school. For example, a school may routinely pay admissions officers by commission in violation of incentive compensation rules, fail to provide educational materials or qualified teachers, and admit unqualified students on a regular basis. None of these violations is a ground for cancellation. Instead, each cancellation offers relief for a narrow set of circumstances. We recommend that Congress and the Department consider new cancellations that will afford relief to all borrowers who attend schools that violate key HEA regulations and for borrowers who have secured judgments against schools based on HEA provisions but are unable to collect from the schools or other sources.

With respect to the existing programs and the regulatory process, we urge the Department to add the following items to the upcoming negotiated rulemaking agenda:

### **1. Closed School Cancellation**

- a.** Expand and clarify the extenuating circumstances that allow borrowers to obtain closed school discharges even if they do not meet the 90 day standard. **(Direct Loans: 34 C.F.R. § 685.214(c).**

We repeatedly hear from our clients about deteriorating conditions at schools that begin to occur many months before the school finally shuts down. For example, a recent client attended an accredited aviation school that laid off numerous flight instructors and sold most of its planes prior to closing. These problems began a few years before the final closing.

The regulations for closed school discharges arbitrarily limit relief to students who were in attendance at the time the school closed or withdrew not more than 90 days before the school closed. The regulations provide for a longer period in exceptional circumstances, but do not specify the types of circumstances that qualify. These should include, for example, proof of deterioration at the school such as teacher lay-offs, course closures, and other documented problems. We also urge the Department to apply relief to borrowers with older loans, not only those with loans incurred at least in part January 1, 1986 or afterwards.<sup>2</sup>

### **2. False Certification Cancellations:**

- a. Broaden Relief to Conform to Statutory Authority (Direct Loans: 34 C.F.R. § 685.215).** At a minimum, the Department should update

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<sup>2</sup> Relief should be extended earlier than 1986 for false certification and unpaid refund discharges as well.

the ability to benefit certification provision so that it includes relief for those improperly certified under the 6 credit hour category. In addition, the regulations should be amended to conform to the broader relief provided for in the statute.

Borrowers should be eligible for relief in any case in which a school falsely certifies eligibility, including not only in the ATB context, but also if the school improperly or falsely certifies a student's satisfactory progress, which is a necessary requirement for student eligibility.<sup>3</sup> Borrowers should also be eligible for relief in cases where the school falsely certifies that the program in which they are enrolled is an "eligible program." For example, the program may not be eligible because it does not meet the credit hour provisions. In addition, the Department has taken a very restrictive interpretation of the "disqualifying" status basis for false certification. 34 C.F.R § 685.215(a)(iii). Many borrowers that legitimately could not have been employed in the fields allegedly trained for are denied relief. The regulations should be clarified to address this inequity. For example, the regulations should clarify that borrowers should be eligible for relief if they are not proficient in English, but are enrolled in courses given in English or that lead to an employment field that requires English proficiency. Borrowers should also be eligible for relief in cases where a program lacks accreditation so that graduates are ineligible to take licensing or other professional association or state employment exams in the field.<sup>4</sup>

- b. Address problems with the burden of proof.** The Department should specify that borrowers that submit a sworn statement establishing their eligibility for a false certification discharge and any available corroborating evidence are presumptively eligible for the discharge. Currently, the Department regularly requires borrowers to present additional independent evidence, particularly for ATB falsification discharges. The Department often requires proof of federal or state investigatory findings of fraud. The problem is that many borrowers cannot provide proof of federal or state investigations of particular schools because enforcement has been so lax in this area that no such investigations exist. The Department unfairly relies on a 1995 Dear Colleague letter that states an absence of findings of improper practices raises an inference that no improper practices were reported because none were taking place.<sup>5</sup> The regulations should clarify that the Department should look not only for evidence of findings from oversight agencies, but examine other evidence as well including student complaints. Further, the regulations should specify

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<sup>3</sup> For examples of teachers being pressured to manipulate grades in order to retain students, see Kelly Field, "Faculty at For-Profit Colleges Allege Constant Pressure to Keep Students Enrolled", Chronicle of Higher Education (May 8, 2011).

<sup>4</sup> See, e.g., "Testimony of Yasmine Issa", Before the Senate, Heath Education and Labor Committee (June 24, 2010), available at: <http://help.senate.gov/imo/media/doc/Issa.pdf>.

<sup>5</sup> U.S. Department of Education, Dear Colleague Letter Gen-95-42 (Sept. 1995).

that assuming the borrower's statement and any other evidence is credible, the Department must grant discharges if it does not find evidence contradicting the information in the borrower's application. The Department should also reinforce in regulations the guidance in the 2007 Dear Colleague letter for FFEL loans requiring agencies to check for the availability of evidence to support false certification allegations and to make inferences in certain circumstances that problems or violations have occurred.<sup>6</sup> The Department should also be required to keep all evidence that it collects in evaluating discharge applications and promptly make the information available to borrowers on request. Once presumptive eligibility is established based on the borrower's application, the burden should shift to the Department to disprove the borrower's eligibility.

- c. Require Evaluation for Group Discharges.** Individual borrowers do not have access to the full range of information that guaranty agencies and the Department collect about student complaints, findings from other false certification discharges, and other key information. The Department must be required to grant group discharges in cases where the Department determines that a school committed pervasive and serious violations of false certification provisions. For instance, if the Department determines that a school was systematically falsely certifying ability-to-benefit tests during a certain period of time, the Department should grant group discharges to all ATB students enrolled during that time period.
- d. Eliminate the "Crime" requirement for identity theft cancellations.** The false certification/identity theft cancellation adopted in 2006 remains mostly an illusory right as long as borrowers are required to prove that a crime was committed in order to obtain relief. Most such crimes are never prosecuted. The Department should adopt a standard of proof similar to the Fair Credit Reporting Act which defines identity theft as fraud committed or attempted using the identifying information of another person without authority. Allowing discharge when the thief was never prosecuted is particularly appropriate given the difficulties victims have experienced in getting public authorities to prosecute these crimes. The Department could also rely on the same type of documentation that credit reporting agencies rely to determine that the crime of identity theft has occurred, to place fraud alerts and/or to remove erroneous information from credit reports, the filing of a police report of the identity theft and/or the filing of the FTC's "Identity Theft Victim's Complaint and Affidavit."

## **B. Strengthen Other Cancellation Programs**

### **1. Create a Fair and Equitable Disability Discharge Process (34 C.F.R. § 685.213)**

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<sup>6</sup> U.S. Department of Education, Dear Colleague Letter No. FP-07-09 (Sept. 20, 2007).

We represent numerous disabled borrowers and hear from borrowers and advocates across the country representing these borrowers. From our experience, the main flaw is that the disability discharge process is not merit-based. Truly disabled borrowers do not necessarily receive discharges. Instead, the borrowers who are able to overcome irrational procedural hurdles are the borrowers that most commonly receive discharges.<sup>7</sup> We believe that regardless of policy differences, we can come together to ensure that the process is fair and administered according to existing regulations.

We have met with numerous Department staff in recent months about problems with the disability discharge process. We appreciate the Department's efforts to improve this process, but more needs to be done. Among other recommendations, we urge the Department to:

- a. Accept disability determinations by other government agencies as presumptive proof for Department of Education discharges.**
  - b. Provide detailed information about the basis for denials.** We are encouraged by new form letters which provide spaces for the Department to describe reasons for denial. The regulations should affirm that the reasons must be specific and accurate.<sup>8</sup>
  - c. Fix the arbitrary medical review system.** The Department routinely requests additional information from physicians who have already signed discharge forms, often giving these doctors unrealistic time tables to respond. We hope that the new application form (issued in August 2010) will alleviate some of these problems. However, the new form will more likely lead to merit-based decisions if the Department uses trained medical personnel to review the applications. At a minimum, we urge the Department to publicly provide information about this process, including details about the medical review system.
  - d. Clarify the requirements for the veteran discharge.** This discharge applies only to veterans with who have been determined to be unemployable due to service-connected conditions.<sup>9</sup> However, not all V.A. physicians use the same terminology in granting disability determinations. The Department should specify the range of acceptable determinations that meet the “unemployable due to service-connected condition” standard. All determinations that are equivalent to this standard should be accepted.
- 2. Simplify and remove inequity in the definition of full-time employment for Public Service Loan Forgiveness. (34 C.F.R. § 685.219).** Section 401 of the CCRAA defines a “public service job” specifically as a full-time job, but it does not define “full-time.” In its final regulations governing public service loan forgiveness

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<sup>7</sup> See generally Sasha Chavkin, “For Disabled Borrowers of Student Loans, Big Barrier is Education Department”, The Chronicle of Higher Education (Feb. 13, 2011).

<sup>8</sup> For guidance in this area, the Department should consider the regulations requiring specific and accurate creditor notices pursuant to the Equal Credit Opportunity Act, Reg. B, 12 C.F.R. 202.9(a)(2) and Official Staff Commentary.

<sup>9</sup> 20 U.S.C. § 1087(a)(2).

(Sec. 685.219(b)), the Department has defined “full-time” as working in qualifying employment in one or more jobs for the greater of –;

- (i)(A) An annual average of at least 30 hours per week, or
- (B) For a contractual or employment period of at least 8 months, an average of 30 hours per week; or
- (ii) Unless the qualifying employment is with two or more employers, the number of hours the employer considers full-time.

The second half of clause (ii) creates both unnecessary administrative complexity and inequity for individuals whose employers consider full-time to be more than 30 hours per week. Borrowers will have to submit proof of their employer’s definition of full time, and the Department will have to collect and verify this information for each borrower in the Public Service Loan Forgiveness program. Defining full time as 30 hours per week for all applicants, would greatly simplify the administration of the program and ensure that all borrowers are treated equitably with regard to eligibility for Public Service Loan Forgiveness.

### **III. Addressing Collection Abuses**

Using private collection agencies not only to collect, but also to resolve disputes with borrowers has been a disaster for borrowers. In the federal loan programs, private collection agencies are given authority to act on behalf of the loan holder in everything from rehabilitation to information about discharges to loan compromises. Yet dispute resolution is not their primary mission. They are not adequately trained to understand and administer the complex borrower rights available under the Higher Education Act and there is insufficient oversight of their activities. As a result, consumers are deprived of important options to which they are legally entitled. Even worse, some collectors misrepresent these rights or steer consumers into options more profitable for the collector.

We urge the Department to eliminate the use of private collection agencies. In the meantime, there are ways to improve the system so that private collection agencies follow the law and better serve borrowers. The regulatory issues we urge you to consider in this round include:

- 1. Collection charges should be limited to only those fees that are bona fide and reasonable and actually incurred.** Reasonable collection fees should only be charged when actual costs are incurred and in no case for government offsets or wage garnishments. The fairest and most straightforward approach is to charge fees based on actual time and activity expended on each case, with a reasonable numerical ceiling. Instead, the Department uses a “cost-averaging” basis that leads to ballooning balances even in cases where collection activity is minimal. In addition, the amount of fees to be charged must be clearly written in the promissory note. In no event should fees be capitalized
- 2. All collection letters must include information about exemptions and other rights.** The Department should notify all borrowers receiving disability benefits of the availability of the disability discharge program.

## IV. Repayment and Default

Rehabilitation and consolidation are currently the two main ways for borrowers to get out of default through repayment. Both programs are flawed in design and in execution. We focus below on proposed regulatory changes to rehabilitation.

### Rehabilitation

There are serious problems with the rehabilitation program. Among other actions, the Department should use the rulemaking process to ensure that borrowers are able to exercise their reasonable and affordable repayment rights. The problem in this area derives in part from a system established by the Department which provides compensation to collectors for setting up rehabilitation plans only if the plans require borrowers to make certain minimum payments. Yet borrowers have a statutory right to make reasonable and affordable repayments.<sup>10</sup>

In addition, collectors often pressure buyers to pay more during rehabilitation, claiming that their payments will increase after the process is completed. This advice is inaccurate, most likely a relic of the pre-IBR era. In fact, borrowers coming out of default should be able to select any available payment plan, including IBR. In those cases, their IBR payments could be even lower than what they were paying under rehabilitation.

We urge the following reforms to the rehabilitation process that can be addressed through the regulatory process:

- 1. Use the IBR formula to determine reasonable and affordable rehabilitation payments.** As described above, the most pervasive abuse in the rehabilitation program is loan holders pressuring borrowers to pay more than they can afford or claiming inaccurately that minimum payments are required. Using the established IBR formula would eliminate this abuse and allow borrowers access to the same system for determining reasonable payments as borrowers who are not in default can access.
- 2. Eliminate the requirement that guaranty agencies must sell loans to new holders prior to rehabilitation.** Alternatively, the Department should waive this requirement during periods when buyers are not available.<sup>11</sup>

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<sup>10</sup> 20 U.S.C. §1078-6(a)(1).

<sup>11</sup> We have not found the lack of buyers to be a problem for Direct Loans since resale is not required in these circumstances. However, to the extent this is in fact a problem for Direct Loans, we urge the Department to address the issue for these loans as well. The pressure to pay higher payments is a persistent problem in both the FFEL and Direct Loan programs.

**3. If the resale requirement remains, clarify when sale is required.** Loan holders and collectors often pressure borrowers to pay higher payments than are reasonable and affordable because they claim this is necessary to facilitate sale of the loans at the end of the rehabilitation process. Although we do not believe that this is a real barrier to resale, the Department can help avoid this problem by clarifying the meaning of requiring resale if “practicable.” We have found that lenders interpret “practicable” to mean that they only have to sell if they are assured a certain profit level. Borrowers who have made the maximum payments they can afford should not be held hostage in this way.

**4. Prohibit all collection during the rehabilitation period.** Most collectors will agree to cease collection, other than routine billing statements, when asked, but they do not automatically do so. Cessation of collection should be a standardized requirement in the regulations. It is contrary to both borrower and loan holder interests to continue collection efforts while a borrower is making the effort to repay through rehabilitation. Routine information about the status of the rehabilitation payments should be allowed, but other collection efforts should cease.

**5. Require creditors to remove all negative history on a credit report after rehabilitation.** The current regulations requiring removal of only the “default notation” is minimally helpful to borrowers who have earned a “fresh start.” The regulations should also require removal of all other negative history related to the rehabilitated loan. In addition, we find that collection agencies and loan holders oversell the “credit clearing” benefit of rehabilitation. In fact, the Department’s ombudsman states in FAQs that after rehabilitation, “...all derogatory information placed in your credit bureau files by the Department of Education or any of its collection agencies will be removed.”<sup>12</sup> However, the regulations require only that the Department remove the default from the borrower’s credit history.<sup>13</sup> If in fact the Department is already doing more in practice, this should be reinforced and clarified in the regulations. We recently heard from a borrower who relied on the Department’s representations on its website and on representations from the collection agency that his credit would be completely cleared up after rehabilitation. He wrote: “This statement on the DOE website is patently untrue. I successfully rehabilitated my loans and the derogatory information is still there. Not only that, everyone in the system, DOE, loan servicers etc.. tells me that all the old late payments and other derogatory information will remain on my credit reports until it drops off naturally due to aging.” The Department and its collectors should fix this discrepancy so that borrowers can get full credit clearing benefits after rehabilitation. In the meantime, the agencies must stop providing false information about the benefits of rehabilitation.

**6. Prohibit the Practice of Requiring Certain Borrowers to Consolidate after Completing Rehabilitation Payments.** In its instructions to collectors,

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<sup>12</sup> See [http://www.ombudsman.ed.gov/resources/faqs/fixproblem\\_faq.html#fixcredit](http://www.ombudsman.ed.gov/resources/faqs/fixproblem_faq.html#fixcredit) (last checked May 2011).

<sup>13</sup> 34 C.F.R. § 685.211(f)(1); 34 C.F.R. § 682.405(b)(3)(i)(B).



the Department terms rehabilitation plans with lower payments “balance sensitive rehabilitations.” In the collection manual which the Department took off-line last year, the Department states that in general these borrowers must consolidate their loans immediately after rehabilitation in order to take advantage of the longer-term repayment plans that are available on FFEL consolidation loans.<sup>14</sup> This is wrong first because there are no more FFEL consolidation loans.

In addition, the Department reasons that it is because the borrowers agree to consolidation that they can qualify for rehabilitation with smaller monthly payments.<sup>15</sup> In fact, according to the regulations, borrowers must pay only what is reasonable and affordable based on their total financial circumstances with no minimum amount. Once they rehabilitate, they can select an income-based repayment plan. They do not have to consolidate in order to get a longer-term repayment plan and this practice should be specifically prohibited in the regulations.

## V. Income-Based and Income-Contingent Repayment

We urge the Department to make a number of changes to improve the income-based repayment program (IBR) and income-contingent repayment program (ICR) , including:

1. **Change forgiveness period to 20 years for IBR and ICR for all borrowers.** The Secretary has the authority to set the maximum repayment period for both IBR and ICR--the period after which remaining loan balances are forgiven--as long as it does not exceed 25 years. We urge the Secretary to set the maximum at 20 years for both programs, rather than the 25 years in current rules. Congress recently changed the forgiveness period for IBR only and only for borrowers taking out loans in 2014 or beyond. We urge the Department to amend the regulations so that all borrowers in these circumstances are entitled to the same forgiveness period. This should include all borrowers repaying through IBR **and** ICR regardless of when they obtained their loans.
2. **Allow borrowers to remain in IBR if their income verification is delayed.** Low-income borrowers move frequently and often do not receive paperwork needed to retain program benefits, such as IBR’s required annual authorization to release IRS records for the purposes of determining if the borrower has a partial financial hardship. Borrowers who are forced to make payments based on a 10-year standard repayment plan because they did not submit the necessary annual paperwork need to be able to quickly restore their eligibility for IBR, and their previous IBR payments need to count towards forgiveness. This is very important since IBR and ICR are often the only realistic options borrowers have to stay out of default. In addition, any borrowers that may have been forced out of IBR and into standard repayment plan

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<sup>14</sup> U.S. Department of Education, “PCA Procedures Manual: 2009 ED Collections Contract” (“2009 PCA Manual”) at 105 (September 2009).

<sup>15</sup> Id.

due to delays in providing income information should be able to re-enter IBR immediately upon providing that information.

- 3. Ensure that borrowers who elect to exit IBR are not penalized for leaving the program and ensure that borrowers can re-enter IBR as they currently can for ICR.** An advocate working with a low-income borrower in Ohio recently reported that her client called Direct Loan servicing to discuss changing repayment plans. This borrower qualified for IBR, but was told that if she changes to IBR, she will never be able to change payment plans again. However, the Direct Loan servicers, told her that she could change payment plans if she instead selected ICR. This advice biasing borrowers toward ICR is problematic for many reasons including that IBR is often a better option for low-income borrowers and because choosing IBR should not limit future repayment plan choices. The regulations should be clarified in this area.

Further, under current regulations, IBR borrowers can face severely limited repayment options if they elect to exit IBR, especially if they did not consolidate their loans before exiting IBR. There is no statutory or practical reason to treat borrowers who exit the IBR plan more harshly by imposing lump sum or otherwise unaffordable payments based on a condensed repayment timeline.

- 4. Require lenders to notify borrowers before they need to re-submit income verification.** The Department currently specifies in regulations that the standard repayment plan is designated to a borrower if the borrower fails to renew the required written consent for income verifications. However, lenders are not under any obligation to notify or remind borrowers of the need to annually submit income verification. This is information that must be highlighted to borrowers who are often not aware of the submission requirement. It is in both the Department's and borrowers' interest to make IBR participation as efficient as possible and annual notification before new forms are due will reduce unnecessary paperwork and confusion as well as disruptive shifts in payment requirements for borrowers whose payment caps rise unexpectedly and become unaffordable due to the absence of updated income information.
- 5. Ensure that forgiveness is available to both ICR and IBR borrowers.** Prior to the publishing of the IBR regulations, the ICR regulations stated explicitly that borrowers repaying through ICR would have their loans forgiven after 25 years.<sup>16</sup> However, since IBR went into effect, the ICR forgiveness regulations were removed from the section on ICR to the IBR forgiveness section.<sup>17</sup> Borrowers that made ICR payments at any time after July 1, 1994 should qualify for forgiveness.<sup>18</sup> The problem is that the IBR forgiveness section also states that borrowers must have participated in IBR.<sup>19</sup>
- 6. Ensure that borrowers retain time earned toward forgiveness after consolidation.** This is a critical issue for both the IBR/ICR forgiveness period and

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<sup>16</sup> 34 C.F.R. §685.209(c)(4)(iv) (prior regulation).

<sup>17</sup> 34 C.F.R. § 685.221(f).

<sup>18</sup> 34 C.F.R. §685.221(f)(3)(i).

<sup>19</sup> 34 C.F.R. §685.221(f)(1),

for public service forgiveness. For example, many borrowers graduate from undergraduate colleges and work for a number of years at non-profit or government organizations. They should not lose the benefit of time earned toward forgiveness during these years even if they later go to graduate school and consolidate the new loans with the old. There is no current regulations prohibiting this practice, but we understand that the Department is taking a restrictive interpretation, arguing that all time earned toward forgiveness is lost after consolidation. There is precedent for the Department to separately consider the underlying loans in a consolidation loan for possible cancellation. For example, the Department has clarified that it does this for purposes of false certification and closed school discharges.<sup>20</sup>

## VI. Restore a Student Loan Safety Net

A viable safety net is essential and necessary for borrowers regardless of how or why they got into financial trouble. The government has extraordinary powers to collect student loans, far beyond those of most unsecured creditors. While collecting funds is important for the government and taxpayers, there comes a point of no return where the government's ceaseless efforts to collect make no sense, monetarily or otherwise. Restoration of the safety net must include bankruptcy rights for student loan borrowers, restoration of a statute of limitations, limits on Social Security offsets and EITC offsets, and enforcement of fair collection rights. A viable safety net also requires improvements to the disability and other discharge system, as discussed in greater detail above.

Although much of these changes require Congressional action, the Department can accomplish a number of important goals through the regulatory process. These include:

1. **Eliminate the current regulation which improperly allows loan holders to consider a prior bankruptcy in determining eligibility for PLUS loans.**<sup>21</sup> This conflicts with the provision in the Bankruptcy Code that prohibits the government, guarantors and lenders from discriminating against those who have not paid their student loans when those loans were discharged in bankruptcy.<sup>22</sup>
2. **Ensure that all borrows have a right to suspension or reduction of the amount collected based on hardship.**

The current regulations for wage garnishment through the Debt Collection Improvement Act specifically provide at 34 C.F.R. §34.7 that “We consider objections to the rate or amount of withholding only if the objection rests on a claim that withholding at the proposed rate or amount would cause financial hardship to you and your dependents.” This same language should be added to the guaranty agency garnishment hearing provisions at 34 C.F.R. §682.410, to the tax refund hearing provisions at 34 C.F.R. §30.33 et. seq. and to the offset regulations for all loans at 34 C.F.R. §30.20. The offset

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<sup>20</sup> See, e.g., 34 C.F.R. § 685.212(d) (In the case of a Direct Consolidation Loan, the Secretary discharges the portion of the consolidation loan equal to the amount of the discharge applicable to any loan disbursed, in whole or in part, on or after January 1, 1986 that was included in the consolidation loan.).

<sup>21</sup> 34 C.F.R. § 685.200(c)(1)(vii)(B)(2) (Direct Loans).

<sup>22</sup> 11 U.S.C. §525(c).

issue is particularly important because the Department currently takes the position that they may reduce offsets due to hardship at their discretion but are not required to do so.

## VII. Ensure that Borrowers Can Enforce Their Rights

Congress must specify that borrowers and other parties with standing have a private right of action to enforce the HEA. In addition, the Department and other relevant state and federal agencies, including the Federal Trade Commission (FTC), must ensure that lenders and schools that are required to do so are complying with the FTC Holder Rule. Enforcement and oversight is especially important in the private student loan context.

There are other steps that can be taken without Congressional action, including:

1. **Conform Direct Loan Regulations to the FTC Holder Rules.** The regulations state that, in any proceeding to collect on a Direct loan, the borrower may assert as a defense against repayment any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable state law.<sup>23</sup> The most important regulatory change is to eliminate the provision limiting claims to those available under state law. There is no such limit in the statute and therefore the Department should amend this regulation to include all actions against schools and all claims.<sup>24</sup>
2. **Ensure that Fair Hearings are Fair.** We urge the Department as part of this rulemaking process to standardize the regulations for fair hearings and ensure that all fair hearing procedures are truly fair. A fair hearing should include the opportunity for consumers to choose from a list of neutral arbiters, easy access to records and reports related to their case and the opportunity to present testimony by phone if the closest agency forum is inconvenient. Agencies must require hearing officers to tape proceedings and to make transcripts available when requested by borrowers. These provisions can be clarified and strengthened through the regulatory process. In addition, the Department should clarify that borrowers are able to appeal adverse actions taken by guaranty agencies and other entities as well as actions taken by the Department.

## VIII. Problems in the For-Profit School Sector

We have testified and reported on problems in the for-profit higher education sector for many years, including detailed testimony at the June 2009 Department hearing in Philadelphia.<sup>25</sup> We support the Department's recent efforts to restore integrity to the financial aid system. Although we understand that these issues are not intended to be the focus of this round of rulemaking, we urge the Department to aggressively enforce existing and new "program integrity" regulations such as the strengthened incentive compensation rules.

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<sup>23</sup> 34 C.F.R. § 685.206(c)(1).

<sup>24</sup> 20 U.S.C. § 1087e(h).

<sup>25</sup> The testimony is available on-line at: [http://www.studentloanborrowerassistance.org/blogs/wp-content/www.studentloanborrowerassistance.org/uploads/File/Testimony\\_DOE\\_062209.pdf](http://www.studentloanborrowerassistance.org/blogs/wp-content/www.studentloanborrowerassistance.org/uploads/File/Testimony_DOE_062209.pdf)

We also recommend that the Department consider the related issue of cohort default rate calculations at the upcoming rulemaking sessions. This is particularly important given the persistent default rate problems in all higher education sectors and particularly in the for-profit industry.

Setting an accurate cohort default rate and penalizing schools with consistently high rates is a key to accountability in this sector. The current system, however, is too weak to capture offenders. The current cohort default rate calculation fails to capture the true scope of student loan defaults. We also support the recommendations in testimony submitted by The Institute for College Access and Success (TICAS), including using the three year cohort default rates for single-year sanctions beginning in 2013 rather than 2014.

Thank you for your consideration of this testimony. Please feel free to contact Deanne Loonin if you have any questions or comments. (Ph: 617-542-8010; E-mail: [dloonin@nclc.org](mailto:dloonin@nclc.org)).