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U.S. Department of Education
400 Maryland Ave, S.W., Room 2C172
Washington, D.C. 20202

August 12, 2022

Re: NPRM - Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program

Docket ID ED–2021–OPE–0077

Dear Mr. Gaina,

The National Student Legal Defense Network (“Student Defense”)¹ writes in response to the request for comments regarding the Notice of Proposed Rulemaking (“NPRM”) published in the *Federal Register* on July 13, 2022.² The NPRM addresses many issues facing student loan borrowers and the Department’s oversight of the programs authorized by Title IV of the Higher Education Act (“HEA”). Pub. L. No. 89-329, § 401 *et seq.*, 79 Stat. 1219, 1232 (codified as amended at 20 U.S.C. § 1070 *et seq.*). In this comment, we focus specifically on the Department’s proposals, statements, and actions regarding “recoupment,” *i.e.*, whether and how the Department intends to, and does in fact, require institutions (as well as those individuals and entities with substantial control over institutions) to reimburse the Department when institutional misconduct gives rise to a successful “Borrower Defense” claim by a student loan borrower.

These issues are not new. In 1991, a bipartisan report by the U.S. Senate Permanent Subcommittee on Investigations led by Senator Nunn (“Nunn Report”) referred to the Department’s “dismal record” in conducting oversight, concluding that the Department “has failed to efficiently or effectively carry out” its responsibilities to oversee federal student aid programs.³ Strikingly—years before the current issues surrounding the Department’s Borrower Defense program—the Nunn Report also stated that the Department “must develop ways to assist those students who continue to be victimized by fraud and abuse” in the student aid system because “the Department’s oversight systems have failed.”⁴ As the Nunn Report made clear, providing assistance to these students was

¹ Student Defense is a non-partisan organization, recognized as non-profit under section 501(c)(3) of the Internal Revenue Code, that works, through litigation and advocacy, to advance students’ rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility. We appreciate the assistance of Brooke Menschel, Democracy Forward Foundation, in the preparation of this comment.

² Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 87 Fed. Reg. 41,878 (July 13, 2022) (to be codified at 34 C.F.R. pts. 600, 668, 674, 682, 685).

³ S. Rep. No. 102-58, at 24 (1991), *available at*:
<https://files.eric.ed.gov/fulltext/ED332631.pdf>.

⁴ *Id.* at 37.

inextricably intertwined with holding wrongdoers accountable and deterring future misconduct. The Department, the Nunn Report concluded, “must not only increase efforts to prevent this type of abuse in the future, but also work with students to ease financial burdens imposed as a result of past abuse.”⁵

In the thirty intervening years since the Nunn Report was released, the Department has published multiple iterations of a “Borrower Defense” rule—including both substantive and procedural versions in the last six years following high-profile scandals generated by for-profit colleges. In each iteration, the Department’s regulations have contemplated that the Department may impose financial liability on educational institutions whose actions lead to successful borrower defense claims. *See, e.g.*, William D. Ford Federal Direct Loan Program, 59 Fed. Reg. 61,664, 61,696 (Dec. 1, 1994) (“1994 Rule”) (codifying, in 34 C.F.R. § 685.206(c)(3), the rule that the Secretary may recoup losses through “an appropriate proceeding” against any “school whose act or omission resulted in the borrower’s successful defense against repayment”). Yet we are unaware of a *single* example of the Department recouping the costs of a “borrower defense” discharge. This fact, combined with the mounting costs of a large volume of borrower defense claims, suggests that the Department struggles to balance the need to provide relief to harmed students, on the one hand, with accountability for (and deterrence of) wrongdoing, on the other.

Defrauded students and borrowers must be compensated for their financial losses. By allowing an institution to participate in the Federal Student Aid programs, the Department—which both certifies institutions for participation and recognizes the accrediting agencies that accredit those institutions—implicitly grants that institution a seal of approval relied upon by students. Accordingly, even apart from legal obligations, when an institution fails to comply with its responsibilities, and when the government fails to properly oversee an institution, the government must ensure that injured parties are properly compensated and take steps to prevent misconduct in the first instance. To do so, the Department must emphasize enforcement and deterrence. In this regard, recoupment of borrower defense discharges is an important tool.

We applaud the Department’s many statements highlighting the importance of recoupment. We agree, for example, that a strong borrower defense rule must “mak[e] it easier for the Department to hold institutions accountable for costs, reducing the financial impact to taxpayers.” 87 Fed. Reg. at 41,879. We also agree that “to protect the title IV programs and ensure accountability . . . it is *critical* that borrower defense regulations contain a process for the Department to recover the cost to the taxpayer caused by discharging all or a portion of loans associated with approved claims from institutions[.]” 87 Fed. Reg. at 41,844 (emphasis added).

The importance of recoupment has not gone unnoticed. Apart from this NPRM, we applaud prior statements by the Department on the subject. For example, as Undersecretary Kvaal reportedly

⁵ *Id.*

stated in March 2022, “if a company owns, controls or profits from a college, it should also be on the hook if the institution fails students.”⁶

Congress has also taken notice. For example, a coalition of U.S. Senators has urged this Administration to prioritize the “primary goal of strengthening regulations to protect *students and taxpayers* from the risks *and costs* of predatory for-profit colleges.”⁷ And more directly, in October 2021, Congresswoman Rosa DeLauro, the Chair of the U.S. House of Representatives Committee on Appropriations and its Subcommittee on Labor, Health and Human Services, Education, and Related Entities, wrote a letter to Secretary Cardona, stating:

... student borrowers who were harmed should receive swift relief without having to wait for potentially lengthy proceedings where institutions can contest determinations. However, the Department must draft strong rules that establish an expectation that there will always be straightforward, substantial consequences for the predatory actions that lead to a successful borrower defense claim.⁸

Congresswoman DeLauro is correct: the Department must draft strong rules that establish—as a baseline expectation—the consequences of predatory actions that lead to successful borrower defense claims. The Department must ensure that the regulations provide the authority to “impose sanctions and corrective actions on predatory institutions *on top of recouping full amounts* from loans discharged.” And the Department must ensure that it takes the necessary steps to “recoup funds retroactively to avoid th[e] negative incentive and to strengthen the deterrent effect of the recoupment process.” *Id.*

Unfortunately, we are concerned that aspects of the NPRM make the Department’s statements illusory. **The NPRM proposes—by its own admission—a system that will continue to fail borrowers and taxpayers by only recouping an estimated 2% of borrower defense discharges.**⁹ At the same time, the Department’s proposal shows only a slight decrease in the

⁶ Annie Nova, *Department of Education Says Owners of Trouble Private Colleges Will be on the Hook for Costs to Taxpayers*, CNBC (Mar. 23, 2022, 1:49 PM), <https://www.cnbc.com/2022/03/23/feds-say-owners-of-troubled-schools-responsible-for-costs-to-public.html>.

⁷ Letter. from Sen. Richard Durbin et al. to Miguel Cardona, Sec’y of Educ. (July 1, 2021), *available at* <https://www.durbin.senate.gov/imo/media/doc/Consumer%20Protections%20and%20Program%20Integrity%20Dem%20Caucus%20Letter%207.1.21.pdf>.

⁸ Letter from Rep. Rosa DeLauro to Miguel Cardona, Sec’y of Educ. (Oct 4, 2021), *available at* <https://delauro.house.gov/sites/delauro.house.gov/files/documents/DeLauro%2010.4.21%20letter.pdf>.

⁹ In the “Regulatory Impact Analysis” section of the NPRM, the Department predicts that under the proposed system, for every dollar transferred from the Department to an affected borrower on an annualized basis, only approximately 2% would be reimbursed to the Department by affected institutions. *See* 87 Fed. Reg. at 41,964 (Table 11) (comparing “Borrower Defense claims

anticipated volume of submitted claims (based on loan disbursement date, *no* decrease from 2023 to 2028), suggesting that the rule—as drafted—may not achieve the desired deterrent effect.

Given these estimates, the Department must make important changes to the regulations, along with key operational changes and commitments, to create and effectuate a process that emphasizes deterrence and ensures that taxpayers do not continue to foot the bill for predatory profiteering. We thank the Department for the opportunity to comment on the proposal and hope to ensure the best possible rule to protect students and taxpayers alike.

I. The Department Must Commit to Holding Bad Actors Accountable for Pre-2023 Misconduct.

As discussed below, we support the Department’s plan to bifurcate the borrower defense process. Injured students should not be forced to wait out a lengthy adjudicatory process before obtaining loan relief. We also support the Department’s decision to establish a more permissive relief standard to benefit past and future borrowers. However, by retroactively applying a new standard to borrowers *and* bifurcating the process, without displaying a meaningful commitment to recoup from wrongdoers, the Department risks granting a “get out of jail free” card with respect to institutional misconduct predating July 1, 2023. Because the Department proposes to use a more permissive standard to grant relief—which it absolutely should—it must also commit to using the appropriate prior standard to recoup.

Institutions—including (and indeed *especially*) those institutions that the Department has found to have “strong indicia regarding substantial misconduct”—should not be allowed to escape accountability simply because the Department is choosing to provide a more permissive standard for borrowers or is settling a claim in litigation.¹⁰

II. Personal Liability is Critical to Recoupment and Deterrence.

As the Department rightly recognizes in NPRM, recoupment is critical to deterrence. *See e.g.*, 87 Fed. Reg. at 41,947 (“[T]he Department also expects a deterrent effect from the proposed regulations as institutions adjust their behavior according to the proposed rules.”); *id.* at 41,949 (noting that “[a]n institution that engages in problematic practices for years could face significant liabilities from approved borrower defense claims that they cannot afford,” which will “deter[] institutions from engaging in misleading or other questionable marketing practices[.]”).

from the Federal government to affected borrowers” to “Reimbursements of borrower defense claims from affected institutions to the Federal government”).

¹⁰ Our concern in this regard has been heightened in recent weeks by the Department’s pronouncements (as part of the *Sweet v. Cardona* litigation), that its use of “settlement and compromise” authority to resolve that lawsuit will not “constitute evidence” or “be considered” by the Department in assessing liabilities against institutions determined to have “strong indicia” of “substantial misconduct.” *See* Def’s Consolidated Opp. to Mtns. For Intervention, *Sweet v. Cardona*, No. 3:19-cv-03674-WHA, Dkt. 288 at 13–14 (N.D. Cal. July 25, 2022); Decl. of Ben Miller, *Sweet v. Cardona*, No. 3:19-cv-03674-WHA, Dkt. 288-1 at ¶ 11 (N.D. Cal. July 25, 2022).

In 2015, then-Deputy Attorney General Sally Yates issued a memorandum about the importance—from an enforcement *and* deterrence standpoint—of holding individual wrongdoers personally accountable for “corporate misdeeds.” Then the number-two ranking official in the U.S. Department of Justice, Deputy AG Yates wrote that “[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public’s confidence in our justice system.”¹¹

The Yates Memorandum directed the Department of Justice to “fully leverage its resources to identify culpable individuals at all levels in corporate cases” and to use its “best efforts to hold to account the individuals responsible for illegal corporate conduct.” The same must be true with respect to the student loan programs.

The Department has the tools at its disposal to do just that. Long before Sally Yates became Deputy Attorney General—on the heels of the Nunn Report and in connection with the 1992 reauthorization of the HEA—Congress explicitly and intentionally added provisions giving the Department the authority—and in some cases, a mandate—to recover financial losses from individuals who “exercise substantial control over [an] institution,” *i.e.*, individuals who “directly or indirectly” control a “substantial ownership interest in the institution,” and individuals who are “member[s] of the board of directors, the chief executive officer, or other executive officer of the institution or of an entity that holds a substantial ownership interest in the institution” (collectively, the “Institutional Control Group”).¹²

¹¹ Memorandum from Sally Q. Yates, Deputy Att’y Gen. to Dep’t of Just. (Sept. 9, 2015), available at <https://www.justice.gov/archives/dag/file/769036/download>.

¹² See Higher Education Amendments of 1992, Pub. L. No. 102-325 § 498(e), 106 Stat. 448, 649 (1992) (adding HEA § 498(e)(1), 20 U.S.C. § 1099c(e)). In that same legislation, Congress added other specific references to individual liability, including, for example, in the context of closed school loan and false certification discharges. See Pub. L. No. 102-325 § 428, 106 Stat. at 551 (amending HEA § 437 to include § 437(c)(1), 20 U.S.C. § 1087(c)(1) and requiring the Secretary to discharge such loans and to “pursue any claim available to such borrower against the institution *and its affiliates and principals*”) (emphasis added). Separately, the HEA provides that if an “individual” “willfully fails to pay” or “willfully attempts in any manner to evade payment of” a refund owed to the Department, such individual may be liable “as a responsible person for a penalty under section 6672(a)” of the Internal Revenue Code of 1986, with respect to the nonpayment of taxes. HEA § 498(e)(6), 20 U.S.C. § 1099c(e)(6); HEA § 437(c)(1), 20 U.S.C. § 1087(c)(1).

The emphasis on personal liability was recommended by the Office of the Inspector General (“OIG”), which testified that:

“[T]he HEA should be amended to require owners of corporate proprietary schools to be personally liable for school losses. Current law allows Title IV participation by corporate proprietary schools, but does not provide a means of holding school owners personally liable for losses caused by a school’s failure. Thus, when schools close or otherwise fail to meet

Holding members of the Institutional Control Group personally liable is particularly important given the relationship between recoupment of large liabilities and institutional bankruptcy. In the past decade, numerous large for-profit chains shuttered under the weight of consumer-facing law enforcement investigations, resulting in substantial (*i.e.*, multi-hundred million dollar) borrower defense claims *and* institutional bankruptcies. For example, between January 1, 2015 and January 1, 2022, more than 42,300 borrower defense applications were filed by borrowers from ITT Technical Institute. During the same period, more than 155,000 claims were filed by borrowers from Corinthian Colleges, Inc.¹³ The relief provided has been substantial; and both companies entered bankruptcy shortly after announcing a closure, thereby leaving the financial burden on the Department.

In these cases, the bankruptcy filing acted to limit the Department's ability to recoup. Under section 362(a) of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, the following acts are automatically stayed:

- “[T]he commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case”
- “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case.”

11 U.S.C. § 362(a)(1), (6).¹⁴ As a result, once an institution has filed for bankruptcy, it is nearly impossible for the Department to pursue liabilities against the institution itself outside of that

their financial responsibilities, owners are able to escape with large personal profits while the taxpayer and student are left to pay the bill.”

H.R. Rep. No. 102-447, at 84, 1992 U.S.C.C.A.N. 334, 417–18 (1992). In addition, OIG recommended that the law “ensure that school owners are held personally liable for the accuracy of information, claims or other statements on which institutional eligibility is based.” *Id.*

¹³ Documents produced in response to ED FOIA Nos. 22-01683-F, 22-02164-F and 22-02546-F (on file with Student Defense). *See also National Student Legal Defense Network v. U.S. Dep’t of Educ.*, No. 1:22-cv-01473-RDM (D.D.C. 2022).

¹⁴ The automatic stay applies to “all entities,” including any “governmental unit.” 11 U.S.C. §§ 101(15), 362(a); *In re Univ. Med. Ctr.*, 973 F.2d 1065, 1074 (3d Cir. 1992) (stating that “Congress subjected the government, acting as [a] creditor, to the limitations of the automatic stay.”). The Department is exempt from the automatic stay when seeking to enforce a “police or regulatory power,” 11 U.S.C. § 362(b)(4), which arises only when the government is acting “to prevent or stop [a] violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to *fix* damages for violation of such law.” *In re Univ. Med. Ctr.*, 973 F.2d at 1075 (emphasis added) (citing H.R. Rep. No. 95-595, at 343 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6299). *See also, e.g., Solis v. SCA Rest. Corp.*, 463 B.R. 248, 251–52 (E.D.N.Y. 2011) (“In attempting to apply the § 362(b)(4) exception, courts look to the purposes of the law that

proceeding. Even if the Department attempts recoupment within the bankruptcy proceeding, the government's status as an unsecured creditor (except as to specific priorities delineated in 11 U.S.C. § 507) renders meaningful recoupment unlikely, eviscerating any deterrence effect.

Personal liability is therefore critical. When an entity files for bankruptcy, that filing does not stop the Department from pursuing individual owners and executives, within the statutory framework set forth in the HEA. Although the HEA and existing regulations afford the Department the tools necessary to hold individuals accountable, the Department can build into regulations steps that could clear the path for *individual, personal* liability (including liability for private equity and other investors) for recoupment of borrower defense outlays. We therefore propose¹⁵ that the Department:

- (1) Amend 34 C.F.R. Part 668 to require institutions, as a condition of participation in the Title IV programs, to affirmatively waive any right to contest that the assessment of a liability violates § 362(a) of the Bankruptcy Code, unless the Department seeks to collect that liability. This can be accomplished by interpreting 11 U.S.C. § 362(b)(16) to state that the assessment (and/or repayment) of a liability is a condition of determining an entity's financial responsibility, which is a mandatory component of determinations "regarding the eligibility of the [institution] to participate in programs authorized under [the HEA]." Doing so will allow the Department to then require the "assumption" of liability by a member of the Institutional Control Group, as authorized by the HEA.
- (2) Amend the regulations governing the Direct Loan Agreement ("DLA") (and the DLA itself) to require institutional representatives who sign the Program Participation Agreement ("PPA") and DLA to acknowledge that there may be a claim for funds, within the meaning of the 31 U.S.C. § 3701, against those who exercise "substantial control," over the institution (*i.e.*, the Institutional Control Group) stemming from the failure to "perform [an institution's] functions pursuant to the [DLA]."
- (3) Amend the regulations governing the PPA to require all individuals with "substantial control" over an institution to acknowledge, in writing, that the Department can legally require them to personally assume liabilities established by the Department. Such a provision should also include an acknowledgment by the individuals that institutional liabilities to the Department that are past-due can be legally enforceable against those individuals. Such a

the government seeks to enforce to distinguish between situations in which a state acts pursuant to its 'police and regulatory power,' and where the state acts merely to protect its status as a creditor." (internal quotation marks omitted). Where an institution has *closed* or ceased participating in the Title IV programs, the Department's role as a *regulator* is naturally diminished, and it is operating more as a *creditor*.

¹⁵ Many of these ideas were set forth previously by Student Defense. See Daniel Zibel & Alice Yao, Nat'l Student Legal Def. Network, *Protection & The Unseen: Holding Executives Personally Liable under the Higher Education Act* (2020), <https://www.defendstudents.org/news/body/docket/100-Day-Docket-Personal-Liability-Report.pdf>.

provision can also require their consent to the use of nontax debt collection mechanisms to the extent permitted by law.

- (4) Amend 34 C.F.R. Part 668 to require that the institution and members of the Institutional Control Group consent to the maintenance of information regarding liabilities owed to the Department in a “system of records” that identifies both the institution and members of the Institutional Control Group. Establishing a system of records will allow the Department to report an individual’s failure to repay a liability to consumer reporting agencies.
- (5) Amend 34 C.F.R. Part 668 to require individuals and institutions to acknowledge that the procedures afforded to the institution for a reconsideration of any liability, *i.e.*, the Office of Hearings & Appeals (“OHA”) appeal process in 34 C.F.R. Part 668 Subpart H, are sufficient “reconsideration” procedures for a liability assessment under 31 U.S.C. § 3711(e)(2). The provision could note that if such procedures are followed, and the debt remains delinquent for a “period of 180 days,” *id.* § 3711(g)(1), after the Department requires assumption, the Department can then “transfer the debt or claim to the Secretary of the Treasury” who may take “appropriate action to collect” on the claim.

III. The Department Should Both Acknowledge & Explain that it is Reallocating the Burden of Proof in Recoupment Proceedings

We also applaud the Department for ensuring in the NPRM that the burden of proof in Department-initiated recovery proceedings will rest with the educational institutions liable for losses stemming from successful borrower defense claims. This is a critical and appropriate move that ensures the regulations serve the Department’s long-standing stated goals: protecting students, deterring misconduct, safeguarding taxpayer dollars, and ensuring that the Department is using its resources as efficiently and effectively as possible. In so doing, however, the NPRM neither acknowledges this change, nor explains its rationale. Accordingly, the Final Rule should provide a detailed explanation of the revised process and burden allocation and explain why it is appropriate.

The Department’s Recoupment Process Under the 2022 NPRM

The 2022 NPRM bifurcates the relief determination for the borrower from the recoupment process. The recoupment process portion eliminates 34 C.F.R. § 668.87 in its entirety; adds a new regulatory section (34 C.F.R. § 685.409) that provides a “general framework” for the procedure for the Department to recoup; and relies on pre-existing procedures in 34 C.F.R. subpart H for the Department to recover from educational institutions. NPRM, 87 Fed. Reg. at 41,911-12, 41,941, 42,007.

We support the use of the Subpart H framework to establish liabilities and provide institutions with sufficient procedural rights. In the Final Rule, the Department should clarify how its recoupment efforts will work within the existing Subpart H proceedings, which are designed for appeals of a “final audit determination or a final program review determination arising from an audit or program review of the institution’s participation in any Title IV, HEA program[.]” 34 C.F.R. § 668.111(a). We recommend that the Department not only clarify that it will be using its Program Review authorities

to assess an institution's borrower defense liability, but also clarify its statutory and legal basis for doing so.¹⁶

Placing the Burden on Educational Institutions is a Sensible Revision

Having taken the recoupment process out of Subpart G and moved it to Program Reviews and Subpart H, the NPRM appropriately ensures that institutions, rather than the Department, bear the ultimate burden of proof in such proceedings. Compare 34 C.F.R. § 668.89(b)(3)(1)(iii) (“The designated department official has the burden of persuasion in a borrower defense and recovery action.”) with 34 C.F.R. § 668.116(d)(2) (“An institution . . . requesting a review of . . . [a] determination issued by the designated department official . . . ha[s] the burden of proving . . . that

¹⁶ We note in this regard that the Department already uses an off-site program review process to impose liabilities for “closed school loan discharges.” The imposition of liabilities in this manner gives schools right to an appeal through Subpart H. See generally *In Re: Cosmetology Career Institute*, No. 21-48-SP 12 (May 27, 2022). The proposed process is analytically and procedurally identical.

More generally, as the NPRM notes, section 454(a)(3) of the HEA requires that before participating in the Direct Loan program, an institution must accept financial liability for any losses resulting from its failure to comply with its obligations under the program. 20 U.S.C. § 1087d(a)(3). The Department is required to conduct program reviews of all participating educational institutions to assess compliance and “strengthen the administrative capability and financial responsibility provisions.” 20 U.S.C. § 1099c-1(a). HEA § 498 describes the Department’s authority to determine the “the administrative capability and financial responsibility of an institution of higher education” in part by “determin[ing] whether an institution . . . is able . . . to meet all of its financial obligations.” 20 U.S.C. § 1099c(c). Those obligations include “repayments to the [Department] for liabilities and debts” that include “liabilities . . . to the Secretary for funds under [the HEA], including loan obligations discharged.” 20 U.S.C. §§ 1099c(c)(1)(C), 1099c(c)(3)(A). As the Department recognized in the 2016 Rule, “[t]hese provisions are meaningless if the Secretary can enforce claims against institutions only if the HEA or another statute explicitly authorizes such recoveries.” 2016 Rule, 81 Fed. Reg. 75,930. And in *Chauffeur’s Training School, Inc. v. Spellings*, 478 F.3d 117, 129-30 (2d Cir. 2007), the Second Circuit held that the Department’s use of its Program Review authority to assess liabilities on institutions was a reasonable application of the HEA. Doing so is “quite consistent with the text and apparent intention of the statute.” *Chauffeur’s Training Sch., Inc.*, 478 F.3d at 129-30.

The Department’s interpretation of its statutory authority is also consistent with common law principles. Because borrowers have a right to recover from educational institutions for losses incurred as a result of an institution’s failures, and those rights are transferred to the Department once a loan is discharged, see, e.g., proposed 34 C.F.R. § 685.411, 87 Fed. Reg. 42,010, those regulatory provisions “create a right of recovery for the Secretary . . . upon discharge of student loans.” *Cosmetology Career Institute*, Docket No. 21-48-SP, at 8 (evaluating the nearly identical regulatory provision concerning closed school discharge, 34 C.F.R. § 685.214(e)). A key purpose of transferring the borrower’s right to recover from educational institutions is to “preserve [the Department’s] right to recover from third parties to mitigate loss to the Federal taxpayer investment.” NPRM, 87 Fed. Reg. 41,906.

[it] complied with program requirements.”).¹⁷ This framework is sensible to enhancing efficiency, minimizing confusion for both the Department and educational institutions, and ensuring consistency across similar processes for recovering financially from educational institutions that have violated their obligations. Reallocating the burden in the Subpart H proceedings from the Department to educational institutions is central to meeting the goals and purpose of the NPRM.

Allocating the burden to the educational institutions is logical and prudent for numerous reasons. First, by mandating that borrower defense recoupment and other liability proceedings utilize the same procedures that exist within Subpart H, the NPRM ensures that neither the Department nor educational institutions are required to navigate an unfamiliar process. (As the Department’s own records reflect, Subpart G proceedings are rarely used; and we suggest the Department provide data to support that point in the Final Rule). Streamlining liability proceedings will alleviate confusion on the part of both the Department and the educational institutions and will reduce delays in resolving borrower defense claims—which will no longer be tied to the recoupment proceedings—and the Department’s repayment claims.¹⁸ With a more efficient process, the Department will be able to adjudicate borrower defense claims more efficiently and effectively.

Second, in recoupment proceedings, the educational institutions, rather than the Department, will have the easiest access to any additional relevant evidence that has not already been considered. Under the NPRM, Subpart H proceedings will arise only after: (i) the Department issues its Program Review Report (“PRR”); (ii) the educational institution has the opportunity to rebut facts and allegations in the PRR; and (iii) the Department issues its Final Program Review Determination (“FPRD”), asserting the Department’s conclusion regarding recoupment.¹⁹ Moreover, evidence relevant to the borrower defense claim will have been *twice* determined to be consistent with a finding of liability for the educational institution even before a Subpart H proceeding began (once in the borrower-facing forgiveness determination and a second time when the Department issues the

¹⁷ See also *Chauffeur’s Training Sch., Inc.*, 478 F.3d at 122 (reiterating that the educational institution bears the burden in administrative financial liability hearings); *St. Louis Univ. v. Duncan*, 97 F. Supp. 3d 1106, 1110 (E.D. Mo. 2015) (same). OHA has affirmed that this burden of proof allocation applies in recoupment proceedings as recently as May 2022. *Cosmetology Career Institute*, Docket No. 21-48-SP, at 12 (dismissing arguments by the educational institution that § 668.116(d)’s burden of proof allocation did not apply in the context of recovery for losses incurred through school loan discharge proceedings where the Department provided adequate notice of the proceedings because “the Department has authority to assess liability for discharged loans”).

¹⁸ The NPRM touches on some, although not all, of the benefits of reallocating the burden and standardizing the liability procedures. See, e.g., 87 Fed. Reg. 41,912 (“[Under the Proposed Rule’s framework,] [b]orrower defense claimants would receive faster answers on group applications[,] . . . [t]axpayers and the Department would still preserve a process for seeking recoupment for liabilities from an institution[, a]nd the institution would be subject to a familiar, long-established process that already affords significant due process rights before a liability can become final.”)

¹⁹ As noted *infra*, under the Department’s long-standing application and interpretation of the HEA, the FPRD is not issued until after the Department has provided the PRR to the institution, given the institution an opportunity to respond to the PRR, and the Department has considered that response before issuing a final determination. HEA § 498a, 20 U.S.C. § 1099c-1.

FRPD reflecting the Department’s determination that the institution must pay the costs of forgiveness). To the extent that additional evidence rebuts a liability determination but was not already provided to the Department, the educational institution will be the only entity to have access. *See, e.g., United States v. Fior D’Italia, Inc.*, 536 U.S. 238, 257 n.4 (2002) (Souter, Scalia, and Thomas J., dissenting) (noting that the “general rule [is] that the burden shifts to those with peculiar knowledge of the relevant facts . . . All else being equal, the burden is better placed on the party with easier access to relevant information”) (citing *Campbell v. United States*, 365 U.S. 85, 96 (1961) (“[T]he ordinary rule ... does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary”); *National Communications Assn. v. AT & T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001) (“[A]ll else being equal, the burden is better placed on the party with easier access to relevant information”)) (additional citations omitted).

Because the burden will be placed on the educational institutions in the Subpart H process, we recommend that the Department amend 34 C.F.R. § 668.116(e) to allow, in cases where an institution is challenging recoupment related to Borrower Defense, the institution to provide any evidence that is reasonably necessary for the school to prove its defense. We believe that the Department is capable of reviewing and considering such evidence, and that opening the door in this manner to evidence will ultimately minimize appellate (either for the Secretary or in federal court) challenges to OHA recoupment decisions.

Finally, placing the burden on educational institutions will serve as a further deterrent where those same institutions will be responsible for establishing that they should not be liable for repaying losses from successful borrower defense claims. This effect will extend beyond those institutions facing recoupment proceedings and will likely result in “improved school conduct” more generally. 87 Fed. Reg. 41,881. More conscientious educational institutions will ultimately “reduc[e] the financial impact to taxpayers.” 87 Fed. Reg. 41,879; *see also*, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926, 76,059 (Nov. 1, 2016) (“2016 Rule”) (“In the absence of any recovery from institutions, taxpayers would bear the full cost of successful claims from affected borrowers.”).

The Department Should Acknowledge and Explain the Burden Reallocation

Although the revision to the Program Review process and Subpart H for recoupment is sensible and appropriate, the Department should explicitly acknowledge and explain it in the Final Rule.²⁰

²⁰ The proposed changes to the recoupment process from Subpart G to the Program Review/Subpart H process discussed in this section are not necessarily subject to the Administrative Procedures Act’s notice and comment requirements as they revise procedures for recovery proceedings that were established through a 2017 procedural rule. *See* Student Assistance General Provisions, 82 Fed. Reg. 6,253 (Jan. 19, 2017) (“2017 Procedural Rule”); *see also* 5 U.S.C. § 553(b)(A). The specific regulations concerning the burden allocation, which seek to further revise and refine the procedures and practices established by the 2017 Procedural Rule, are analytically indistinguishable from those adopted in 2017 and therefore did not require notice and comment. The APA “mandate[s] that agencies use the same procedures when they amend or repeal a rule as

Under the Administrative Procedures Act (“APA”) a regulation is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” where the agency fails to engage in “reasoned decision making” throughout the regulatory process. *Ass’n of Priv. Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012) (citing 5 U.S.C. § 706(2)(A)). Agencies may demonstrate reasoned decision making by relying on appropriate factors (and avoiding those that Congress did not intend to inform agency decisions), considering all important aspects of a problem, and providing an explanation for the decision that is consistent with the evidence. *See, e.g. Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

“One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Providing an adequate explanation for agency decisions is particularly important where, like here, a proposed regulation would result in a policy change. Where an agency proposes a regulatory change, the agency must at least “display awareness” of the change by acknowledging both the preexisting policy and the proposed revision. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). “An agency may not, for example, depart from a prior policy *sub silentio*.” *Id.* (emphasis original). Moreover, to ensure compliance with the APA, the agency must provide “good reasons for the new policy.” *Id.*; *see also Priv. Sector Colls. & Univs.*, 681 F.3d at 441 (“An agency’s departure from past practice can, however, if unexplained, render regulations arbitrary and capricious.”) (internal citations omitted). “Good reasons” need not be overly detailed or definitively establish that the new policy is objectively superior, but the agency’s reasoning must demonstrate that the new policy is statutorily permissible and that the agency believes it is better than the pre-existing policy. *FCC v. Fox*, 556 U.S. at 515. To the extent the new policy “rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests,” a “more detailed justification” may be necessary. *FCC v. Fox*, 556 U.S. at 515; *accord, e.g., DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

Here, the final rule should evince the Department’s “reasoned decision making” by acknowledging the proposed change to the recoupment process—including specifically placing the burden on educational institutions, demonstrating that the proposed framework is permissible under the HEA, and explaining why the Department believes it is better to allocate the burden in recoupment proceedings to the educational institution rather than to the Department. Although the NPRM already incorporates some evidence of reasoned decision making, the final rule could be more comprehensive and more explicit.

they used to issue the rule in the first instance.” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 101 (2015); *cf. Friends of Animals v. Bernhardt*, 961 F.3d 1197, 1205–06 (D.C. Cir. 2020) (“[I]t is, of course, black-letter administrative law that ordinarily an agency that promulgates a rule under § 553’s auspices must use the same procedure to revoke that rule. . . . But we do not see how a government action that illegally never went through notice and comment gains the same status as a properly promulgated rule such that notice and comment is required to withdraw it.”). Where regulations are exempt from notice and comment under the APA, good cause exists to waive the HEA’s negotiated rulemaking requirement..

As discussed above, the HEA supports the proposed recoupment process and burden allocation. The final rule should cite the relevant regulatory sections and case law that support the Department's interpretation of the HEA.

Moreover, because the NPRM does not explicitly address a particular policy change, namely reallocating the burden in recoupment proceedings from the Department to the educational institutions, it also does not explain the reasons behind that change, or fully unpack the reasons for revising the recoupment process. While the NPRM does highlight the value of using a consistent process for liability proceedings across different programs, the final rule should elaborate on the reasons behind the change. Those reasons, as explained above, include increased efficiency, which will result in the Department processing borrower defense claims more quickly, and decreased taxpayer burdens. The proposed revisions also further the purpose of the HEA and student loan discharge provisions writ large. The final rule should be explicit about those connections. *See, e.g., Judulang v. Holder*, 565 U.S. 42, 55 (2011) (“[T]he [agency’s] approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system. A method for [achieving an agency goal] that bears no relation to these matters . . . is arbitrary and capricious.”).

IV. Enforcement, Recoupment, and Government Discretion.

When pursuing recoupment, or fulfilling any other function, the Department is bound to act in a timely fashion in service of its mission and to be a responsible fiduciary of taxpayer dollars. Doing so requires that the Department adhere to reasonable timeframes and regularly exercise its discretion by considering a range of factors and determining how best to proceed. Although this exercise of discretion is inherent to the Department's normal functioning, the NPRM threatens to inadvertently restrict the Department's ability to regularly assess the appropriate course of action on whether to seek recoupment.

In describing the process, the NPRM rightly acknowledges that recoupment will not always be feasible and that the Department will consider various factors when determining whether to pursue recovery from an educational institution. *See* 87 Fed. Reg. 41,912. Yet we urge the Department to ensure that in seeking to provide educational institutions with certainty about the recoupment process, the Final Rule does not handcuff the Department's ability to exercise its normal discretion. As drafted, the NPRM misrepresents the nature of the Department's prosecutorial discretion by suggesting that the Department may need to specify in advance all instances where it might not seek to recoup losses incurred from successful borrower defense proceedings. *See* 87 Fed. Reg. 41,912 (“The Department also proposes that it would have the option to not seek recoupment in circumstances where doing so would not make financial sense.”). In fact, the Department is not only able to exercise its discretion *without* proposed 34 C.F.R. § 685.409(b), it is obligated to do so in order to best serve taxpayers and fulfill its mission. *See, e.g.,* 2016 Rule, 81 Fed. Reg. 75,968: (“[I]t is important for the Department to retain discretion in deciding whether to initiate a proceeding to adjudicate its right of recovery from a school.”). Because section 685.409(b) does nothing to alter the Department's existing discretion, we recommend removing the relevant narrative language and eliminating 34 C.F.R. § 685.409(b) or substantially revising 34 C.F.R. § 685.409(b)(1) to clarify that

the Department will exercise its discretion consistently with normal practice. 87 Fed. Reg. 41,912; 34 C.F.R. § 685.409; 87 Fed. Reg. 42,009-10.

The Department may very well identify a number of reasons *not* to pursue recoupment beyond specific financial calculations. For example: 1) the Department may not wish to further punish an educational institution that has taken affirmative steps to remedy its prior failures; 2) short-term priorities and resources may not support the Department’s participation in recoupment proceedings, despite a long-term financial benefit of doing so; and 3) engaging in recoupment proceedings may be strategically unwise if the Department or another agency (such as the Department of Justice) is considering a broader action against the educational institution. Moreover, there are important reasons the Department may seek recoupment, even where doing so is financially detrimental. For example, the Department might choose to pursue a financially disadvantageous recoupment: 1) in the case of a known bad actor that has previously escaped liability; 2) where the Department believes it is strategically wise to establish a record of liability for future litigation or legislative purposes; or 3) if the Department determines that pursuing recoupment in most cases will enhance the likelihood that more educational institutions will be deterred from wrongdoing.²¹

Finally, Student Defense also supports the inclusion of timelines proposed by the Department in proposed 34 C.F.R. § 685.406 for adjudicating borrower defense claims. However, the NPRM also limits the Department’s exercise of its discretion in determining when to recoup from liable educational institutions in some of these cases by asserting that institutions will not face recoupment actions if the Department fails to meet the decisional timelines. The NPRM suggests that the reason is because the “Department’s failure to render a decision by the end of the timeline would render the loan[] unenforceable.” 87 Fed. Reg. at 41,904. Even if the loan is rendered “unenforceable” at this point, the Department should not simply waive its right to recoup from the institution. On a case-by-case basis, the Department may find a reason to make factual findings regarding borrower defense, and seek recoupment, even after a loan is otherwise deemed “unenforceable” as to the borrower. The Department should not limit its discretion in the Final Rule and has not explained (i) its basis for treating loans in this way; (ii) why such a loan deemed “unenforceable” due to the passage of time following a borrower defense application “would not be viewed as having received an approved borrower defense claim;” or (iii) its statutory authority (outside of the borrower defense regulation) to simply render a loan “unenforceable.” Regardless if the Department fails to comply with a timeline, if the agency determines at a later date that the institution had committed misconduct that gives rise to a borrower defense claim on a now-“enforceable” loan, it should still take action against the school, including recoupment.

V. Transparency is key to deterrence and requires operational improvements.

As the Department stated in the NPRM, “[r]eleasing the results of investigations will teach institutions what types of risky conduct to avoid in the future.” 87 Fed. Reg. 41,888. We agree that transparency around enforcement activities can help deter regulated entities from engaging in

²¹ See Letter from Rep. Rosa DeLauro, *supra* n. 8.

misconduct. Unfortunately, the Department has long been plagued with transparency problems²² which must be remedied.

1. Final Program Review Determinations Must be Issued Quickly. Having opted to rely on the Subpart H processes for recoupment, the Department must focus on, and reduce, the length of time it takes to issue a Program Review. Under the Department’s longstanding application and interpretation of the HEA,²³ the FPRD is not issued until after the Department has provided the PRR to the institution, given the institution an opportunity to respond to the PRR, and the Department has considered that response before issuing a final determination.²⁴

Although the statute does demand that the Secretary afford institutions some time to respond to the PRR before it issues the FPRD, the fact remains that the Department has historically been quite slow to issue final determinations. For example, of the 169 FPRDs (and expedited determination letters) listed on the Department’s website for Fiscal Year 2019,²⁵ 69 of the reviews (more than 40%) began three or more years before. And typically, the review is backward looking—such that a review that began three years prior is often looking at conduct that is four, five, or six years old.

In one particularly egregious case, on January 28, 2019, the Department issued a Final Program Review Determination against Drake College of Business (“DCB”), in which it assessed a liability for \$30.6 million.²⁶ That liability (in essence, an attempt to “recoup” funds improperly received by DCB) was long overdue. The program review which spurred the liability began in August 2010 regarding Award Years 2008-09, 2009-10, and 2010-11 (“year to date”). More than five years after the Program

²² See, e.g., Alexandra Hegji & Henry B. Hogue, Cong. Rsch. Serv., R46143, *The Office of Federal Student Aid as a Performance-Based Organization* 49–53 (2019), <https://files.eric.ed.gov/fulltext/ED603157.pdf>; Letter from Daniel Zibel, Vice President & Chief Counsel & Eileen Connor, Dir., Proj. on Predatory Student Lending, to Miguel Cardona, Sec’y of Educ. (Jan. 13, 2022) (describing how the Department has “allowed its release of facts and data to become woefully outdated”), available at: <https://www.defendstudents.org/news/body/2022.1.13-Transparency-Ltr.pdf>; Letter from Protect Students & Taxpayers Coal. to Miguel Cardona, Sec’y of Educ. (March 2, 2021) (requesting that the Department to “commit to increasing transparency into how schools are performing and actions the Department takes when schools are harming students and taxpayers”), available at: <https://protectstudentsandtaxpayers.org/wp-content/uploads/ED-ltr-transparency-2021.pdf>.

²³ HEA § 498a, 20 U.S.C. § 1099c-1.

²⁴ U.S. Dep’t of Educ., Fed. Student Aid, *Program Review Guide for Institutions* (2017), <https://fsapartners.ed.gov/sites/default/files/attachments/programrevguide/2017ProgramReviewGuide.pdf>.

²⁵ U.S. Dep’t of Educ., Fed. Student Aid, *Program Reviews, FY2019*, <https://studentaid.gov/data-center/school/program-reviews> (last visited Aug. 11, 2022).

²⁶ U.S. Dep’t of Educ., Fed. Student Aid, *Final Rev. Determination, Drake Coll. Of Bus.* (Jan. 29, 2019), available at https://studentaid.gov/sites/default/files/fsawg/datacenter/library/FPRD/Drake_College_of_Business_NJ_022239_01_29_2019_FPRD_Redacted.pdf.

Review began, the Department issued the initial “Program Review Report” on October 25, 2016. As the Department wrote in the 2019 FPRD:

The Department issued its Program Review Report (PRR) on October 25, 2016. On December 21, 2016, counsel for Drake requested an initial 60 day extension to respond to the Program Review Report (PRR). On February 21, 2017, Drake's counsel submitted a second request for an additional 60 days to respond to the PRR. The Department granted both requests. Ultimately, the Department allowed Drake until June 9, 2017, to submit its response to the PRR. Drake did not respond to the PRR or submit the information requested related to any findings. On September 25, 2017, the Department issued a letter to the president of Drake and advised him that the Department had not received Drake's response to the PRR or the results of the required file review. The Department further advised Drake's president that the Department would proceed with its final determination to identify liabilities associated with the program review even if a response was not filed. To date, Drake has not submitted a response.

It should be noted that Drake withdrew its participation in the Title IV programs effective July 31, 2015, and subsequently closed.

Alternatively stated, when the Department issued its FPRD in January 2019, DCB had not been participating in Title IV for 4.5 years and had been seemingly nonresponsive, for approximately two years, to communications regarding the FPRD. For regulated entities to know the rules of the road, including whether they have violated those rules, determinations must be issued timely.

We urge the Department to create and follow practices to avoid these sorts of lengthy delays with respect to borrower defense liabilities.²⁷

2. FPRDs Must be Publicly Released in Real-Time. Not only must the Department expeditiously issue FPRDs to institutions, it must also expeditiously *publicly* release those determinations. Unfortunately, that is not presently the case. Typically, the Department has posted FPRDs on its website via the FSA Data Center. That information is updated annually—not in real-time—and with a substantial lag. As of the submission of this comment, for example, the most recent FPRD to be publicly posted on the Department’s website was issued in September 2020, nearly two years ago.

3. OHA Must Increase Transparency. Just as the Department must improve transparency, so too must it increase the transparency of the Subpart H appeals process. Although OHA publishes (via its website) *decisions* issued by the Office and by the Secretary (on subsequent appeal), everything

²⁷ The DCB FPRD is also noteworthy because of what happened after the Department assessed the liability, *i.e.*, nothing. According to information released by the Department of Education in April 2021 (with data as of February 2021) and again in June 2022 (with data as of January 2022), the \$30.6 liability remains unpaid. *See* Responses to FOIA Nos. 21-00919-F & 22-01861-F (on file with Student Defense).

else about the process is secretive. The public has no way to know whether an appeal has been filed, what arguments were made in support of the appeal, what arguments were made in response to the appeal, and any other procedural issues that can arise within OHA. Whereas federal courts make virtually all pleadings available to the public via PACER (“Public Access to Court Electronic Records”), the public (including state law enforcement, state regulators, and accreditors) has no way to view OHA filings.²⁸

Student Defense has tried using the Freedom of Information Act to gain access to these records, with almost no success. On February 24, 2021, Student Defense submitted a FOIA Request for “all filings for any cases pending before OHA or the Secretary under 34 C.F.R. Part 668 Subparts G or H.” See Department of Education FOIA Ref. No. ED # 21-01030-F. As of July 22, 2021 the Department had not produced any documents, so Student Defense sued the Department in federal court. See *Nat’l Student Legal Def. Network v. U.S. Dep’t of Educ.*, No. 21-CV-01994-APM (D.D.C. July 22, 2021). Even with litigation, and nearly one-and-a-half years after the FOIA was submitted, the Department has not yet completed its production.

* * *

Thank you for your attention to these important issues facing student loan borrowers. For more information, please contact Student Defense Vice President and Chief Counsel Dan Zibel at dan@defendstudents.org.

Sincerely,

The National Student Legal Defense Network

²⁸ The potential need for legitimate redactions to OHA filings is no obstacle. Courts, including federal courts, *routinely* permit and/or require parties to file multiple versions of filings, with certain information redacted or submitted to the court only under seal.