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Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave. SW
Washington, D.C. 20202

Re: Student Debt Relief Based on Hardship for the William D. Ford Federal Direct Loan Program, the Federal Family Education Loan Program, the Federal Perkins Loan Program, and the Health Education Assistance Loan Program, Docket ID ED–2023–OPE–0123, RIN 1840–AD95, 89 Fed. Reg. 87,130 (proposed Oct. 31, 2024).

Dear Secretary Cardona:

On behalf of the Competitive Enterprise Institute, I respectfully submit these comments to the Department of Education ("the Department") concerning its proposed rule on student debt relief, 89 Fed. Reg. 87,130 (proposed Oct. 31, 2024) (to be codified at 34 C.F.R. pt. 30(G)). The Competitive Enterprise Institute is a non-profit public interest organization committed to advancing the principles of free markets and limited government. It has a longstanding interest in applying these principles in the rulemaking process.

The Proposal

The Department proposes to add a new section 30.91 to title 34, part 30 of the Code of Federal Regulations. Proposed section 30.91 consists of subsections (a), (b), (c), and (d). Before considering the absence of authority for the proposal and its costs and benefits, this comment will take a close look at what the Department has proposed. In numerous places the proposed rule is unclear and inconsistent with the Department's explanation of it in the preamble, which in turn is internally inconsistent. Before the rule can be finalized, the Department must ascertain how it wants the rule to operate and then rewrite the rule so that it is cogent and operates as intended.

The proposal was written by a committee, 89 Fed. Reg. at 87,135, and it shows. In some places the preamble asserts that proposed subsection (a) is not a pathway to relief; rather, proposed subsections (c) and (d) are pathways to relief. *Id.* at 87,134, 87,152. A borrower who meets the standard of subsection (a) is said to qualify for a waiver under subsection (c). *Id.* at 87,146, 87,147. The preamble's cost-benefit analysis does not consider subsection (a) because it does "not describe discretionary pathways for relief." *Id.* at 87,152. However, the text of subsection (a) is to the contrary. It states, "The Secretary may waive up to the outstanding balance of a loan owed to the Department" if either of two standards (to be discussed below) are met. It does not reference subsection (c). For the most part, the preamble does not describe subsection (a) as relief that must be channeled through subsection (c) but rather describes what it actually

says: "Proposed § 30.91(a) would permit the Secretary to waive all or part of an existing loan balance." *Id.* at 87,138. A few paragraphs later, however, the preamble compromises with itself by stating, "The language in proposed § 30.91(a) should be understood in the context of the standards for relief described in the discussion of proposed § 30.91(c) and § 30.91(d)." *Id.*

Subsection (c) appears to have been intended, perhaps by part of the committee at least, to be distinct from subsection (a) because, as its title states, it provides "immediate relief."

Subsection (d) establishes a "[p]rocess for additional relief" but does not say what that additional relief might be. The Department implies that it would be additional to or different from debt relief. It discusses scenarios in which an individual can, in the absence of a student loan debt burden, demonstrate hardship based on bills other than student loan payments such as when the debtor has a $0 income-driven repayment plan. *Id.* at 87,148. Subsection (d) indicates that additional relief includes "automated relief" but does not say what "automated relief" is either. Apparently, "automated" does not describe the relief but rather the method by which it is awarded. The preamble states, "The Department interprets the word 'automated' as used in proposed § 30.91(d) to mean relief that the Secretary may grant based on information already in the Department's possession rather than acquired through an application." *Id.* at 87,149. If that is the Department's interpretation of what it wrote, it should say so in the regulation rather than use the cryptic word "automated," which generally means something else.

The standard for awarding relief under subsection (d) is also obscure. The preamble asserts,

> For proposed § 30.91(d), the Department would address the risk of strategic behavior with a two-fold requirement that the borrower must be highly likely to be in default, or experience similarly severe negative and persistent circumstances, and that other options for payment relief would not sufficiently address the borrower's persistent hardship, including IDR plans, for those eligible.

Id. at 87,148. *See also id.* at 87,132. None of that is in the text of subsection (d), which instead twice references the standard of subsection (a). If the Department proceeds with the proposed rulemaking, it should re-write subsection (d) to provide rather basic information: what the Department intends to do and under what circumstances.

Subsection (a) is entitled "Standard for waiver due to hardship." Despite that title, subsection (a) has two standards. The second standard is a determination by the secretary of education that "the costs of enforcing the full amount of the debt are not justified by the expected benefits of continued collection of the entire debt." Making such a determination is an ordinary managerial function. The standard can be justified by the prudence of not spending more on collection than will be collected. The standard's imprecision, however, could lead to the abuse of writing off some collectible obligations because that course is easier or more popular. If the Department proceeds with the proposed rulemaking, it should make clear that the 80 percent probability of default that subsection (c) requires for immediate relief is also a requirement of subsection (a). The Department should make another clarification as well. A waiver pursuant to this standard is cost effective and justifiable only if the costs of enforcing the full amount of the debt are more than the expected benefits of continued collection of the entire debt *plus the costs of estimating the probability of a debtor's default*.

Subsection (a)'s other standard is more substantively defective and should simply be excised. Having a standard that assesses the utility of collection efforts, subsection (a) has no need of a standard that does not. Yet the other standard of subsection (a) lacks this sensible consideration and instead authorizes the waiver of debts, whether collectible or not, "when the Secretary determines that a borrower has experienced or is experiencing hardship related to such a loan such that the hardship is likely to impair the borrower's ability to fully repay the Federal government." Factors the Secretary may consider in waiving all or part of a student loan pursuant to subsections (a) and (c) include *but are not limited to* those listed in proposed subsection (b).

The factors in subsection (b) would impair a borrower's ability to fully repay the government, as would any other decrease in income or increase in expenses. The proposal does not say how much the ability to repay needs to be impaired. The Department's rebuttable presumption would be that the *entire* loan should be waived. *Id.* at 87,138. In view of the low standard of any impairment at all in ability to repay and the unlimited factors that may lead to a finding of any impairment, that presumption would be hard to rebut, even if any effort were to be made to rebut it. Thus, the standard is barely a standard at all but rather an unbounded opportunity for the secretary to waive obligations as he pleases. For these reasons, the Department should remove from subsection (a) the standard allowing waiver "when the Secretary determines that a borrower has experienced or is experiencing hardship related to such a loan such that the hardship is likely to impair the borrower's ability to fully repay the Federal government."

Absence of Constitutional Authority for the Proposal

As the preceding discussion reflects, the proposal as written would allow the Department to systematically dispose of accounts receivable held or guaranteed by the United States worth billions of dollars whether or not they are ultimately collectible. The Department has not been granted authority for this largesse. The Constitution grants Congress "Power to dispose of . . . Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Congress may delegate its authority under this clause "as it deems appropriate, *Yakus v. United States*, 321 U.S. 414 (1944), and any delegation is constitutionally permissible if Congress provides 'standards to guide the authorized action such that one reviewing the action could recognize whether the will of Congress has been obeyed.'" *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1191 (D. Utah 2004) (quoting *Yakus v. United States*, 321 U.S. at 425–26), *appeal dismissed*, 455 F.3d 1094 (10th Cir. 2006). The statutes the Department relies upon as waiver authority[1] contain no standards that would in any way guide determinations to waive student loans because of hardships. In the absence of such standards, the Department's misreading of the statutes would render them unconstitutional. Therefore, those statutes cannot be used to support the proposal. The Department has failed to offer defensible authority for its proposal.

Costs and Benefits

The benefits of the proposal cannot exceed or even equal its costs, nor does the Department contend that they can. This is because the proposal is, at best, a proposal for zero-sum transfers. The Department acknowledges that it is proposing transfer payments from taxpayers to debtors. 89 Fed. Reg. at 87,131, 87,153. More precisely, value in an account receivable paid for by taxpayers—who have hardships of their own—is transferred to an account payable of a borrower. The transfers are zero-sum transfers, which are those in which "every dollar of spending on some people comes at the expense of

[1] 20 U.S.C. §§ 1082(a)(6), 1087a(b)(2), 1087hh(2).

taxes on other people, either now or in the future."[2] Normally, such transfers are worse than zero-sum transfers. One of the reasons for this is the cost of administering the transfers. Economists Michael Boskin and Edgar Browning have estimated that the cost to the private economy of a program is three times its benefit.[3]

The administrative costs of the proposed transfers would be particularly high because of the complexity of the methodologies the Department has devised. The Department proposes to validate a model that employs a long list of predictors of insolvency, evaluate the performance of the model, produce scores for each borrower, and thereby conduct an individualized determination of whether each borrower fits within the hardship standard under subsection (a) and would, as a result, qualify for a waiver. 89 Fed. Reg. at 87,145-47. The Department would gather data itself on the various inputs for individual borrowers as applications from borrowers are not required.

Moreover, subsection (d) would operate fully independently and "would likely involve detailed reviews of applications submitted by borrowers or other data already in the Department's possession." *Id.* at 87,149.

The Department acknowledges that these massive and complex projects could result in significant administrative costs, *id.* at 87,156, and would require hiring additional staff. *Id.* at 87,157. Subsection (d) in particular would cause the Department to "incur significant costs to create, disseminate, and process applications to complete a holistic assessment of the information submitted by the borrower related to hardship." *Id.* at 87,156. The Department estimates that the personnel costs for reviewing its estimate of 4 million applications annually (apparently just for subsection (d)) to be $100 million. *Id.* at 87,147.

The costs of the Department's proposal to waive the obligations of debtors to the United States would, therefore, greatly exceed its benefits. Moreover, the proposed rule is opaque, disorganized, and unauthorized. Accordingly, the Department should take no further action in this rulemaking other than, in due course, to refer the issue of its proper objectives in this matter to a new committee under the auspices of the Department of Government Efficiency.

Cordially yours,

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Attorney

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[2] Chris Edwards, *How the Government Spends $6.7 Trillion*, Cato Briefing Paper No. 174 at 4 (Mar. 4, 2024).

[3] *Id.* at 5 (citing Michael J. Boskin, "A Framework for the Tax Reform Debate," in Frontiers of Tax Reform, ed. Michael J. Boskin (Stanford, California: Hoover Institution Press,1996), p. 14; Edgar K. Browning, Stealing from Each Other: How the Welfare State Robs Americans of Money and Spirit (Westport, Connecticut: Praeger, 2008), p. 179.)