Nos. 23-15049, 23-15050, 23-15051 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THERESA SWEET, et al.,

Plaintiffs-Appellees,

&

EVERGLADES COLLEGE, INC., LINCOLN EDUCATIONAL SERVICES CORPORATION, and AMERICAN NATIONAL UNIVERSITY,

Intervenors-Appellants,

v.

MIGUEL CARDONA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:19-cv-3674 | Hon. William H. Alsup

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1:

1. Intervenor-Appellant Everglades College, Inc., states that it is a nonprofit corporation, that it does not have a parent corporation, and that no publicly traded company owns 10% or more of its stock.

2. Intervenor-Appellant Lincoln Educational Services Corporation states that it is a publicly traded corporation, that it does not have a parent corporation, and that no publicly traded company owns 10% or more of its stock.

3. Intervenor-Appellant American National University, Inc., states that it is wholly owned by National University Services, Inc., a privately held Virginia corporation, and that no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

These appeals arise from a government settlement that has few, if any, analogues in American jurisprudence. Through a collusive settlement of a nationwide class action that merely sought to compel the Department of Education ("Department") to restart adjudication of applications for student-loan cancellation, the Department will instead ignore its regulations and governing statutes, forgo adjudication altogether, cancel billions in loans for hundreds of thousands of borrowers, and cut billions in refund checks from the Treasury without an appropriation from Congress. Specifically, the Department will cancel the debt and refund all past payments for individuals who attended any of 151 schools that the Department "determined"—in secret negotiations with Plaintiffs—engaged in "substantial misconduct." These schools have been given no opportunity to defend themselves and, in many instances, have not even received notice of the allegations for which they have been convicted. Appellants are three educational institutions that were named in the settlement, involuntarily, and intervened to protect their rights.

To explain this unprecedented sweeping settlement is to detail its illegality. It is based on a newly discovered and specious claim of statutory authority, under the Higher Education Act ("HEA"), that supposedly permits the Secretary of Education ("Secretary") to cancel, *en masse*, every student loan in the country. It has stripped

hundreds of institutions of due-process and Administrative Procedure Act ("APA") rights. And the Department has done all this in a class action that it says (1) is moot and (2) cannot maintain a certified class. Necessarily, this appeal presents several issues. But that is a function of just how far the district court and settling parties departed from legal norms. All of these issues, independently and together, require reversal.

To understand this settlement in context, it is necessary to consider the political forces that wrought it. The President directed the Department to implement a national program of blanket cancellation of student-loan debt. *See Brown v. U.S. Dep't of Educ.*, 2022 WL 16858525, at *2 (N.D. Tex. Nov. 10, 2022). The Department has complied by announcing two sweeping debt-cancellation programs. The first—a plan to cancel $10,000 of loans per debtor—proceeds under the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act"). A federal court has vacated that program of "vast 'economic and political significance'" because it exceeds the Secretary's authority. *Id.* at *11-12 (quoting *West Virginia v. EPA*, 142 S.Ct. 2587, 2607-14 (2022)). The Supreme Court will address the issue this Term. *See Biden v. Nebraska*, No. 22-506 (U.S. Dec. 1, 2022); *Dep't of Educ. v. Brown*, No. 22-535 (U.S. Dec. 12, 2022). The second program—disguised as this settlement—is the subject of this appeal.

JURISDICTIONAL STATEMENT

This is an appeal from the November 16, 2022 final judgment approving a class-action settlement between Plaintiffs and the Department of Education. 1-ER-28. The district court purported to exercise jurisdiction under 28 U.S.C. § 1331.

Appellants each timely filed notices of appeal on January 13, 2023. 5-ER-898-913; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

The issues presented in this appeal are:

1. Did the district court have jurisdiction to approve a class-action settlement in a case that was already moot?

2. Does the HEA, 20 U.S.C. §§ 1082(a)(6) and 1087e(a)(1), authorize the Secretary to cancel and refund federal student loans *en masse* and outside statutorily defined circumstances?

3. Did the Secretary violate the rulemaking requirements of the HEA and APA by establishing, outside formal rulemaking, new procedures for "review" of borrower-defense applications?

4. Did the district court err in approving a class-action settlement when the requirements of Rule 23 were no longer satisfied?

5. Does a class-action settlement violate the due-process rights of third parties

by constituting a federal regulator's "determination" of "substantial misconduct" by those third parties without notice and an opportunity to be heard?

6. Did the district court err in denying intervention of right to educational institutions directly named in, and harmed by, a settlement by their federal regulator?

STATUTORY PROVISIONS AND RULES

Pertinent materials are in the addendum. *See* Cir. R. 28-2.7.

STATEMENT OF THE CASE

I. FEDERAL STUDENT LOANS AND BORROWER DEFENSE

Under Title IV of the HEA, 20 U.S.C. § 1070 *et seq.*, the Secretary administers the Direct Loan Program, which issues student loans from the federal government, and the Federal Family Education Loan ("FFEL") Program, which, until 2010, allowed students to obtain private loans guaranteed by the federal government. For Direct Loans, the Secretary must "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment." *Id.* § 1087e(h). The Department did so in 1995 (60 Fed. Reg. 37,768 (July 21, 1995)), in 2016 (81 Fed. Reg. 75,926 (Nov. 1, 2016)), in 2019 (84 Fed. Reg. 49,788 (Sept. 23, 2019), and in 2022 (87 Fed. Reg. 65,904 (Nov. 1, 2022)). These regulations establish a "borrower-defense" ("BD") program allowing Direct Loan borrowers to obtain debt cancellation if they prove their school engaged in certain misconduct.

The borrower-defense process entails two steps. In Step One, the Department must notify the school of a BD claim. 34 C.F.R. §§ 685.206(c)(2) & (e)(10), 685.222(e)(3)(i). For loans issued before July 1, 2020, the Department must "consider[] … [a]ny response or submissions from the school." *Id.* § 685.222(e)(3)(i). A Department official then adjudicates the applications "through a fact-finding process" and issues a written decision. *Id.* § 685.222(e)(3)-(4). For loans issued after July 1, 2020, the Department must "provide a copy" of the application to the school, affirmatively "invite the school to respond and to submit evidence" in its defense, *id.* § 685.206(e)(10), and "consider[] the school's response," *id.* § 685.206(e)(11)-(12). The Department then must issue a reasoned written decision. *Id.* Step Two occurs only if—after a Step-One adjudication—the Department finds a school engaged in misconduct, grants a BD application, and discharges debt. The Department may then initiate proceedings to recover the discharged amount from the school. *See id.* §§ 685.206(c)(3) & (e)(16), 685.222(e)(7).

II. THIS LAWSUIT

In 2019, borrowers sued the Department, alleging a "policy of inaction" on their BD applications constituted "unlawfully withheld and unreasonably delayed

agency action" under 5 U.S.C. § 706(1). 4-ER-836, 890-93 ¶¶ 7, 377-404.[1] Plaintiffs were explicit in describing the relief they sought (and did not seek):

> Plaintiffs … do not ask this Court to adjudicate their borrower defenses. Nor do they ask this Court to dictate how the Department should prioritize their pending borrower defenses. Their request is simple: they seek an order compelling the Department to start granting or denying their borrower defenses and vacating the Department's policy of withholding resolution.

4-ER-836-37 ¶ 10. In moving to certify a Rule 23(b)(2) class, Plaintiffs reiterated that they sought "a single injunction requiring the Department to start and to continue adjudicating borrower defenses." 4-ER-828. Because "the Department ha[d]"—at the time—"decided zero applications since June 2018," the district court certified a Rule 23(b)(2) class of:

> All people who borrowed a Direct Loan or FFEL loan to pay for a program of higher education, who have asserted a borrower defense to repayment to the U.S. Department of Education, whose borrower defense has not been granted or denied on the merits….

4-ER-815, 821. "This class definition," the district court held, "shall apply for all purposes, including settlement." 4-ER-821. The Class includes about 296,000 members, U.S. Stay Opp. 8-9, No. 22A867 (U.S. Apr. 12, 2023) ("U.S. Stay Opp."), who received more than $7.5 billion in loans, 3-ER-558.

After summary-judgment briefing, the parties executed a settlement, which would have required the Department to adjudicate pending BD applications and

[1] Plaintiffs' second count was dismissed. 4-ER-833.

issue final decisions on a timeline. 4-ER-776-800. The district preliminarily approved the settlement, 4-ER-772-75, and the Department issued BD decisions. Plaintiffs then moved for final approval of the settlement and to enforce it, claiming that certain denial notices violated the settlement by providing insufficient reasoning. 4-ER-743-71.

After a fairness hearing, at which Plaintiffs registered their complaints about the alleged "form denial notices," the district court withheld approval of the proposed settlement. 4-ER-720. The court noted it was "disappointed" because it had hoped to "get reasoned decisions, even if reasoned denials," 4-ER-721, adding that "[i]t is, after all, impossible to argue with an unreasoned decision," 4-ER-719. The court directed a "return to litigating the merits" and sua sponte ordered Plaintiffs to seek extra-record discovery from the Department, including depositions of Department officials. 4-ER-721. The court directed Plaintiffs to "move for summary judgment as to the lawfulness of the Secretary's delay and the lawfulness of the perfunctory denial notice." 4-ER-717-21, 726. "The merits," as the court outlined them, did not include deciding any BD application.

On March 28, 2021, Plaintiffs supplemented their complaint to add a claim that the Department had adopted an unlawful "presumption of denial" policy for BD applications in violation of 5 U.S.C. § 706(2). 4-ER-695-97 ¶¶ 436-55. Plaintiffs sought an order declaring that class members "are entitled to a decision on the

merits," declaring that the form denials are invalid, and compelling the Department "to lawfully adjudicate each and every borrower defense application." 4-ER-698-99.

Despite claiming that time was of the essence in litigating their APA case, Plaintiffs then spent seventeen months focused solely on obtaining a single deposition of the former Secretary of Education. The district court ordered the deposition to proceed, but this Court granted a mandamus writ and ordered the district court to quash the subpoena. *See In re U.S. Dep't of Educ.*, 25 F.4th 692 (9th Cir. 2022).

Notably, at oral argument in the mandamus proceeding, this Court asked counsel for Plaintiffs and the Department if, given the "new key players in place" at the Department, "the parties could settle again?" Oral Arg. 39:25, *In re Dep't of Educ.*, No. 21-71108 (9th Cir. Oct. 6, 2021). Both parties refused to get "into specifics of whether there are or are not settlement discussions." *Id.* at 45:27. Yet just ten days after this Court granted the writ, the "Parties reported [they are] in [the] process of finalizing settlement negotiations." 5-ER-950; *see also* 3-ER-617.

Six months later, on June 22, 2022, Plaintiffs and the Department filed a fully executed settlement agreement (the "Settlement") and jointly moved for preliminary approval. 3-ER-554-616. Because the briefing schedule was still in force, the next day, on June 23, the Department filed a summary-judgment motion arguing that

because the Department had already resumed adjudicating BD applications, it "has already provided the very relief that Plaintiffs sued to obtain" and thus the case "is moot and must be dismissed." 3-ER-509-10 (cleaned up). The Department also argued there was no longer a basis for class-wide relief. 3-ER-510.

III. THE SETTLEMENT

Despite the court's certification of only an indivisible injunctive class seeking limited APA relief, the Settlement sweeps far more broadly, creating three subclasses and providing differentiated injunctive and monetary relief to each. The Settlement proceeds as follows:

A. Subclass 1: "Automatic Relief Group"

For Class Members who have debt "associated with the schools, programs, and School Groups listed" in Exhibit C to the Settlement, the Department will, within twelve months of final judgment, automatically: (i) "discharge" the debt, (ii) refund "all amounts … previously paid to the Department," and (iii) delete the credit tradeline associated with the debt. 3-ER-580, 582-83 (Definition "S"). If there is a "substantial question" as to whether debt "is associated with" a listed school, that "question will be resolved in favor of the Class Member (*i.e.*, in favor of granting relief)" without further inquiry, adjudication, or process provided to the school. 3-ER-583. Approximately 66% of the Class (196,000 borrowers) will

receive this automatic debt cancellation and refunds without individualized adjudication of their claims. U.S. Stay Opp. 8-9.

Exhibit C originally listed 153 institutions. 3-ER-612-16. The Settlement offers no explanation as to why any school is listed, but the preliminary-approval motion offered a single sentence of explanation:

> [B]ecause the Department has identified common evidence of institutional misconduct by the schools, programs, and school groups identified in Exhibit C to the Agreement, it has determined that every Class Member whose Relevant Loan Debt is associated with those schools should be provided presumptive relief under the settlement due to strong indicia regarding substantial misconduct by the listed schools, whether credibly alleged or in some instances proven, and the high rate of class members with applications related to the listed schools.

3-ER-573-74. The final-approval motion added that the Exhibit C list "was created based on information available to the Department at the time the agreement was executed regarding demonstrated or credibly alleged misconduct, as well as a review of the comparative rate of Class Members with applications concerning the listed schools." 2-ER-271. After preliminary approval, the parties removed four schools from Exhibit C that "were erroneously included" due to unexplained "clerical errors" and added a new school. 2-ER-283.

B. Subclass 2: "Decision Group"

For Class Members whose debt is not associated with an Exhibit C school—about 100,000 borrowers, 3-ER-559—the Settlement establishes a new "review" process not found in any operative BD rule. The "review" requires a series of

presumptions that essentially guarantee a finding of wrongdoing by any accused school and, thereafter, debt cancellation and refunds. Under these presumptions, a borrower's claim cannot be denied for (1) false allegations, (2) insufficient evidence, (3) lack of reliance, or (4) untimeliness. 3-ER-584-85. Depending on when the BD application was submitted, the Department has six to thirty months to "issue a decision" on Decision Group applications. 3-ER-586-87.

C. Subclass 3: "Post-Class Applicants Group"

Finally, the Settlement creates a third subclass of "Post-Class Applicants" who "submi[t] a borrower defense application after the Execution Date … but before the Final Approval Date." 3-ER-587. Thus, the Settlement created an avenue to encompass anyone with a federal student loan, and the settling parties spent months recruiting people to enter this subclass. *See* 2-ER-70-71 (detailing efforts by the federal government to solicit borrowers to "file your application"); 2-ER-273 ("Class Counsel did routinely undertake significant independent efforts to … reach borrowers whose circumstances warranted asserting" a BD claim). For Post-Class Applicants, the Settlement requires the Department to "review" their applications under the standards established in the 2016 Rule, even though the BD regulations normally require different standards for many of these applications. 3-ER-587. If the Department does not complete the "review" within thirty-six months, regardless of reason, it must cancel the applicant's debt and refund prior loan payments,

regardless of the application's merit. *Id*. In other words, within three years the Department can unilaterally cancel federal student-loan debt—and refund prior payments on student debt—by simply not acting. The Department has represented that this sub-class "consists of approximately 250,000 applications from approximately 206,000 borrowers who attended approximately 4,000 schools." 2-ER-58. That covers nearly three-quarters of institutions of higher education that receive Title IV funds. School Data, Federal Student Aid, bit.ly/3NwNfwu.

IV. "EXHIBIT C" SCHOOLS INTERVENE AND OBJECT TO SETTLEMENT

After the settling parties lodged the Settlement, four educational institutions ("Intervenors") listed on Exhibit C moved to intervene of right or permissively. 3-ER-345-94, 434-98. The district court denied intervention of right but granted permissive intervention on the condition that Intervenors could not seek discovery. 1-ER-54-55.

The settling parties moved for final approval of the Settlement. 2-ER-251-81. Intervenors filed objections, arguing that the court could not approve the Settlement because: (1) the case was already moot; (2) class certification could no longer be maintained; (3) the Department did not have statutory authority to agree to the relief in the Settlement; (4) the Department would violate the APA by entering into and effectuating the Settlement; and (5) the Settlement violates Intervenors' due-process

rights. 2-ER-106-21, 136-53, 189-208. The court overruled all objections and granted final approval to the Settlement as written. 1-ER-29-53.

Three Intervenors (hereinafter, "Schools") timely appealed and this Court consolidated the appeals. The Schools were denied a stay of the judgment pending appeal.

V. HARM TO SCHOOLS FROM THE SETTLEMENT

Throughout the final approval and stay proceedings, the Schools explained how the Settlement directly harms them. Beyond stripping them of their rights to defend themselves in BD adjudications, the Settlement immediately exposes the Schools to additional adverse government action. First, the Department may take the position that its "determination" of "substantial misconduct"—made during the secret Settlement process—is relevant to the Secretary's finding of "financial responsibility" needed for a school to participate in federal financial-aid programs. *See* 20 U.S.C. § 1099c(c); 34 C.F.R. §§ 668.15, 668.171. Indeed, after the Settlement was entered, activists cited it as a reason the Department should not have renewed Lincoln's Program Participation Agreement. 2-ER-83-85, 89-90.

Second, the Department recently announced "guidance" that "clarifies" "settlements … by the Department … involving federal student aid" will be a factor that the Department considers "when determining whether to pursue personal liability." Press Release, *Education Department Takes Steps to Hold Leaders of*

Risky Colleges Personally Liable, Dep't of Educ. (Mar. 2, 2023), https://www.ed.gov/news/press-releases/education-department-takes-steps-hold-leaders-risky-colleges-personally-liable. Among other harms, this will immediately make it more difficult for the Schools to recruit and retain officers and directors.

Third, the harm is not limited to Executive Branch decisionmaking. Plaintiffs' counsel has already used the Settlement to attempt to block a state university system from acquiring an Exhibit C school. *See* Berardinelli Decl. Ex. A at 1-2, ECF No. 17-4, No. 23-15050. And a United States Senator recently published a letter to high school teachers and administrators in Illinois touting this Settlement and its list of "151 predatory institutions," and urging school officials to "sound the alarm on for-profit colleges."[2]

Beyond adverse government action, the reputational harm from inclusion on Exhibit C negatively affects the Schools' community, business, and financial relationships. In their intervention motions, and at every point since, the Schools have explained the reputational harm and how its effects unfold over time. *See, e.g.*, 2-ER-71 ¶ 7; 2-ER-78 ¶ 14. For example, an ECI official explained that inclusion on Exhibit C "is already causing … reputational harm, as third parties are treating it

[2] *See* Press Release, *Durbin Warns Illinois Education Professionals to Sound the Alarm on For-Profit Colleges* (Apr. 21, 2023), https://www.durbin.senate.gov/newsroom/press-releases/durbin-warns-illinois-education-professionals-to-sound-the-alarm-on-for-profit-colleges.

like a finding of wrongdoing by the schools." 3-ER-461 ¶ 12. Sure enough, a few months later, another ECI official reported that "[s]ome lenders have expressed concern and begun inquiring about the Settlement as part of their due diligence, which has (1) required ECI to dedicate resources to addressing those questions and concerns, (2) delayed and/or increased the cost of financing, and (3) caused, in some instances, potential lenders not to provide financing." 2-ER-77 ¶ 13. Likewise, a Lincoln official explained that "Lincoln's unfounded inclusion on a list of purported wrongdoers is inflicting, and will continue to inflict, substantial reputational harms on Lincoln and its schools." 3-ER-495 ¶ 15. Sure enough, a few months later, a teacher at Centennial High School in Nevada—a community partner with Lincoln—disinvited Lincoln representatives from addressing a class specifically because "Lincoln Tech is on the U.S. Department of Ed's list of predatory schools." 2-ER-69-70 ¶¶ 4-5.

SUMMARY OF ARGUMENT

The final judgment should be reversed and the case dismissed.

I. The district court lacked jurisdiction to enter the judgment because the case had become moot. Plaintiffs brought two APA claims: (1) they sought to end the Department's alleged "policy of inaction" on BD claims, and (2) they sought a rescission of alleged "form denials" of a subset of BD claims. As the Department

itself demonstrated, that relief had been granted by the time of the Settlement. The district court thus lacked jurisdiction and should have dismissed the case as moot.

II. Even if the district court had jurisdiction, the Secretary lacked authority to grant mass student-loan discharges through the guise of a settlement.

A. The Secretary relies on the HEA, 20 U.S.C. § 1082(a)(6), to assert an unlimited power to cancel student loans at any time for any reason. That is a $1.6 trillion power—and much more when the asserted refund authority is considered. But the few words of section 1082(a)(6) upon which the Secretary relies do not confer anything like the limitless loan-discharge authority the Secretary claims. First, section 1082(a)(6) governs FFEL Loans, not Direct Loans, which comprise most of the debt at issue. To reach Direct Loans, the Secretary relies on 20 U.S.C. § 1087e(a)(1), but that provision incorporates in the Direct Loan program only the "terms, conditions, and benefits" of FFEL Loans, not all of the Secretary's "functions, powers, and duties." Second, even if section 1082(a)(6) did apply to Direct Loans, it only grants the Secretary authority to "compromise" loans under carefully delineated circumstances. Far from the clear statement required by the major-questions doctrine, the plain language and context of the HEA affirmatively forecloses the Secretary's claimed power.

B. Independently, the Settlement violates the APA and principles of administrative law, which must be followed even in agency settlements. Here, the

Settlement ignores existing regulations and establishes new regulatory procedures for BD adjudications. That can be done only through formal rulemaking. Moreover, the Department's actions were arbitrary and capricious because they were unexplained and ignored contrary evidence.

III. The Settlement's final approval independently violated Rule 23.

A. The Class was certified under Rule 23(b)(2) on the theory that Plaintiffs sought only injunctive relief. Yet the Settlement awards billions in monetary relief. No monetary relief class was certified, or could have been certified, given myriad individualized issues among Class members. As the Department correctly argued below, the class should have been decertified.

B. The Settlement created three distinct sub-classes receiving differentiated relief. Accordingly, the Settlement destroyed commonality, typicality, and adequacy of representation required by Rule 23.

C. The Settlement is *defined* to include individuals who are ineligible for BD relief, and the Schools demonstrated that many Class members were in fact ineligible. The presence of significant percentages of uninjured members required decertification.

D. The Settlement includes 250,000 BD claims submitted *after* the class period ended. These claimants never received notice and were never certified as Class members. They should have been excluded from the class judgment.

IV. The Settlement flagrantly violates the Schools' due-process rights. It impugns and defames the Schools' reputations by including them on a federal regulator's list of supposed bad actors (now endorsed by a federal court), without providing any opportunity for the Schools to defend themselves. It strips the Schools of their rights to create an administrative record and receive a reasoned decision on each BD claim that implicates them and exposes them to recoupment liability and other negative consequences. The Settlement gives the Schools no opportunity to challenge the secret evidence the Department relied on for its "determination" of "substantial misconduct."

V. Finally, if this case continues, the district court's refusal to allow the Schools to intervene of right should be reversed. The Schools have a right to participate fully in the case, including any future settlement discussions.

STANDARD OF REVIEW

The district court addressed the Schools' mootness objections at 1-ER-45-48. Mootness issues are reviewed de novo. *Williams v. U.S. Gen. Servs. Admin.*, 905 F.2d 308, 310 (9th Cir. 1990).

The district court addressed the Schools' objections to the Secretary's statutory settlement authority at 1-ER-34-42. This court "review[s] de novo a district court's interpretation and application of federal statutes," including "a

district court's application of the APA standards." *San Luis & Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1227 (9th Cir. 2017) (cleaned up).

The district court addressed the Schools' due-process objections at 1-ER-42-45. The standard of review is de novo. *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003) (en banc).

The district court denied intervention of right at 1-ER-54-55. The standard of review is de novo. *Canatella v. California*, 404 F.3d 1106, 1112 (9th Cir. 2005).

The district court approved the class-action settlement and refused to decertify the class at 1-ER-48-53. This ruling is reviewed for abuse of discretion. *Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015); *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 984 (9th Cir. 2015). A court abuses its discretion when its rulings are based "on an erroneous view of the law." *Pulaski*, 802 F.3d at 984.

STANDING

Standing to appeal requires the Schools to show "[1] a threat of injury [2] stemming from the order they seek to reverse" [3] that "would be redressed if they win on appeal." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1399 (9th Cir. 1995). Although the district court questioned the Schools' standing to appeal, 1-ER-23, the Schools have standing for three reasons.

1. The Settlement strips the Schools of administrative rights to participate in pending BD adjudications, assert defenses, submit evidence, and receive decisions.

34 C.F.R. §§ 685.206(c)(1)–(2), (e)(10)–(11), 685.222(e)(3)(i). The Settlement automatically resolves pending BD claims against Exhibit C schools, and it changes legal standards by which all other pending or "post-class" BD claims will be decided. These types of injuries suffice for Article III standing in APA lawsuits every day.

2. The Settlement also inflicts a continuously expanding reputational injury that can only be redressed by reversing or vacating the judgment and the Department's unlawful "determin[ation]" of "substantial misconduct." 3-ER-573-74. Reputational injuries visited through widespread publication "bea[r] a close relationship to" the traditionally recognized "reputational harm associated with the tort of defamation" and suffice to show standing. *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2208-09 (2021). "[A] person is injured when a defamatory statement 'that would subject him to hatred, contempt, or ridicule' is published to a third party." *Id.*; *see also Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1114-15 (9th Cir. 2017). Here, Exhibit C has been widely published—including by the settling parties themselves.[3] Moreover, the speaker here is the Schools' primary federal regulator, and the publication is a list of institutions that regulator supposedly "determined" to

[3] On their website, Plaintiffs' counsel editorializes about the Department's "determin[ation]" of "strong indicia regarding substantial misconduct" for Exhibit C schools. *Information on the* Sweet v. Cardona *Settlement*, Project on Predatory Student Lending, bit.ly/3oESRdk. The Department likewise publicizes Exhibit C. *See* Sweet v. Cardona *Settlement*, Federal Student Aid, bit.ly/41RfFVL.

have committed "substantial misconduct," which has been converted into a federal court's final judgment carrying the force of law. That is concrete injury.

Beyond publication, the record is replete with evidence of other concrete injuries traceable to Exhibit C. *See California v. Azar*, 911 F.3d 558, 572 (9th Cir. 2018) (economic harm of any magnitude supports standing). The Schools produced uncontroverted affidavits attesting (1) that ECI's financial partners have requested expanded diligence on the Settlement or refused to extend credit because of the Settlement, 2-ER-77; Berardinelli Decl. ¶ 8, ECF No. 17-4, No. 23-15050, and (2) that Lincoln has had to describe the Settlement as a material risk in securities reporting, 2-ER-72.

Exhibit C also inflicts serious programmatic harms. For example, six months after Exhibit C was released, a high school teacher at a school with which Lincoln has had a longstanding relationship denied Lincoln an opportunity to speak with a class about career opportunities specifically because of Exhibit C. The teacher's email stated:

> It is my understanding that Lincoln Tech is on the U.S. Department of Ed's list of predatory schools. I no longer feel comfortable taking class time to have your people talk to my students.

2-ER-69-70 ¶ 4. This email draws a direct connection between inclusion on Exhibit C and programmatic harm to schools—starkly demonstrating the concrete injury Exhibit C is inflicting here and now. 2-ER-70 ¶ 5.

Even while Plaintiffs and the government have argued (implausibly) that the Settlement does not harm the Schools, they have used the Settlement to inflict more harm. Berardinelli Decl. Ex. A at 1-2, ECF No. 17-4, No. 23-15050; 2-ER-70-71 ¶ 6; *see also* 2-ER-89-90; *supra* 13-14.

The Schools have thus adduced much more than the "identifiable trifle" necessary to show injury-in-fact. *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 932 (9th Cir. 2008) (citation omitted). Courts routinely find standing on far less evidence. *See, e.g.*, *Meese v. Keene*, 481 U.S. 465, 473-74 (1987) (affidavits establishing impact on conduct of government designation of films as "political propaganda" sufficed for standing); *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003) (upholding standing based on "reputational injury [that] derives directly from an unexpired and unretracted government action").

Causation and redressability are easily satisfied. As noted, lenders and community partners have cited *the Settlement* as the basis for requesting additional diligence and forgoing business relations. Plaintiffs will argue that these harms have other root causes, but it is undisputed that the identified harms started immediately after Exhibit C was published—not before. Reversing or vacating the Settlement would redress these harms by depriving the Settlement of its legal force and signaling to interested parties that the Department's determination of "substantial misconduct" was unlawful. That "judicial determination" would undoubtedly

"provide a significant measure of redress for the harm to … reputation," because a party who prevails on a claim of harm to "reputation is in some sense relieved by that judgment." *Foretich*, 351 F.3d at 1214-16; *see also Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 716-17 (6th Cir. 2015) (order setting aside agency decision suffices to redress "reputational harm"); *Meese*, 481 U.S. at 476 (similar).

3. At minimum, this Court has jurisdiction "for the purpose of correcting the error of the lower court in entertaining the suit" after it became moot. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 73 (1997) (citations omitted). This Court need not resolve standing to decide a question that "goes to the Article III jurisdiction of this Court and the courts below." *Id.* at 67. As explained below, the district court lacked jurisdiction to approve the Settlement because Plaintiffs' claims were moot when the parties settled. *See infra* 23-25. Courts have an inherent "obligation to 'satisfy [themselves] not only of [their] own jurisdiction, but also that of the lower courts in a cause under review.'" *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (citation omitted).

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION TO APPROVE THE SETTLEMENT.

"A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute." *Frank v. Gaos*, 139 S.Ct. 1041, 1046 (2019). Here, the Department lodged its Settlement on June 22, 2022, and urged the court to

approve it. The next day, the Department moved for summary judgment, arguing that the case had already become moot *before* the Settlement was lodged. 3-ER-509, 519-21. Tellingly, the Department has never retreated from that position. *See* ECF No. 18, at 14 n.2, No. 23-15050. The Department was correct. The district court had no authority to approve the Settlement.

Plaintiffs sought only two forms of relief: (1) an end to the "policy of inaction" on BD claims, and (2) a rescission of alleged "form denials" of a subset of BD claims. *See* 4-ER-836 ¶ 7; 4-ER-624 ¶ 6. In support of the Department's assertion of mootness, Richard Cordray, Chief Operating Officer for Federal Student Aid, attested below that (1) "[o]ver the last approximately 18 months, … the Department ha[d] prioritized … adjudication of borrower defense applications," approving tens of thousands of them, and (2) "[a]ll applications … previously denied with a form denial notice will be reconsidered." 3-ER-541-43 ¶¶ 8-9. Thus, the Department provided Plaintiffs with "full redress for the injuries asserted in their complaint[]," mooting the case. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 164 n.5 (2016). Because there was "no longer any actual controversy between the parties," the district court lacked authority to approve the Settlement and should have dismissed the case. *Alvarez v. Smith*, 558 U.S. 87, 92 (2009); *see Carter v. Veterans Admin.*, 780 F.2d 1479, 1481 (9th Cir. 1986) (complaint seeking injunctive relief directing a federal agency to take an action mooted by agency's taking that action);

Martinez v. United States, 670 F.App'x 933, 934 (9th Cir. 2016) (APA unlawful-delay claim moot because agency ended the delay).

The district court held the case was not moot because the Department had not adjudicated *every* Class member's BD application. 1-ER-47. But a claim for injunctive relief is moot when "a court can no longer grant any effective relief *sought in the injunction request.*" *Akina v. Hawaii*, 835 F.3d 1003, 1010 (9th Cir. 2016) (per curiam) (emphasis added). Plaintiffs were adamant in their Complaint that they "d[id] *not* ask" the court "to adjudicate their borrower defenses" or "to dictate how the Department should prioritize their pending borrower defenses." 4-ER-836-37 (emphasis added). "Their request [wa]s simple: they s[ought] an order compelling the Department *to start* granting or denying their borrower defenses and *vacating the Department's policy* of withholding resolution." *Id.* (emphases added).

Accordingly, the district court lacked jurisdiction to grant final approval and the final judgment must be reversed and the case dismissed. *Frank*, 139 S.Ct. at 1046.

II. THE DEPARTMENT LACKS AUTHORITY TO PROVIDE THE SETTLEMENT RELIEF.

A. The HEA Does Not Grant The Secretary Authority To Cancel Student-Loan Debt *En Masse*.

The Department and the district court both conceded that a federal agency cannot enter a settlement "requiring an agency to take substantive action clearly

beyond its statutory authority." U.S. Stay Opp. 28; *see also* 1-ER-35. Accordingly, the Secretary must identify a source of authority for the relief provided by the Settlement. The Secretary claims that the HEA grants him power to cancel student debt *en masse* and refund all prior payments on such debt without a specific appropriation. Critically, the Secretary's claimed authority is not cabined to this APA case or to settlements of BD claims pending before the agency. Instead, the Secretary's claimed authority would allow him to nullify *$1.6 trillion* in federal loans and to spend untold trillions more in refunding past payments on those loans.[4]

An agency's claim of power over an issue of such "vast economic and political significance" falls under the "major questions doctrine" and requires the government to show "clear congressional authorization." *West Virginia v. EPA*, 142 S.Ct. 2587, 2605, 2609 (2022) (citations omitted). Far from "clear" authorization here, the HEA's plain terms and context show the Secretary is not authorized to cancel any student loan, at any time, for any reason. That is why, for more than fifty years, no Secretary asserted the "breathtaking amount of authority," *Ala. Ass'n of Realtors v.*

[4] *See* U.S. Dep't of Educ., Federal Student Loan Portfolio, Summary, https://studentaid.gov/data-center/student/portfolio (in Q1 2023, 43.8 million borrowers owed $1.635 trillion in outstanding principal and interest on federal student loans). The Settlement itself encompasses a "staggering number" of borrowers, 1-ER-39, and at least $7.5 billion of debt owed to American taxpayers (an amount that probably doubled due to "Post-Class Applicants"), 3-ER-558.

Dep't of Health & Hum. Servs., 141 S.Ct. 2485, 2489 (2021) (per curiam), the Secretary has now discovered in the HEA.

The Secretary has contended that two subsections of the HEA work in concert to vest him with the sweeping power to cancel federal student loans and refund prior payments on such loans. First, the Secretary has invoked section 1082(a)(6), which bears the heading "General [P]owers" and states: "In the performance of, and with respect to, the functions, powers, and duties, vested in him *by this part*, the Secretary may … enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption." 20 U.S.C. § 1082(a)(6) (emphasis added). Second—because "this part" is Part B of the HEA, *id.* §§ 1071–1087-4, which addresses only FFEL Loans and not Direct Loans (Part D)—the Secretary has invoked 20 U.S.C. § 1087e(a)(1).[5] Section 1087e(a)(1) states that Direct Loans "shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers" under Part B. But these sections—read separately or together—do not grant the vast power the Secretary claims.

[5] "[T]he vast majority" of loans "at issue here" are "[D]irect [L]oans." 2-ER-303. Likewise, most of the Department's outstanding loans are Direct Loans, not FFEL Loans. *See* U.S. Dep't of Educ., Federal Student Aid Portfolio, Summary, https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls (in Q1 2023, 38.3 million borrowers owed $1.4 trillion for Direct Loans, while 8.8 million borrowers owed $197 billion in FFEL loans).

1. Section 1087e(a)(1) Does Not Incorporate Section 1082(a)(6).

The Secretary has failed to explain how "the functions, powers, and duties, vested *in him*"—not in a loan contract—constitute "terms, conditions, or benefits" of "loans." These words are not equivalent, as their plain meaning confirms. In the contractual context, a "term" is a "stipulation"; a "condition" is a "stipulation or prerequisite"; and a "benefit" is the "advantage or privilege" the agreement confers. *Black's Law Dictionary* 1772, 366, 193 (11th ed. 2019). None of these terms is easily shoehorned into the "functions, powers, and duties" vested in a Cabinet secretary. Indeed, even during this litigation, the Department disclaimed the specious interpretation the Secretary now adopts. *See* Mem. from Principal Deputy Gen. Counsel, U.S. Dep't of Educ., to Sec'y of Educ. at 4 & n.3 (Jan. 12, 2021) ("the Secretary's general power to compromise or waive claims under the FFEL program is neither a term nor a condition nor a benefit of FFEL program loans").[6]

Moreover, the HEA itself specifically defines the "terms and conditions" of FFEL loans in *other* subsections of Part B. *E.g.*, 20 U.S.C. § 1077 ("terms of federally insured student loans"); *id.* § 1078-2(a)(2) ("Terms, conditions, and

[6] Although the Department conveniently rescinded this memorandum after Intervenors cited it, the Department did so based on disagreement with the memorandum's treatment of the HEROES Act, not the HEA. *See* 87 Fed. Reg. 52,943 (Aug. 30, 2022). Regardless, "when the government … speaks out of both sides of its mouth, no one should be surprised if its latest utterance isn't the most convincing one." *Bittner v. United States*, 143 S.Ct. 713, 722 n.5 (2023).

benefits" of Federal Plus Loans); *id.* § 1078-3(b)(4) ("Terms and conditions" of Consolidation Loans); *id.* § 1078-8(a) ("terms and conditions" of Unsubsidized Stafford Loans). These provisions include, among other things: specific terms and conditions addressing to whom loans can be made, *id.* § 1077(a)(1); how they can be made, *id.* § 1077(a)(2); how long they can last, *id.*; when repayment must begin, *id.* § 1077(a)(2)(B); minimum annual repayment amounts, *id.* § 1077(c); applicable interest rates, *id.* § 1077a; the option for graduated or income-sensitive repayment, *id.* § 1077(a)(2)(H); when "installments of principal need not be paid," *id.* § 1077(a)(2)(C); and how borrowers can pay early without penalty, *id.* § 1077(a)(2)(F).

These are the "[t]erms and conditions" incorporated into Part D by 20 U.S.C. § 1087e(a)(1), not the Secretary's "General powers." Indeed, if the Secretary's "General powers" in section 1082 were loan "terms," it would lead to absurd conclusions, including that the Secretary's "power[] … [to] prescribe … regulations," *id.* § 1082(a)(1), constitutes a loan "term." In short, the HEA simply has no "language incorporating into Part D the Secretary's 'general powers' … of Section 1082, from Part B." *Pa. Higher Educ. Assistance Agency v. Perez*, 416 F. Supp. 3d 75, 96 (D. Conn. 2019).

2. If Section 1087e(a)(1) Does Incorporate Section 1082(a), Then The District Court Lacked Jurisdiction To Approve Injunctive Relief.

If section 1082(a) is interpreted (wrongly) as "terms, conditions, and benefits" of Direct Loans, then section 1082(a)(2) is equally applicable—and it divested the court of jurisdiction to award injunctive relief against the Secretary. Section 1082(a)(2) provides, in part, that "district courts shall have jurisdiction of civil actions arising under this part without regard to the amount in controversy," subject to an important limitation: "no ... injunction ... shall be issued against the Secretary or property under the Secretary's control." 20 U.S.C. § 1082(a)(2). In this case, Plaintiffs and the Department settled this Rule 23(b)(2) class action on the premise that it awards only "injunctive relief" against the Department, which violates section 1082(a)(2). 1-ER-49.

The district court ignored the jurisdictional bar on the theory that the Department was "consenting" to the injunctive relief. 1-ER-40. But subject-matter jurisdiction cannot arise through party consent. *CFTC v. Schor*, 478 U.S. 833, 851 (1986). The Executive Branch cannot provide the Judicial Branch with more expansive jurisdiction than Congress provided. *See Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1105 (D.C. Cir. 2005).

3. Section 1082(a)(6) Is A General Provision That Must Be Read In The Context Of More Specific Authorizations And Does Not Grant Authority For Blanket Debt Cancellation.

Even if section 1082(a)(6) is interpreted (wrongly) to apply to Direct Loans, it does not provide authority for blanket debt cancellation of Direct or FFEL Loans. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia*, 142 S.Ct. at 2607. And "[i]t is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). This canon applies "to statutes such as the one here," where "Congress has enacted a comprehensive scheme" in which "a general authorization" and "more limited, specific authorization[s] exist side-by-side." *Id.* In such a situation, the "general language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Id.* at 646 (brackets omitted). This result "avoids … the superfluity of a specific provision that is swallowed by the general one," which would violate "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *Id.* at 645; *see also Corley v. United States*, 556 U.S. 303, 314 (2009). The Secretary's reading of section 1082(a)(6) violates these cardinal rules of statutory interpretation.

First, section 1082(a)(6) is a summary grant of "General powers" tied to the Secretary's "performance of … the functions, powers, and duties, vested in him by this part." In other words, the Secretary's ability to compromise claims is limited to "the performance of … powers[] and duties[] vested in him by" Part B of the HEA. And Part B specifically delimits the circumstances under which the Secretary has the power or duty to cancel FFEL Loans. To read section 1082(a)(6) as providing the power to grant full discharge in *every* circumstance would render meaningless the specific authorizations provided in these sections. Specifically:

- Part B delineates only five circumstances in which the Secretary may discharge loans in full based on: (1) the borrower's death or total disability, 20 U.S.C. § 1087(a), (d); (2) the borrower's bankruptcy, *id.* § 1087(b); (3) the school's closure, *id.* § 1087(c); (4) the school's false certification of the student as student-loan eligible, *id.*; or (5) the school's failure to pay refunds to the lender, *id.*
- Part B authorizes *partial* discharge pursuant to carefully delineated terms, conditions, and amounts. *See, e.g.*, 20 U.S.C. § 1078-10(c)(1) ($5,000 for teachers broadly); *id.* § 1078-10(c)(3) ($17,500 for teachers in math, science, or special education); *id.* § 1078-11(b)(1)–(18) ($10,000 for, among others, early childhood educators, nurses, foreign-language specialists, librarians, "highly qualified" teachers, child-

welfare workers, speech-language pathologists and audiologists, school counselors, public-sector employees, nutrition professionals, and other health and educational professionals); *id.* § 1078-12(d)(3) ($40,000 for legal-aid attorneys).

- Part B also authorizes the Secretary to pay some interest payments for students who meet certain conditions, such as a school's documentation of their need for a loan based on various factors. *See* 20 U.S.C. § 1078.

The Secretary's claimed authority to provide not just $10,000, $17,500, or $40,000 in debt relief for some professions, or full relief in a handful of circumstances, but *full* discharge in *all circumstances*—and refunds of past payments—renders these carefully calibrated grants of specific authority impermissibly superfluous.

Second, Congress carefully planned for the delimited discharges it has authorized. Congress pledged "[t]he full faith and credit of the United States … to the payment of all amounts which may be required" under the full-discharge provisions of section 1087. 20 U.S.C. § 1075(b)(4). Congress appropriated funds for each of these full-discharge scenarios. *See id.* § 1071(b)(2). And Congress mandated that FFEL loans include terms allowing the Secretary to discharge them under section 1087. *See id.* § 1077(a)(2)(E). Congress did *none* of this for the boundless discharges the Secretary claims under section 1082(a)(6). The absence of such congressional planning indicates that no discharges were expected, or

authorized, beyond those specifically delineated in Part B. "When Congress includes particular language in one section of a statute but omits it from a neighbor," the Court "normally understand[s] that difference in language to convey a difference in meaning." *Bittner*, 143 S.Ct. at 720.

Third, the Secretary's interpretation also would render some Part B provisions "nonsensical." *Corley*, 556 U.S. at 314. Consider 20 U.S.C. § 1078-1. That section allows the Secretary to "waive or modify" certain requirements relating to the Department's agreements with loan-guaranty agencies, but explicitly directs that "the Secretary may not waive … any statutory requirement pertaining to the terms and conditions attached to student loans." *Id.* § 1078-1(a)(1)(A). This prohibition makes no sense if the Secretary can discharge those same loans under section 1082(a)(6). Or take 20 U.S.C. § 1082(i), which conditions the Secretary's authority to sell defaulted loans on his first exhausting "all other collection efforts." This condition is nonsensical if the Secretary may unconditionally discharge that same defaulted loan.

Fourth, Part D provides the Secretary specific, but limited, authority to discharge Direct Loans. *E.g.*, 20 U.S.C. § 1087e(m) (full discharge for public-service employees); *id.* § 1087j(c) ($5,000 for teachers broadly and $17,500 for math, science, and special-education teachers); *id.* § 1087e(*l*) (covering interest for active service members). As with Part B, the Secretary's reading of section

1082(a)(6)—through section 1087e(a)(1)—to authorize him to fully discharge *all* Direct Loans for *any* reason impermissibly renders these more specific Part-D discharge authorizations superfluous. And it creates other absurdities, purporting to allow, for example, the Secretary to cancel the underlying principal on Direct Loans while the Secretary can reduce interest rates on these loans only if "cost neutral" to the federal government, 20 U.S.C. § 1087e(b)(9)(A). Similarly, Congress has prevented the Secretary from buying or selling Direct Loans at a cost to the federal government, *id.* §§ 1087i, 1087i-1, but the Secretary's claimed authority would allow him to discharge those same loans for free. Other examples abound. *E.g.*, *id.* § 1087e(d)(4) (authorizing alternative repayment plans only if they do not "exceed the cost to the Federal Government" compared to normal plans); *id.* § 1087h(c) (prohibiting payment for administrative expenses without submitting to Congress "a detailed description of the specific activities for which" payments will be made).

Fifth, the Department's view of section 1082(a)(6) of the HEA cannot be squared with its view of the HEROES Act in *Nebraska* and *Brown*. There, the Secretary contends that the HEROES Act provides him with blanket debt-cancellation authority in cases of national emergency. Petrs. Br. 34-57, *Biden v. Nebraska*, No. 22-506 (U.S. Jan. 4, 2023). But if section 1082(a)(6) already authorized the Secretary to cancel loans *en masse* at *any time*, there was no need for Congress to authorize such power only during specific national emergencies, or for

the Secretary to have invoked the HEROES Act to "issu[e] waivers and modifications to the [death, bankruptcy, and school-closure] provisions of 20 U.S.C. 1087," JA 261, *Nebraska*, No. 22-506 (U.S. Jan. 4, 2023).

Finally, the district court's contrary considerations lack merit. The district court fretted that "Section 1082 is the only congressional authorization in the Higher Education Act for the Secretary to sue and be sued regarding student aid," 1-ER-36, but the Schools' plain-text reading does not leave the Secretary without "any powers related to" Direct Loans, U.S. Stay Opp. 30. Part D is replete with provisions granting the Secretary carefully defined powers over the Direct Loan program. *E.g.*, 20 U.S.C. § 1087a(a) (Secretary's authority to select "participating institutions" for Direct Loans); *id.* § 1087e(h) (borrower defense as prescribed in regulations); *id.* § 1087e(j)(2) (payment periods). As explained above, Part D provides specific authority to the Secretary for discharging Direct Loans in prescribed circumstances not present here.

At times, the Department tried to augment its claimed authority by referencing the Secretary's "statutory authorization to provide discharges and refunds to borrowers who have made borrower-defense claims." U.S. Stay Opp. 28 (citing 20 U.S.C. § 1087e(h)). But that authority can only be exercised "in regulations," and the government concedes that the program adopted here is "'effectuated pursuant to the terms of the Settlement Agreement, not pursuant to the Department's borrower

defense regulations.'" *Id.* at 22 (citation omitted); *id.* at 9-10 (similar for Subclasses 2 and 3). And, of course, other statutes also require formal rulemaking. *See* 5 U.S.C. § 553; 20 U.S.C. § 1098a(b)(2).

The Department also has sought refuge in the Attorney General's statutory authority to supervise litigation involving the United States, 28 U.S.C. §§ 516, 519, which purportedly gives the Attorney General "plenary" settlement authority. U.S. Stay Opp. 27-28. But this authority is not, in fact, "plenary" because the Attorney General concededly cannot "approve a settlement requiring an agency to take substantive action clearly beyond its statutory authority." *Id.* at 28. Pointing to the Attorney General's settlement authority merely begs the question whether any statute authorizes the *Secretary* to cancel loans *en masse*, cut refund checks from the Treasury, or adjudicate borrower-defense claims through extra-regulatory processes. As explained above, no statute does.

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Statutory text cannot be read "in a vacuum." *Abramski v. United States*, 573 U.S. 169, 179 (2014). When considered in relation to the rest of the HEA, the Department's claimed authority under section 1082(a)(6) to discharge any and all student debt must be rejected.

B. The Settlement Violates Administrative Law Principles And The Administrative Procedure Act.

"[A]s a matter of general administrative law," it is "obvious" that "[a]

settlement agreement cannot be a means of bypassing congressionally mandated requirements." *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1030-31 (9th Cir. 2007). Consistent with that principle, the "decision to enter into [a] settlement agreement" must comply with the APA and established principles of administrative law. *United States v. Carpenter*, 526 F.3d 1237, 1241 (9th Cir. 2008). Here, the Settlement unlawfully forgoes rulemaking required by statute, bypasses existing rules governing the BD program, and is arbitrary and capricious.

1. The government admits that the Settlement establishes new "regulatory procedures" for "adjudicat[ing] [borrower-defense] applications." U.S. Stay Opp. 3-4, 10; *see also* ECF No. 18, at 19, No. 23-15050 (describing Settlement as new "framework" for "resolving" BD claims). For the Decision Group and Post-Class Applicants, this "framework" establishes an entirely new adjudication process, complete with borrower-friendly presumptions and resurrected standards from superseded rules. The new "framework" for the Automatic Relief Subclass was even more mysterious. It involved the Department engaging in secret, *ex parte* meetings with claimants' counsel, after which the Department "determined" that 151 schools (give or take, based on "clerical errors," 2-ER-283) engaged in "substantial misconduct" warranting immediate monetary relief. Even if the HEA granted the Secretary the authority to establish a program of *en masse* loan cancellation and

refunds, at minimum, creation of such a far-reaching, detail-laden program would require formal rulemaking.

Rulemaking is required three times over. First, the HEA requires the Secretary to "specify *in regulations*" the process for resolving BD claims. 20 U.S.C. § 1087e(h) (emphasis added). Second, under the HEA, negotiated rulemaking was required because the new "framework" is a regulation that "pertain[s]" to Title IV, the subchapter governing student loans. *Id.* § 1098a(b)(2). Third, under the APA, notice-and-comment rulemaking was required because the new "framework" is a legislative "rule." 5 U.S.C. § 551(4). Specifically, the "framework" has the "'force and effect of law,'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015), and "'affect[s] individual rights and obligations'" to repay debts, *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). If the Department wishes to establish a new BD program, it must promulgate new rules. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995); *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1187 (9th Cir. 2013).

2. The Secretary has exercised rulemaking authority under section 1087e(h) by promulgating extensive BD regulations. *See* 34 C.F.R. §§ 685.206, 685.222. Those regulations are binding and apply not just to the settling parties but also to the Schools. The Department's effort to "craft[]" a new "process for resolving the enormous backlog of claims," 1-ER-41, thus violates the

administrative law principle that an agency must follow its own regulations. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 748 (2004).

But instead of adjudicating the "backlog" of BD claims under the process required by its regulations, the Department imposed "streamlined procedures," ECF No. 18, at 3, No. 23-15050, for hundreds of thousands of BD claims. Agencies may not "ignore" their rules in seeking "a quick way to reach a desired result." *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979).

It is well-settled that an agency's power to settle claims "does not include license to agree to settlement terms that would violate the civil laws governing the agency." *Exec. Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 762 (4th Cir. 1993). This Court's decision in *Portland General* explains why—and highlights the Settlement's illegality. There, this Court considered whether the Bonneville Power Administration ("BPA") had unlawfully exercised its authority to "compromise or … settl[e]" claims arising under a subsidy program. 501 F.3d at 1013, 1026. Under the agency's organic statute, BPA was empowered to effectively "subsidiz[e] the cost" of certain "utilit[ies'] high-cost power" subject to statutory constraints, including the requirement that the agency adopt a formula in regulations for determining whether utilities were entitled to subsidies. *Id.* at 1027. After promulgating such regulations and administering the program for nearly two

decades, practical concerns led BPA to "enter into a new agreement for a global, long-term 'settlement' of [its] prospective … obligations" under the program. *Id.*; *see id.* at 1018-19 (noting that agency sought to "bypass" binding regulations deemed "impractical").

In a striking parallel to this case, BPA claimed an "essentially unlimited" authority to "compromise claims" "free from the constraints" imposed by statute. 501 F.3d at 1030-31. Like the Department here, BPA "took the position that the [settlement] agreement was governed only" by its authority to settle and compromise claims, not the statutory provisions establishing the subsidy program. *Id.* at 1027. BPA thus claimed a "broad," "otherwise unregulated authority … to enter into settlements" concerning the subsidy program, free from other statutory and regulatory constraints. *Id.* at 1025.

This Court invalidated the settlement, reasoning that the settlement of the agency's "[program] obligations must be grounded in the … program authorized by [statute] that creates the occasion for the settlement in the first place." 501 F.3d at 1031. That is because an agency's "power to compromise claims is not a substantive power," but a "facilitative power" that serves *other* "substantive grants of authority." *Id.* at 1030. The agency was "not excused" from following statutory requirements and its own binding regulations merely because it "call[ed] its actions … a …

'settlement.'" *Id.* at 1032; *see also id.* at 1035-36 ("Until [the agency] adopts new regulations, … [it] is bound by its [existing] regulations.").

Just so here. Like BPA, the Department has claimed authority to settle pending BD claims "independent" of the HEA's authorization of the BD program, 1-ER-40, which empowers the Department to establish such a program only "in regulations," 20 U.S.C. § 1087e(h). But "established administrative law principles" foreclose that claim. *Portland Gen.*, 501 F.3d at 1029. The settlement of the Department's BD "obligations must be grounded in the … program authorized by [the statute and regulations] that creat[e] the occasion for the settlement in the first place." *Id.* at 1030-31. Having promulgated regulations that govern the BD program, the Department is "bound" to follow them—or else undertake rulemaking to amend them. *Id.* at 1035. And by effectively committing the Department to implementing new "substantive rules, which normally may be promulgated only pursuant to notice and comment procedures," the Settlement "transgress[es] the APA's limitations on an agency's rulemaking authority." *Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.L.C. 126, 164 (1999).

Neither of the district court's grounds for rejecting this straightforward conclusion has merit. First, the court noted that the Settlement does not amend binding regulations because those "regulations remain in place." 1-ER-41. But the

Settlement is unlawful precisely *because* it "does not reflect the current [BD] program, as defined by [the Department's] own regulations," and the Department has settled the claims "as if it ha[s] changed its regulations, which it ha[s] not." *Portland Gen.*, 501 F.3d at 1036. Those regulations are meaningless if, in practice, they will be ignored and replaced by a new process. This "type of mass settlement" of BD claims is "illegal" because governing regulations do not permit the Department to cancel loans "regardless of the merit of those claims." *Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 167 (D.C. Cir. 2017).

Second, the district court reasoned that requiring the Department to follow its BD regulations would unduly "limit" the Department's "broad discretion" to settle cases—and to invoke "independent sources of statutory authorization" *besides* the statute authorizing the BD program. 1-ER-40-41. But the underlying premise is wrong. "Settlement of [the Department's] [BD] obligations is … directly related to, and inextricably intertwined with, the authority conferred to [the Department] under [section 1087e(h)]." *Portland Gen.*, 501 F.3d at 1032. The Department's settlement authority—as a "facilitative power"—cannot be exercised "independent" of the more "traditional regulatory powers" it serves. *Id.* at 1030. The HEA's plain text confirms that the Secretary may "compromise" claims only "[i]n the performance of … the functions, powers, and duties, vested in him by this part." 20 U.S.C. § 1082(a)(6).

3. The Settlement independently violates the APA's prohibition on arbitrary action. 5 U.S.C. § 706(2)(A). The Department alternatively claims that its determination to automatically grant every BD application associated with 151 schools was based on "strong indicia," 3-ER-559, "sufficient indicia," 2-ER-264, or "certain indicia," 2-ER-266, of misconduct by listed schools—and "on information" it had "regarding demonstrated or credibly alleged misconduct" and "the comparative rate of Class Members with applications concerning the listed schools," 2-ER-271. The Department failed to specify any of the "indicia" of misconduct; what "information" it relied upon; and which schools made the list because of "demonstrated" misconduct, versus "credibly alleged misconduct," versus merely the "rate of … applications concerning the listed school[]"—much less to explain what constitutes "demonstrated," "credibly alleged," or a sufficiently high "comparative rate." The Department's vague, conclusory statements are the opposite of a "satisfactory explanation," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), that "present[s] … data" to justify an agency determination, *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 492 (D.C. Cir. 1988).[7]

[7] After the district court preliminarily approved the Settlement, the settling parties admitted they had "erroneously" included some schools on Exhibit C and excluded another school. 2-ER-283. They provided no explanation for these "errors," further demonstrating the arbitrariness of the Department's highly consequential "determin[ation]."

Moreover, an agency "cannot ignore evidence that undercuts its judgment." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018); *see E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 980 (9th Cir. 2020). Yet in the only record document related to ECI, the Department said it reviewed "a sample of 50 applications" and concluded it "has not identified evidence that suggests that [ECI] is participating in … activity that would support borrower defense discharges." 4-ER-703. The Department also submitted an exhibit to identify any "final determinations" that schools had "engaged in fraudulent conduct for which borrower defense relief may be granted," and identified "None" for Lincoln. 4-ER-740. Despite this *exculpatory* evidence, the Department "determined" without explanation that "substantial misconduct" occurred at ECI and Lincoln, 3-ER-573-74.

At times, Plaintiffs have argued that the number of BD claims against the Schools justified the Department's action. But Lincoln showed that the claims of which it was aware amounted to just a fraction of 1% of the more than 340,000 students who have enrolled in Lincoln's programs since 2005. 3-ER-494 ¶ 8; 2-ER-156 ¶ 2. The comparative rates thus cannot justify the Department's action.[8]

[8] Even the number of BD claims is inflated. Lincoln showed that 12% of claims submitted as a "group" claim consisted of individuals who had no Title IV loans associated with attendance at Lincoln's schools. 2-ER-156 ¶ 5.

Plaintiffs also have relied on the filing of lawsuits or investigations against listed schools. But Lincoln settled an investigation by the Massachusetts Attorney General in 2015 to avoid the costs of litigation, with no findings of wrongdoing and a commitment that the settlement would not be "evidence in any proceeding to prove any liability, any wrongdoing, or an admission on the part of Defendants by any individual or entity not a party hereto." 2-ER-168 § X. This, too, is not evidence of wrongdoing. *None* of the Schools has a judgment of wrongdoing against them. The Department's unexplained determination of sufficient "indicia" of "misconduct" is unsupported, arbitrary, and capricious.

The district court failed to grapple with this evidence or assess the rationality of the Department's actions. That is reason to reverse.

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The Secretary has no authority to grant the sweeping relief provided in the Settlement. His claim that the HEA provides unlimited debt-cancellation authority finds no support in statutory text. And his failure to follow statutory and regulatory requirements is illegal. The judgment should therefore be reversed.

III. THE FINAL APPROVAL VIOLATED RULE 23.

District courts "must ensure that a certified class satisfies Rule 23 throughout the litigation" and "alter or decertify the class if that is no longer the case." *Jin v. Shanghai Original, Inc.*, 990 F.3d 251, 262 (2d Cir. 2021); *see also McNamara v.*

Felderhof, 410 F.3d 277, 280 n.8 (5th Cir. 2005); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 140 (3d Cir. 1998). This duty applies with special force to settlements, which "present unique due process concerns for absent class members, and [a] district court has a fiduciary duty to look after the interests of those absent class members." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015) (cleaned up).

The district court certified only one class in this case—a Rule 23(b)(2) injunctive-relief class consisting of "[a]ll people who borrowed a Direct Loan or FFEL loan … who have asserted a borrower defense to repayment" which "has not been granted or denied on the merits." 4-ER-812. By the time of the Settlement, certification was improper for several reasons: (A) the Settlement includes monetary relief; (B) developments in the litigation undermined commonality, typicality, and adequacy of representation; (C) the Settlement had no mechanism to exclude putative class members who were never injured by the challenged policies; and (D) the Settlement purported to bind "Post-Class Applicants" who were never certified as a class or represented by any named Plaintiff.

A. No Monetary Relief Class Was Ever Certified.

Rule 23(b)(2) applies "only when a single injunction or declaratory judgment would provide relief to each member of the class," and it "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61

(2011). "[I]ndividualized monetary claims belong in Rule 23(b)(3)." *Id.* at 362. Here, no Rule 23(b)(3) class was certified, yet the Settlement guarantees the Automatic Relief Subclass "a refund of all amounts the Class Member previously paid to the Department toward any Relevant Loan Debt." 3-ER-580. The other subclasses are also guaranteed money under certain circumstances. 3-ER-583-87 §§ IV.C.1.i, IV.C.8, IV.D.2. The Settlement itself confirms the monetary nature of the relief because it *releases* all claims for "monetary relief." 3-ER-597. And to the extent the Settlement provides genuine injunctive relief, it does not constitute "a *single* injunction or declaratory judgment [that] would provide relief to *each* member of the class," *Dukes*, 564 U.S. at 360 (emphases added), but instead provides multivariate relief that could be realized only through multiple injunctions applying to *de facto* subclasses.

This divergence between the class certified and the relief awarded by the Settlement required decertification. But the district court instead ruled that the 23(b)(2) class remained proper because (i) "a settlement can provide broader relief than a court could have awarded after a trial," and (ii) "refunds are restitution and fall within the relief available in an injunction/declaratory relief action." 1-ER-49. Both theories are erroneous.

First, the notion that a Rule 23(b)(2) settlement may provide relief that could not be obtained through a trial contradicts binding precedent holding that, apart from

trial-manageability concerns, Rule 23's requirements "demand undiluted, even heightened, attention in the settlement context." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 849 (1999). There is "no basis for exempting settlements from the rule announced in *Dukes*." *W. Morgan-E. Lawrence Water & Sewer Auth. v. 3M Co.*, 737 F.App'x 457, 468 (11th Cir. 2018) (per curiam); *see also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 241-42 (2d Cir. 2016) (Leval, J., concurring) ("*Dukes* did not involve a settlement agreement, but that does not make its precedent any less applicable ….").

Rule 23(b)(2)'s limitation to class-wide injunctive and declaratory relief *must* apply to settlements to avoid obvious constitutional problems. *See Ortiz*, 527 U.S. at 845 (applying "doctrine of constitutional avoidance" to Rule 23(b)). Rule 23(b)(2) classes are "mandatory classes: The Rule provides no opportunity for … class members to opt out, and does not even oblige the District Court to afford them notice of the action." *Dukes*, 564 U.S. at 362. But, when individualized monetary claims are at stake, opt-out rights are required by both due process and the Seventh Amendment. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807, 811-12 (1985); *Ortiz*, 527 U.S. at 845-46. When an absentee declines to exercise an opt-out right, he may "be presumed to consent to being a member of the class"—and to waive his right to a jury in a settlement. *Shutts*, 472 U.S. at 813; *Ortiz*, 527 U.S. at

845-46. But because absentees have no right in a Rule 23(b)(2) class "to decide *for themselves* whether to tie their fates to the class representatives' or go it alone," *Dukes*, 564 U.S. at 364, binding absentees to a settlement of monetary damages is unconstitutional, which means the rule that injunctive-relief classes may not settle individualized claims for monetary damages cannot be abrogated by a settlement. "[P]arties may not accomplish through class settlement what they otherwise would be unable to accomplish through class litigation—precluding absent class members' individualized claims for monetary damages without providing notice and an opportunity to opt out." *3M*, 737 F.App'x at 469.

Second, refunds are not permissible under Rule 23(b)(2) simply because they might be categorized as "restitution." 1-ER-49. That most forms of restitution are equitable relief "may be true, but it is irrelevant" because "[t]he Rule does not speak of 'equitable' remedies generally but of injunctions and declaratory judgments," and a refund "is neither." *Dukes*, 564 U.S. at 365; *see also Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006) ("The text of Rule 23(b)(2) says nothing whatsoever about equitable relief."). If Rule 23(b)(2) "authorizes the class certification of monetary claims at all," *Dukes*, 564 U.S. at 360, the test is not whether the relief is equitable, but "whether the monetary relief could be granted absent individualized determinations" of each class member's "eligibility for [monetary damages]." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986-87 (9th

Cir. 2011) (alteration in original; quotation marks omitted) (allowing any monetary relief in a 23(b)(2) class "has been called into doubt by the Supreme Court").

The Settlement's monetary relief is impermissible under this test. Processing refunds for the Automatic Relief Subclass will require the Department to award each borrower money based on individualized determinations that the borrower (i) has "Relevant Loan Debt" and asserted a borrower-defense claim; and (ii) made payments to the Department on that debt. 3-ER-582-83. For the other subclasses, the award will, at minimum, require the same individualized determinations and may require far more, such as determinations of all the facts presented by an individual application. 3-ER-583-87. Indeed, the settling parties admit that the processes established by the Settlement deal with "complicated matters" given the "differences among Class Members' circumstances." 2-ER-265-66. These determinations necessarily "focus on" the "individual characteristics of the plaintiffs" and not the "conduct of the defendant." *Ellis*, 657 F.3d at 987 (cleaned up). Plaintiffs cannot satisfy Rule 23(b)(2) by "'superficially structur[ing] their case around a claim for class-wide injunctive and declaratory relief" if "the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made.'" *Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534, 560 (C.D. Cal. 2012) (quoting *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 499 (7th Cir. 2012)). Courts have repeatedly held that individualized refunds like this cannot

be obtained in a Rule 23(b)(2) action.[9]

The individual character of these claims is even more obvious under the release, which precludes parties "from prosecuting, any and all claims … for any injunctive, declaratory, and/or monetary relief, including but not limited to damages" and "debt relief." 3-ER-597. If the Class had been certified under Rule 23(b)(3), members of Subclasses 2 and 3 would be entitled to opt out and assert their own claims for immediate refunds and debt cancellation. But because the only class certified here was a Rule 23(b)(2) class, members of those subclasses were stripped of these claims by the Settlement. And "[i]f a class may not even be certified because of the risk that adjudication of its rights may violate the due process rights of its members by forcibly depriving them of claims, then necessarily an adjudication of a class's rights that in fact forcibly deprives the members of their claims is also unacceptable." *Payment Card Interchange*, 827 F.3d at 241-42 (Leval, J., concurring); *see also 3M*, 737 F.App'x at 469 (district court "abused its discretion by certifying a class under Rule 23(b)(2) and approving a settlement that released absent class members' individualized claims for monetary damages").

[9] *See, e.g.*, *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 826 (7th Cir. 2011) (backpay impermissible); *Thorn*, 445 F.3d at 332 (restitution relief impermissible); *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 531 (D.C. Cir. 2006) (refund program impermissible).

B. The Settlement's Creation Of Multiple Subclasses Destroyed Commonality, Typicality, And Adequate Representation.

Under Rule 23(a), class certification may be maintained only if the requirements of commonality, typicality, and adequacy of representation are met. *Amchem*, 521 U.S. at 613-14. Here, they are not.

First, the district court certified the class on a single premise—that class-wide injunctive relief was appropriate because Plaintiffs "challenge[d] the [Department's] policy of inaction—to which each class member was subjected," 4-ER-819, and this policy could be corrected by a single order to "compel the Department to at least begin deciding applications again," 4-ER-809. But by the time the Settlement was proposed, the Department had been "issuing decisions to class members *for 18 months*" and processed *tens of thousands* of claims. 3-ER-520 (emphasis added); *see also* 3-ER-542-46; 3-ER-550-52. As the Department rightly noted in its summary-judgment brief, there was "no longer a delay common to all class members." 3-ER-520. "If there is no evidence that the entire class was subject to the same [unlawful] practice, there is no question common to the class." *Davidson v. O'Reilly Auto Enters., LLC*, 968 F.3d 955, 967 (9th Cir. 2020) (alteration in original). Tellingly, the settling parties did not rely on the theory that all Class members' claims were premised on unlawful delay in seeking settlement approval. Instead, they (improperly) reframed this suit as "challeng[ing] all aspects of the Department's process of adjudicating … pending BD applications," including "the

substance of … the decisions that the Department has rendered." 2-ER-277. The substance of individualized decisions is not common to, or typical of, every Class member.

Second, by the time of settlement, no named plaintiff was typical of the entire Class. "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis*, 657 F.3d at 984 (cleaned up). All named Plaintiffs originally asserted claims that the "policy of delay" constituted unlawfully withheld agency action under 5 U.S.C. § 706(1), 4-ER-837-39. But by the time Plaintiffs filed their Supplemental Complaint, three named Plaintiffs had been issued "form denial notices," 4-ER-676 ¶ 354 (Sweet); 4-ER-681 ¶ 379 (Deegan); 4-ER-685 ¶ 402 (Jacobson), and one named Plaintiff's application had been partially *approved*, 4-ER-683 ¶ 395 (Davis). None of these Plaintiffs was subject to the "policy of delay" anymore, and those issued "form denial notices" had to rely on an entirely different claim—that the "form denials" were arbitrary and capricious under 5 U.S.C. § 706(2) and not accompanied by a "statement of the grounds for denial" under 5 U.S.C. § 555(e). *See* 7 Newberg on Class Actions § 23.21 (6th ed.) ("[T]ypicality will not be satisfied if the class representative is not a member of the class she purports to represent.").

Third, the Settlement's introduction of multiple relief subclasses resulted in "conflicts of interest with other class members." *Ellis*, 657 F.3d at 985. The settling parties recognized that the Settlement features a tradeoff between the relief for the Automatic Relief Subclass and the Decision Group Subclass. 2-ER-264; 2-ER-271 (noting that eighty-seven Class objectors "asked to have the schools they attended added to Exhibit C," and "[t]his was by far the most common objection"). Among the seven named Plaintiffs, five (Sweet, Archibald, Deegan, Hood, and Jacobson) allegedly attended Exhibit C schools. 4-ER-810-11. Because the Department was willing to grant immediate refunds to borrowers whose debt was associated with some—but not all—schools, these named Plaintiffs were able to negotiate for monetary relief for students who attended their schools, while excluding borrowers who attended other schools. Likewise, Class counsel—which was employed by Harvard University—was able to negotiate to keep Harvard off the Exhibit C list. 2-ER-271 n.7. When, as here, a settlement "divides a single class into … groups of plaintiffs that receive different benefits," "[t]he structure of the settlement agreement itself … supports the inference that the representative plaintiffs are inadequate." *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 187 (3d Cir. 2012); *see also Amchem*, 521 U.S. at 627.

C. The Inclusion Of Uninjured Class Members In The Settlement Renders The Certified Class Overbroad.

The subclasses also suffer from serious standing problems. "Every class

member must have Article III standing in order to recover individual damages." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2208 (2021); *see also Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 680 (9th Cir. 2021). But the Settlement grants monetary relief to individuals who were never injured, either by the policies Plaintiffs challenged in their Complaint or by the alleged conduct in their BD applications.

First, by the time the Settlement was lodged, the Department had been processing applications for at least eighteen months and had agreed to issue "new decisions to each borrower who received" a "form denial notice" when the parties proposed the Settlement. 3-ER-541-43. But the Settlement grants monetary relief to any Class member who attended an Exhibit C school and submitted an application before the Execution Date—regardless of whether the application was filed too late for the borrower to have been affected by the challenged policies. 3-ER-582.

Second, by definition, the subclasses contain individuals who are not eligible for BD relief. 3-ER-582-83 § IV.A (automatic relief for Subclass 1); 3-ER-583 (any "substantial question" as to whether debt "is associated with" a listed school "will be resolved in favor of the Class Member (*i.e.*, in favor of granting relief)"); 3-ER-583-84 § IV.C.1 (relief for Subclass 2 regardless of truth of allegations, insufficiency of evidence, or untimeliness of claim); *see also* 4-ER-703-08 (Department finding that "sample of 50 allegations" against ECI were not "are not the type that would

warrant relief"); 2-ER-156 ¶ 5 (evidence that 12 percent of individuals in a group claim against Lincoln "had not received any Title IV federal student loans and therefore are ineligible for borrower defense relief"). Thus, even accepting the parties' fallacious assertion that this case now involves "the substance" of BD claims, 2-ER-277, there are subclass members with no Article III injury.

Accordingly, this Court "lack[s] assurance that every class member who would receive damages under the settlement suffered an actual injury from [defendant's] alleged … violations." *Harvey v. Morgan Stanley Smith Barney LLC*, 2022 WL 3359174, at *3 (9th Cir. Aug. 15, 2022). At minimum, this Court should "vacate the district court's approval of the settlement agreement and remand for the district court to assess Article III standing of the class members." *Id.*

D. The Claims Of "Post-Class Applicants" Were Never Certified.

Finally, by compromising the claims of "Post-Class Applicants," the Settlement purports to bind individuals into a subclass that was never certified, who were not represented by any named Plaintiff, and who did not necessarily receive notice under Rule 23(c) and (e). According to the Settlement, the Class "consist[s] of all people who borrowed a Direct Loan or FFEL loan ... who have asserted a borrower defense to repayment to the Department, whose borrower defense has not been granted or denied on the merits." 3-ER-581 § III.A. This Class "closed as of the Execution Date," which was on or before June 22, 2022. 3-ER-579, 582 §§ II.L,

III.D. But the Settlement also provides relief to—and binds as "Plaintiffs"—any individual who "submit[ted] a borrower defense application after the Execution Date (*i.e.*, the date the class closes), but before the Final Approval Date" of November 16, 2022. 3-ER-580, 587 §§ II.U, IV.D.1.[10]

Because Subclass 3 bound individuals who submitted BD claims up until the moment of final approval, some members of that subclass necessarily never received the notice required by Rule 23(c) and (e) and never had the opportunity to object prior to the fairness hearing. 3-ER-599 §§ X.5-7. Moreover, by compromising the claims of absentees who were never certified as a class, the Settlement violates both Rule 23 and the due-process rights of absentees. Under Rule 23, individual plaintiffs have the authority to "sue ... as representative parties on behalf of all members only if" the requirements of 23(a) and (b) are satisfied. *See Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906, 1920 (2022) (individual plaintiff's assertion of absentees' claims, "of course, requires the certification of a class"); *Amchem*, 521 U.S. at 623 (similar). Under Rule 23 and the Due Process Clause, absentees may be bound by a class-action judgment only if they "are in fact adequately represented by parties who are present." *Hansberry v. Lee*, 311 U.S. 32, 43-44 (1940); *see also* Fed. R. Civ. P.

[10] There are approximately 206,000 Post-Class Applicants. U.S. Stay Opp. 10. The district court sidestepped this issue, reasoning that "the class certification order set no cut-off date for membership." 1-ER-50. But that definition is not the one used in the all-or-nothing Settlement, 3-ER-601 § XIII.A. It is *that* class definition that the court approved in the Final Judgment.

23(a)(4), (e)(2). The "Post-Class" Subclass received *no representation* at all, meaning "the settlement and release that resulted … are nullities." *Payment Card Interchange*, 827 F.3d at 236.

IV. THE SETTLEMENT VIOLATES DUE PROCESS.

The Settlement strips the Schools of "liberty [and] property interest[s]" without constitutionally adequate process. *Hewitt v. Grabicki*, 794 F.2d 1373, 1380 (9th Cir. 1986). The Schools have (1) a protected liberty interest in their reputation, and (2) a property interest in Title IV funds. Exhibit C unconstitutionally impairs these interests. At a minimum, the Schools should be removed from the Settlement.

A. The Settlement Defames And Impugns The Schools' Reputations Without Due Process.

The Schools have a protectable liberty interest in avoiding "stigmatizing governmental" action that has "an immediate and tangible effect on [their] ability to do business." *Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953, 961 (D.C. Cir. 1980). It is well-settled that "[a] liberty interest may be implicated where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." *Endy v. Cnty. of Los Angeles*, 975 F.3d 757, 764 (9th Cir. 2020) (cleaned up). Government infliction of reputational harm deprives a person of a cognizable liberty interest when he is "stigmatized in connection with the denial of a more tangible interest." *Hart v. Parks*, 450 F.3d 1059, 1069 (9th Cir. 2006) (cleaned up). Under this "stigma-plus" test, "stigma from governmental

action plus alteration or extinguishment of a right … previously recognized" establishes a liberty interest. *Fikre v. FBI*, 35 F.4th 762, 776 (9th Cir. 2022) (cleaned up).

The "stigma" of inclusion on a list of wrongdoers "bearing the imprimatur of the [Department]" immediately affects the Schools' relationship with current and prospective students and can cause the Schools to "los[e] additional students to competitors," "los[e] donations," and suffer other consequences. *Sherman Coll. of Straight Chiropractic v. U.S. Comm'r of Educ.*, 493 F. Supp. 976, 978–79 (D.D.C. 1980). And there is another "tangible" plus factor, involving "extinguishment of a right … previously recognized," *Fikre*, 35 F.4th at 776 (cleaned up): By labeling the Schools presumptive wrongdoers, Exhibit C extinguishes the procedural rights guaranteed to schools by the BD regulations and impairs their right to defend themselves in any future recoupment proceedings. 34 C.F.R. § 685.206(c)(3), (c)(4), (e)(16); *id.* § 685.222(e)(7), (h)(1) (specifying procedures for recoupment).

Both the "stigma" and the "plus" factor are clear. First, the stigma: The Settlement has inflicted grievous reputational injuries against the Schools. *See supra* 13-15. Being publicly branded a presumptive wrongdoer by one's primary federal regulator based on undisclosed evidence (or no evidence at all) without any opportunity to defend oneself seriously damages a school's reputation and goodwill. The Schools have worked for decades to build relationships with secondary schools,

community leaders, employers, and business partners, and Exhibit C directly damages those relationships in ways that are difficult to repair. That harm is self-evident, but it is also amply supported by the record. *See, e.g.*, *supra* 13-15.

Second, the plus factor: Under the Settlement, the Schools are denied the administrative rights and defenses guaranteed by the Department's BD regulations. Not only will the Schools lose their rights to create an administrative record and receive a reasoned decision on each BD claim that implicates them, but the Schools will be exposed to potential liability to the Department for all BD claims that were summarily granted or may be granted under the new "review" framework. Given that Plaintiffs brought this litigation to *compel* reasoned BD decisions, they can hardly now claim that the absence of any reasoned decision for the 196,000 BD claims in Subclass 1 is inconsequential.

Under binding regulations, a school has a right to receive notice of a borrower-defense application that implicates the school, a right to submit evidence in the factfinding process that forms the administrative record, and a right to receive a reasoned decision from the Department. *See* 34 C.F.R. §§ 685.206(c)(1)–(2), (e)(10)–(11), 685.222(e)(3)(i). The regulations specify the grounds on which the Department can grant a borrower-defense claim based on, for example, an alleged "statement, act, or omission by an eligible school to a borrower that is false, misleading, or deceptive … and that directly and clearly relates to enrollment or

continuing enrollment at the institution or the provision of educational services for which the loan was made." *Id.* § 685.206(e)(3). To weed out unmeritorious and untimely claims, the regulations also specify grounds on which a BD claim shall *not* be granted and limitations periods. *Id.* § 685.206(e)(5)–(6). These regulations expressly grant rights and defenses to schools, and they are necessary steps in the administrative process. The same regulations that prescribe the BD adjudication process also permit the Department, if it grants a BD application, to seek "recoupment" for discharged funds from the implicated school. *See, e.g.*, *id.* § 685.222(e)(7). As the Department itself has recognized, a school's ability to participate in the initial borrower-defense adjudication is an important right designed to "reduce the likelihood" that a school will later "be burdened by [an] unjustified clai[m]." 84 Fed. Reg. 49,788, 49,825 (Sept. 23, 2019). Schools, however, lose those rights under the Settlement; claims against them are resolved summarily. The Schools also will be subject to new regulatory standards in Subclass 3.

The district court gave short shrift to these obvious interests, but its reasons do not withstand scrutiny. First, the court appeared to suggest that Exhibit C does not implicate due process at all because it "does not carry the necessary legal significance" and "had no legally binding effect on the [Schools]." 1-ER-42-44. But the Settlement plainly implicates due process because it involves state action that impairs the Schools' interests. If a police flyer depicting a person as an "active

shoplifter" is subject to due-process scrutiny, *Paul v. Davis*, 424 U.S. 693, 698-700 (1976), then surely Exhibit C is as well. The Settlement *names* the Schools as bad actors, in a determination bearing the imprimatur of the Schools' primary regulator and the stamp of a federal court's approval.

Second, the district court minimized the loss of the Schools' procedural rights by relying on a carefully worded declaration submitted by the Department to rule that the Department "*cannot* recoup" loans summarily discharged under the Settlement. 1-ER-14; 3-ER-399 ¶ 9. But despite that declaration and the district court's ruling, the government has now represented that recoupment somehow "could occur." U.S. Stay Opp. 2. The Department's representation shows that the threat of recoupment liability is real and imminent—and confirms the importance of allowing the Schools to defend themselves in BD adjudications.

Accordingly, the Schools have a protectable liberty interest for due-process purposes.

B. The Settlement Impairs The Schools' Property Interests.

The Settlement also would deprive the Schools of constitutionally protected property interests in Title IV funds.

Schools have "a property interest in retaining the funds in [their] accounts" and thus possess a vested property interest in Title IV loans already received. *Chauffeur's Training Sch., Inc. v. Riley*, 967 F. Supp. 719, 729 (N.D.N.Y. 1997)

(holding that school has "a constitutionally protected property interest" under the FFEL program in loan proceeds "paid to [the school] by its students to cover the costs of those students' educations"). Even if Title IV funds are dispersed subject to the government's limited right of recoupment, that right is prescribed in regulations that set strict procedures and time limits. *See* 34 C.F.R. §§ 685.206, .222. Otherwise, schools' rights in Title IV funds become vested and are not subject to diminishment or recoupment.

The Settlement would retroactively and impermissibly diminish these property rights. BD claims are now time-barred for many of the loans at issue—as old as 1992, *see* 3-ER-494 ¶ 7—thus precluding any possibility of recoupment. Yet the Settlement grants discharges and refunds for these time-barred claims, creating a new threat of recoupment. The Settlement also will grant claims that are patently unmeritorious. *See, e.g.*, *supra* 45 & n.8. This squarely implicates due process. *Kerley Indus., Inc. v. Pima Cnty.*, 785 F.2d 1444, 1446 (9th Cir. 1986).

C. The Settlement Does Not Provide The Schools Constitutionally Required Process.

Despite these liberty and property interests, the Schools have been offered *no* process to defend against their inclusion in Exhibit C (or in the new process for Post-Class Applicants). The Department has publicly branded every school on Exhibit C as engaging in "institutional" and "substantial misconduct," 3-ER-559, 573, without providing any notice to the schools that this determination process was occurring,

without any official finding of wrongdoing, and without any opportunity to rebut the allegation.

This absence of process is unconstitutional. "[A]dministrative decisions" that "closely resemble judicial determinations … require similar procedural protections," *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1261 (9th Cir. 1977), and "[a]n opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process," *Ralpho v. Bell*, 569 F.2d 607, 628 (D.C. Cir. 1977). No such procedures were provided before the Department purported to "determin[e]" that there were "strong indicia regarding substantial misconduct." 3-ER-573-74.

It is no answer, as the district court reasoned, that this determination does not "impose any liability" against schools, "absent [recoupment] proceedings initiated specifically against them." 1-ER-42. The BD regulations provide schools notice and a right to meet and rebut evidence through *two* different steps: Step One—the lawful adjudication of a BD claim; and Step Two—recoupment or other related disciplinary proceeding. That the Settlement is silent as to Step Two proceedings does not cure the due-process violations inherent in eliminating Step One protections. *See Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1012 (D.C. Cir. 2005) ("Considering petitioners' arguments" after the fact "is not the same thing as allowing them to present evidence on the issue"). Schools are losing important

procedural protections for their vested interests here and now—protections designed to "reduce the likelihood that … schools will be burdened by unjustified claims." 84 Fed. Reg. at 49,825.

***

The Department could have granted BD claims without specifically naming 151 non-party schools. In reality, Exhibit C was *designed* to defame and harm schools. It was collusively created by Plaintiffs' counsel and Department leadership, and included in the Settlement, to make a political statement and harm disfavored schools—based on no evidence of wrongdoing. The Department's process-free determination violates due process.

V. THE DISTRICT COURT ERRED IN DENYING INTERVENTION OF RIGHT.

Although the district court permitted the Schools to intervene permissively, 1-ER-54, the court denied intervention of right on the ground that the Schools did not "have a property interest … at stake," 2-ER-341. That was error.[11]

To intervene by right under Federal Rule of Civil Procedure 24(a), a proposed intervenor must make a (1) "timely" motion showing (2) "that the would-be intervenor has a significantly protectable interest relating to ... the subject of the action," (3) "that the disposition of the action may as a practical matter impair or

[11] As permissive intervenors, the Schools were not permitted to take discovery or participate in settlement negotiations. If this case is remanded, intervention of right would ensure the Schools have full participation.

impede [the intervenor's] ability to protect that interest," and (4) "that such interest is inadequately represented by the parties to the action." *Kalbers v. U.S. Dep't of Just.*, 22 F.4th 816, 827 (9th Cir. 2021) (alterations in original). These requirements are "broadly interpreted in favor of intervention," *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011), and are satisfied here.

The district court correctly concluded that the Schools were timely because they filed their intervention motions just three weeks after learning that they had been named on Exhibit C and that their rights would be implicated. 1-ER-55. The Schools' interests also are not adequately represented by the settling parties; rather, their interests are diametrically opposed.

The district court denied intervention of right on the ground that the Schools lacked protectable interests in the Settlement, but that was wrong. As explained above, the Schools have "a property interest that is imperiled by this litigation." *W. Watersheds Project v. Haaland*, 22 F.4th 828, 842 (9th Cir. 2022). They have rights to participate in pending BD adjudications under binding regulations, and interests in safeguarding their reputations and avoiding exposure to recoupment. And the Settlement would revive time-barred BD claims, rendering vested interests in property contingent. The Settlement's unlawful deprivation of those rights warranted intervention of right, and the district court erred in holding otherwise.

CONCLUSION

The government could have settled this case lawfully. Instead, it awarded Plaintiffs an illegal bonanza and gratuitously maligned non-party schools to make a political statement. When the government violates the law and harms regulated parties, as it has here, courts should hold the government accountable. The final judgment should be reversed and the case dismissed.

Dated: May 4, 2023

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STATEMENT OF RELATED CASES

Under Ninth Circuit Rule 28-2.6, Appellants state that they are not aware of any related cases pending before this Court.

Date: May 4, 2023

/s/ Lucas C. Townsend
Lucas C. Townsend

CERTIFICATE OF COMPLIANCE

I certify that under Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-2(b), this joint brief submitted by separately represented parties is proportionately spaced, has a typeface of 14 points, and contains 15,395 words, excluding the portions excepted by Federal Rule of Appellate Procedure 32(f), according to the word-count feature of Microsoft Word used to generate this brief.

Date: May 4, 2023

/s/ Lucas C. Townsend
Lucas C. Townsend

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May 2023, I electronically filed the foregoing brief and attached addendum with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: May 4, 2023

/s/ Lucas C. Townsend
Lucas C. Townsend

ADDENDUM

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20 U.S.C. § 1082. Legal powers and responsibilities

(a) General powers

In the performance of, and with respect to, the functions, powers, and duties, vested in him by this part, the Secretary may--

(1) prescribe such regulations as may be necessary to carry out the purposes of this part, including regulations applicable to third party servicers (including regulations concerning financial responsibility standards for, and the assessment of liabilities for program violations against, such servicers) to establish minimum standards with respect to sound management and accountability of programs under this part, except that in no case shall damages be assessed against the United States for the actions or inactions of such servicers;

(2) sue and be sued in any court of record of a State having general jurisdiction or in any district court of the United States, and such district courts shall have jurisdiction of civil actions arising under this part without regard to the amount in controversy, and action instituted under this subsection by or against the Secretary shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in that office; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Secretary or property under the Secretary's control and nothing herein shall be construed to except litigation arising out of activities under this part from the application of sections 509, 517, 547, and 2679 of Title 28;

(3) include in any contract for Federal loan insurance such terms, conditions, and covenants relating to repayment of principal and payment of interest, relating to the Secretary's obligations and rights to those of eligible lenders, and borrowers in case of default, and relating to such other matters as the Secretary determines to be necessary to assure that the purposes of this part will be achieved; and any term, condition, and covenant made pursuant to this paragraph or pursuant to any other provision of this part may be modified by the Secretary, after notice and opportunity for a hearing, if the Secretary finds that the modification is necessary to protect the United States from the risk of unreasonable loss;

(4) subject to the specific limitations in this part, consent to modification, with respect to rate of interest, time of payment of any installment of principal and

interest or any portion thereof, or any other provision of any note or other instrument evidencing a loan which has been insured by the Secretary under this part;

(5) enforce, pay, or compromise, any claim on, or arising because of, any such insurance or any guaranty agreement under section 1078(c) of this title; and

(6) enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption.

(b) Financial operations responsibilities

The Secretary shall, with respect to the financial operations arising by reason of this part prepare annually and submit a budget program as provided for wholly owned Government corporations by chapter 91 of Title 31. The transactions of the Secretary, including the settlement of insurance claims and of claims for payments pursuant to section 1078 of this title, and transactions related thereto and vouchers approved by the Secretary in connection with such transactions, shall be final and conclusive upon all accounting and other officers of the Government. The Secretary may not enter into any settlement of any claim under this subchapter that exceeds $1,000,000 unless--

(1) the Secretary requests a review of the proposed settlement of such claim by the Attorney General; and

(2) the Attorney General responds to such request, which may include, at the Attorney General's discretion, a written opinion related to such proposed settlement.

(c) Data collection

(1) Collection by category of loan

(A) For loans insured after December 31, 1976, or in the case of each insurer after such earlier date where the data required by this subsection are available, the Secretary and all other insurers under this part shall collect and accumulate all data relating to (i) loan volume insured and (ii) defaults reimbursed or default rates according to the categories of loans listed in subparagraph (B) of this paragraph.

(B) The data indicated in subparagraph (A) of this paragraph shall be accumulated according to the category of lender making the loan and

shall be accumulated separately for lenders who are (i) eligible institutions, (ii) State or private, nonprofit direct lenders, (iii) commercial financial institutions who are banks, savings and loan associations, or credit unions, and (iv) all other types of institutions or agencies.

(C) The Secretary may designate such additional subcategories within the categories specified in subparagraph (B) of this paragraph as the Secretary deems appropriate.

(D) The category or designation of a loan shall not be changed for any reason, including its purchase or acquisition by a lender of another category.

(2) Collection and reporting requirements

(A) The Secretary shall collect data under this subsection from all insurers under this part and shall publish not less often than once every fiscal year a report showing loan volume guaranteed and default data for each category specified in subparagraph (B) of paragraph (1) of this subsection and for the total of all lenders.

(B) The reports specified in subparagraph (A) of this paragraph shall include a separate report for each insurer under this part including the Secretary, and where an insurer insures loans for lenders in more than one State, such insurer's report shall list all data separately for each State.

(3) Institutional, public, or nonprofit lenders

For purposes of clarity in communications, the Secretary shall separately identify loans made by the lenders referred to in clause (i) and loans made by the lenders referred to in clause (ii) of paragraph (1)(B) of this subsection.

(d) Delegation

(1) Regional offices

The functions of the Secretary under this part listed in paragraph (2) of this subsection may be delegated to employees in the regional office of the Department.

(2) Delegable functions

The functions which may be delegated pursuant to this subsection are--

(A) reviewing applications for loan insurance under section 1079 of this title and issuing contracts for Federal loan insurance, certificates of insurance, and certificates of comprehensive insurance coverage to eligible lenders which are financial or credit institutions subject to examination and supervision by an agency of the United States or of any State;

(B) receiving claims for payments under section 1080(a) of this title, examining those claims, and pursuant to regulations of the Secretary, approving claims for payment, or requiring lenders to take additional collection action as a condition for payment of claims; and

(C) certifying to the central office when collection of defaulted loans has been completed, compromising or agreeing to the modification of any Federal claim against a borrower (pursuant to regulations of the Secretary issued under subsection (a)), and recommending litigation with respect to any such claim.

(e) Use of information on borrowers

Notwithstanding any other provision of law, the Secretary may provide to eligible lenders, and to any guaranty agency having a guaranty agreement under section 1078(c)(1) of this title, any information with respect to the names and addresses of borrowers or other relevant information which is available to the Secretary, from whatever source such information may be derived.

(f) Audit of financial transactions

(1) Comptroller General and Inspector General authority

The Comptroller General and the Inspector General of the Department of Education shall each have the authority to conduct an audit of the financial transactions of--

(A) any guaranty agency operating under an agreement with the Secretary pursuant to section 1078(b) of this title;

(B) any eligible lender as defined in section 1085(d)(1) of this title;

(C) a representative sample of eligible lenders under this part, upon the request of either of the authorizing committees, with respect to the payment of the special allowance under section 1087-1 of this title in order to evaluate the program authorized by this part.

(2) Access to records

For the purpose of carrying out this subsection, the records of any entity described in subparagraph (A), (B), (C), or (D)[1] of paragraph (1) shall be available to the Comptroller General and the Inspector General of the Department of Education. For the purpose of section 716(c) of Title 31, such records shall be considered to be records to which the Comptroller General has access by law, and for the purpose of section 406(a)(4) of Title 5, such records shall be considered to be records necessary in the performance of functions assigned by chapter 4 of Title 5 to the Inspector General.

(3) "Record" defined

For the purpose of this subsection, the term "record" includes any information, document, report, answer, account, paper, or other data or documentary evidence.

(4) Audit procedures

In conducting audits pursuant to this subsection, the Comptroller General and the Inspector General of the Department of Education shall audit the records to determine the extent to which they, at a minimum, comply with Federal statutes, and rules and regulations prescribed by the Secretary, in effect at the time that the record was made, and in no case shall the Comptroller General or the Inspector General apply subsequently determined standards, procedures, or regulations to the records of such agency, lender, or Authority.

(g) Civil penalties

(1) Authority to impose penalties

Upon determination, after reasonable notice and opportunity for a hearing, that a lender or a guaranty agency--

(A) has violated or failed to carry out any provision of this part or any regulation prescribed under this part, or

(B) has engaged in substantial misrepresentation of the nature of its financial charges,

the Secretary may impose a civil penalty upon such lender or agency of not to exceed $25,000 for each violation, failure, or misrepresentation.

(2) Limitations

No civil penalty may be imposed under paragraph (1) of this subsection unless the Secretary determines that--

(A) the violation, failure, or substantial misrepresentation referred to in that paragraph resulted from a violation, failure, or misrepresentation that is material; and

(B) the lender or guaranty agency knew or should have known that its actions violated or failed to carry out the provisions of this part or the regulations thereunder.

(3) Correction of failure

A lender or guaranty agency has no liability under paragraph (1) of this subsection if, prior to notification by the Secretary under that paragraph, the lender or guaranty agency cures or corrects the violation or failure or notifies the person who received the substantial misrepresentation of the actual nature of the financial charges involved.

(4) Consideration as single violation

For the purpose of paragraph (1) of this subsection, violations, failures, or substantial misrepresentations arising from a specific practice of a lender or guaranty agency, and occurring prior to notification by the Secretary under that paragraph, shall be deemed to be a single violation, failure, or substantial misrepresentation even if the violation, failure, or substantial misrepresentation affects more than one loan or more than one borrower, or both. The Secretary may only impose a single civil penalty for each such violation, failure, or substantial misrepresentation.

(5) Assignees not liable for violations by others

If a loan affected by a violation, failure, or substantial misrepresentation is assigned to another holder, the lender or guaranty agency responsible for the violation, failure, or substantial misrepresentation shall remain liable for any civil money penalty provided for under paragraph (1) of this subsection, but the assignee shall not be liable for any such civil money penalty.

(6) Compromise

Until a matter is referred to the Attorney General, any civil penalty under paragraph (1) of this subsection may be compromised by the Secretary. In determining the amount of such penalty, or the amount agreed upon in compromise, the Secretary shall consider the appropriateness of the penalty to the resources of the lender or guaranty agency subject to the determination; the gravity of the violation, failure, or substantial misrepresentation; the frequency and persistence of the violation, failure, or substantial misrepresentation; and the amount of any losses resulting from the violation, failure, or substantial misrepresentation. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the lender or agency charged, unless the lender or agency has, in the case of a final agency determination, commenced proceedings for judicial review within 90 days of the determination, in which case the deduction may not be made during the pendency of the proceeding.

(h) Authority of the Secretary to impose and enforce limitations, suspensions, and terminations

(1) Imposition of sanctions

(A) If the Secretary, after a reasonable notice and opportunity for hearing to an eligible lender, finds that the eligible lender--

(i) has substantially failed--

(I) to exercise reasonable care and diligence in the making and collecting of loans under the provisions of this part,

(II) to make the reports or statements under section 1078(a)(4) of this title, or

(III) to pay the required loan insurance premiums to any guaranty agency, or

(ii) has engaged in--

(I) fraudulent or misleading advertising or in solicitations that have resulted in the making of loans insured or guaranteed under this part to borrowers who are ineligible; or

(II) the practice of making loans that violate the certification for eligibility provided in section 1078 of this title,

the Secretary shall limit, suspend, or terminate that lender from participation in the insurance programs operated by guaranty agencies under this part.

(B) The Secretary shall not lift any such limitation, suspension, or termination until the Secretary is satisfied that the lender's failure under subparagraph (A)(i) of this paragraph or practice under subparagraph (A)(ii) of this paragraph has ceased and finds that there are reasonable assurances that the lender will--

(i) exercise the necessary care and diligence,

(ii) comply with the requirements described in subparagraph (A)(i), or

(iii) cease to engage in the practices described in subparagraph (A)(ii),

as the case may be.

(2) Review of sanctions on lenders

(A) The Secretary shall review each limitation, suspension, or termination imposed by any guaranty agency pursuant to section 1078(b)(1)(U) of this title within 60 days after receipt by the Secretary of a notice from the guaranty agency of the imposition of such limitation, suspension, or termination, unless the right to such review is waived in writing by the lender. The Secretary shall uphold the imposition of such limitation, suspension, or termination in the student loan insurance program of each of the guaranty agencies under this part, and shall notify such guaranty agencies of such sanction--

(i) if such review is waived; or

(ii) if such review is not waived, unless the Secretary determines that the limitation, suspension, or termination was not imposed in accordance with requirements of such section.

(B) The Secretary's review under this paragraph of the limitation, suspension, or termination imposed by a guaranty agency pursuant to section 1078(b)(1)(U) of this title shall be limited to--

(i) a review of the written record of the proceedings in which the guaranty agency imposed such sanctions; and

(ii) a determination as to whether the guaranty agency complied with section 1078(b)(1)(U) of this title and any notice and hearing requirements prescribed in regulations of the Secretary under this part.

(C) The Secretary shall not lift any such sanction until the Secretary is satisfied that the lender has corrected the failures which led to the limitation, suspension, or termination, and finds that there are reasonable assurances that the lender will, in the future, comply with the requirements of this part. The Secretary shall notify each guaranty agency of the lifting of any such sanction.

(3) Review of sanctions on eligible institutions

(A) The Secretary shall review each limitation, suspension, or termination imposed by any guaranty agency pursuant to section 1078(b)(1)(T) of this title within 60 days after receipt by the Secretary of a notice from the guaranty agency of the imposition of such limitation, suspension, or termination, unless the right to such review is waived in writing by the institution. The Secretary shall uphold the imposition of such limitation, suspension, or termination in the student loan insurance program of each of the guaranty agencies under this part, and shall notify such guaranty agencies of such sanctions--

(i) if such review is waived; or

(ii) if such review is not waived, unless the Secretary determines that the limitation, suspension, or termination was not imposed in accordance with requirements of such section.

(B) The Secretary's review under this paragraph of the limitation, suspension, or termination imposed by a guaranty agency pursuant to section 1078(b)(1)(T) of this title shall be limited to--

(i) a review of the written record of the proceedings in which the guaranty agency imposed such sanctions; and

(ii) a determination as to whether the guaranty agency complied with section 1078(b)(1)(T) of this title and any notice and hearing requirements prescribed in regulations of the Secretary under this part.

(C) The Secretary shall not lift any such sanction until the Secretary is satisfied that the institution has corrected the failures which led to the limitation, suspension, or termination, and finds that there are reasonable assurances that the institution will, in the future, comply with the requirements of this part. The Secretary shall notify each guaranty agency of the lifting of any such sanction.

(i) Authority to sell defaulted loans

In the event that all other collection efforts have failed, the Secretary is authorized to sell defaulted student loans assigned to the United States under this part to collection agencies, eligible lenders, guaranty agencies, or other qualified purchaser on such terms as the Secretary determines are in the best financial interests of the United States. A loan may not be sold pursuant to this subsection if such loan is in repayment status.

(j) Authority of Secretary to take emergency actions against lenders

(1) Imposition of sanctions

If the Secretary--

(A) receives information, determined by the Secretary to be reliable, that a lender is violating any provision of this subchapter, any regulation prescribed under this subchapter, or any applicable special arrangement, agreement, or limitation;

(B) determines that immediate action is necessary to prevent misuse of Federal funds; and

(C) determines that the likelihood of loss outweighs the importance of following the limitation, suspension, or termination procedures authorized in subsection (h);

the Secretary shall, effective on the date on which a notice and statement of the basis of the action is mailed to the lender (by registered mail, return receipt requested), take emergency action to stop the issuance of guarantee commitments and the payment of interest benefits and special allowance to the lender.

(2) Length of emergency action

An emergency action under this subsection may not exceed 30 days unless a limitation, suspension, or termination proceeding is initiated against the lender under subsection (h) before the expiration of that period.

(3) Opportunity to show cause

The Secretary shall provide the lender, if it so requests, an opportunity to show cause that the emergency action is unwarranted.

(k) Program of assistance for borrowers

(1) In general

The Secretary shall undertake a program to encourage corporations and other private and public employers, including the Federal Government, to assist borrowers in repaying loans received under this subchapter, including providing employers with options for payroll deduction of loan payments and offering loan repayment matching provisions as part of employee benefit packages.

(2) Publication

The Secretary shall publicize models for providing the repayment assistance described in paragraph (1) and each year select entities that deserve recognition, through means devised by the Secretary, for the development of innovative plans for providing such assistance to employees.

(3) Recommendation

The Secretary shall recommend to the appropriate committees in the Senate and House of Representatives changes to statutes that could be made in order to further encourage such efforts.

(l) Uniform administrative and claims procedures

(1) In general

The Secretary shall, by regulation developed in consultation with guaranty agencies, lenders, institutions of higher education, secondary markets, students, third party servicers and other organizations involved in providing loans under this part, prescribe standardized forms and procedures regarding--

(A) origination of loans;

(B) electronic funds transfer;

(C) guaranty of loans;

(D) deferments;

(E) forbearance;

(F) servicing;

(G) claims filing;

(H) borrower status change and anticipated graduation date; and

(I) cures.

(2) Special rules

(A) The forms and procedures described in paragraph (1) shall include all aspects of the loan process as such process involves eligible lenders and guaranty agencies and shall be designed to minimize administrative costs and burdens (other than the costs and burdens involved in the transition to new forms and procedures) involved in exchanges of data to and from borrowers, schools, lenders, secondary markets, and the Department.

(B) Nothing in this paragraph shall be construed to limit the development of electronic forms and procedures.

(3) Simplification requirements

Such regulations shall include--

(A) standardization of computer formats, forms design, and guaranty agency procedures relating to the origination, servicing, and collection of loans made under this part;

(B) authorization of alternate means of document retention, including the use of microfilm, microfiche, laser disc, compact disc, and other methods allowing the production of a facsimile of the original documents;

(C) authorization of the use of computer or similar electronic methods of maintaining records relating to the performance of servicing, collection, and other regulatory requirements under this chapter; and

(D) authorization and implementation of electronic data linkages for the exchange of information to and from lenders, guarantors, institutions of higher education, third party servicers, and the Department of Education for student status confirmation reports, claim filing, interest and special allowance billing, deferment processing, and all other administrative steps relating to loans made pursuant to this part where using electronic data linkage is feasible.

(4) Additional recommendations

The Secretary shall review regulations prescribed pursuant to paragraph (1) and seek additional recommendations from guaranty agencies, lenders, institutions of higher education, students, secondary markets, third party servicers and other organizations involved in providing loans under this part, not less frequently than annually, for additional methods of simplifying and standardizing the administration of the programs authorized by this part.

(m) Common forms and formats

(1) Common guaranteed student loan application form and promissory note

(A) In general

The Secretary, in cooperation with representatives of guaranty agencies, eligible lenders, and organizations involved in student financial assistance, shall prescribe common application forms

and promissory notes, or master promissory notes, to be used for applying for loans under this part.

(B) Requirements

The forms prescribed by the Secretary shall--

(i) use clear, concise, and simple language to facilitate understanding of loan terms and conditions by applicants; and

(ii) be formatted to require the applicant to clearly indicate a choice of lender.

(C) Free application form

For academic year 1999-2000 and succeeding academic years, the Secretary shall prescribe the form developed under section 1090 of this title as the application form under this part, other than for loans under sections 1078-2 and 1078-3 of this title.

(D) Master promissory note

(i) In general

The Secretary shall develop and require the use of master promissory note forms for loans made under this part and part D. Such forms shall be available for periods of enrollment beginning not later than July 1, 2000. Each form shall allow eligible borrowers to receive, in addition to initial loans, additional loans for the same or subsequent periods of enrollment through a student confirmation process approved by the Secretary. Such forms shall be used for loans made under this part or part D as directed by the Secretary. Unless otherwise notified by the Secretary, each institution of higher education that participates in the program under this part or part D may use a master promissory note for loans under this part and part D.

(ii) Consultation

In developing the master promissory note under this subsection, the Secretary shall consult with representatives of guaranty agencies, eligible lenders, institutions of higher education,

students, and organizations involved in student financial assistance.

(iii) Sale; assignment; enforceability

Notwithstanding any other provision of law, each loan made under a master promissory note under this subsection may be sold or assigned independently of any other loan made under the same promissory note and each such loan shall be separately enforceable in all Federal and State courts on the basis of an original or copy of the master promissory note in accordance with the terms of the master promissory note.

(E) Perfection of security interests in student loans

(i) In general

Notwithstanding the provisions of any State law to the contrary, including the Uniform Commercial Code as in effect in any State, a security interest in loans made under this part, on behalf of any eligible lender (as defined in section 1085(d) of this title) shall attach, be perfected, and be assigned priority in the manner provided by the applicable State's law for perfection of security interests in accounts, as such law may be amended from time to time (including applicable transition provisions). If any such State's law provides for a statutory lien to be created in such loans, such statutory lien may be created by the entity or entities governed by such State law in accordance with the applicable statutory provisions that created such a statutory lien.

(ii) Collateral description

In addition to any other method for describing collateral in a legally sufficient manner permitted under the laws of the State, the description of collateral in any financing statement filed pursuant to this subparagraph shall be deemed legally sufficient if it lists such loans, or refers to records (identifying such loans) retained by the secured party or any designee of the secured party identified in such financing statement, including the debtor or any loan servicer.

(iii) Sales

Notwithstanding clauses (i) and (ii) and any provisions of any State law to the contrary, other than any such State's law providing for creation of a statutory lien, an outright sale of loans made under this part shall be effective and perfected automatically upon attachment as defined in the Uniform Commercial Code of such State.

(2) Common deferment form

The Secretary, in cooperation with representatives of guaranty agencies, institutions of higher education, and lenders involved in loans made under this part, shall prescribe a common deferment reporting form to be used for the processing of deferments of loans made under this subchapter.

(3) Common reporting formats

The Secretary shall promulgate standards including necessary rules, regulations (including the definitions of all relevant terms), and procedures so as to require all lenders and guaranty agencies to report information on all aspects of loans made under this part in uniform formats, so as to permit the direct comparison of data submitted by individual lenders, servicers, or guaranty agencies.

(4) Electronic forms

Nothing in this section shall be construed to limit the development and use of electronic forms and procedures.

(n) Default reduction management

(1) Authorization

There are authorized to be appropriated $25,000,000 for fiscal year 1999 and each of the four succeeding fiscal years, for the Secretary to expend for default reduction management activities for the purposes of establishing a performance measure that will reduce defaults by 5 percent relative to the prior fiscal year. Such funds shall be in addition to, and not in lieu of, other appropriations made for such purposes.

(2) Allowable activities

Allowable activities for which such funds shall be expended by the Secretary shall include the following: (A) program reviews; (B) audits; (C) debt

management programs; (D) training activities; and (E) such other management improvement activities approved by the Secretary.

(3) Plan for use required

The Secretary shall submit a plan, for inclusion in the materials accompanying the President's budget each fiscal year, detailing the expenditure of funds authorized by this section to accomplish the 5 percent reduction in defaults. At the conclusion of the fiscal year, the Secretary shall report the Secretary's findings and activities concerning the expenditure of funds and whether the performance measure was met. If the performance measure was not met, the Secretary shall report the following:

(A) why the goal was not met, including an indication of any managerial deficiencies or of any legal obstacles;

(B) plans and a schedule for achieving the established performance goal;

(C) recommended legislative or regulatory changes necessary to achieve the goal; and

(D) if the performance standard or goal is impractical or infeasible, why that is the case and what action is recommended, including whether the goal should be changed or the program altered or eliminated.

This report shall be submitted to the Appropriations Committees of the House of Representatives and the Senate and to the authorizing committees.

(o) Consequences of guaranty agency insolvency

In the event that the Secretary has determined that a guaranty agency is unable to meet its insurance obligations under this part, the holder of loans insured by the guaranty agency may submit insurance claims directly to the Secretary and the Secretary shall pay to the holder the full insurance obligation of the guaranty agency, in accordance with insurance requirements no more stringent than those of the guaranty agency. Such arrangements shall continue until the Secretary is satisfied that the insurance obligations have been transferred to another guarantor who can meet those obligations or a successor will assume the outstanding insurance obligations.

(p) Reporting requirement

All officers and directors, and those employees and paid consultants of eligible institutions, eligible lenders, guaranty agencies, loan servicing agencies, accrediting agencies or associations, State licensing agencies or boards, and entities acting as secondary markets (including the Student Loan Marketing Association), who are engaged in making decisions as to the administration of any program or funds under this subchapter or as to the eligibility of any entity or individual to participate under this subchapter, shall report to the Secretary, in such manner and at such time as the Secretary shall require, on any financial interest which such individual may hold in any other entity participating in any program assisted under this subchapter.

20 U.S.C. § 1087e. Terms and conditions of loans

(a) In general

(1) Parallel terms, conditions, benefits, and amounts

Unless otherwise specified in this part, loans made to borrowers under this part shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers, and first disbursed on June 30, 2010, under sections 1078, 1078-2, 1078-3, and 1078-8 of this title.

(2) Designation of loans

Loans made to borrowers under this part that, except as otherwise specified in this part, have the same terms, conditions, and benefits as loans made to borrowers under--

(A) section 1078 of this title shall be known as "Federal Direct Stafford Loans";

(B) section 1078-2 of this title shall be known as "Federal Direct PLUS Loans";

(C) section 1078-3 of this title shall be known as "Federal Direct Consolidation Loans"; and

(D) section 1078-8 of this title shall be known as "Federal Direct Unsubsidized Stafford Loans".

(3) Termination of authority to make interest subsidized loans to graduate and professional students

(A) In general

Subject to subparagraph (B) and notwithstanding any provision of this part or part B, for any period of instruction beginning on or after July 1, 2012--

(i) a graduate or professional student shall not be eligible to receive a Federal Direct Stafford loan under this part; and

(ii) the maximum annual amount of Federal Direct Unsubsidized Stafford loans such a student may borrow in any academic year (as defined in section 1088(a)(2) of this title) or its equivalent shall be the maximum annual amount for such student determined under section 1078-8 of this title, plus an amount equal to the amount of Federal Direct Stafford loans the student would have received in the absence of this subparagraph.

(B) Exception

Subparagraph (A) shall not apply to an individual enrolled in course work specified in paragraph (3)(B) or (4)(B) of section 1091(b) of this title.

(b) Interest rate

(1) Rates for FDSL and FDUSL

For Federal Direct Stafford Loans and Federal Direct Unsubsidized Stafford Loans for which the first disbursement is made on or after July 1, 1994, the applicable rate of interest shall, during any 12-month period beginning on July 1 and ending on June 30, be determined on the preceding June 1 and be equal to--

(A) the bond equivalent rate of 91-day Treasury bills auctioned at the final auction held prior to such June 1; plus

(B) 3.1 percent,

except that such rate shall not exceed 8.25 percent.

(2) In school and grace period rules

(A) Notwithstanding the provisions of paragraph (1), but subject to paragraph (3), with respect to any Federal Direct Stafford Loan or Federal Direct Unsubsidized Stafford Loan for which the first disbursement is made on or after July 1, 1995, the applicable rate of interest for interest which accrues--

(i) prior to the beginning of the repayment period of the loan; or

(ii) during the period in which principal need not be paid (whether or not such principal is in fact paid) by reason of a

provision described in section 1078(b)(1)(M) or 1077(a)(2)(C) of this title,

shall not exceed the rate determined under subparagraph (B).

(B) For the purpose of subparagraph (A), the rate determined under this subparagraph shall, during any 12-month period beginning on July 1 and ending on June 30, be determined on the preceding June 1 and be equal to--

(i) the bond equivalent rate of 91-day Treasury bills auctioned at the final auction prior to such June 1; plus

(ii) 2.5 percent,

except that such rate shall not exceed 8.25 percent.

(3) Out-year rule

Notwithstanding paragraphs (1) and (2), for Federal Direct Stafford Loans and Federal Direct Unsubsidized Stafford Loans made on or after July 1, 1998, the applicable rate of interest shall, during any 12-month period beginning on July 1 and ending on June 30, be determined on the preceding June 1 and be equal to--

(A) the bond equivalent rate of the security with a comparable maturity as established by the Secretary; plus

(B) 1.0 percent,

except that such rate shall not exceed 8.25 percent.

(4) Rates for FDPLUS

(A)(i) For Federal Direct PLUS Loans for which the first disbursement is made on or after July 1, 1994, the applicable rate of interest shall, during any 12-month period beginning on July 1 and ending on or before June 30, 2001, be determined on the preceding June 1 and be equal to—

(I) the bond equivalent rate of 52-week Treasury bills auctioned at final auction held prior to such June 1; plus

(II) 3.1 percent,

except that such rate shall not exceed 9 percent.

(ii) For any 12-month period beginning on July 1 of 2001 or any succeeding year, the applicable rate of interest determined under this subparagraph shall be determined on the preceding June 26 and be equal to--

(I) the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the last calendar week ending on or before such June 26; plus

(II) 3.1 percent,

except that such rate shall not exceed 9 percent.

(B) For Federal Direct PLUS loans made on or after July 1, 1998, the applicable rate of interest shall, during any 12-month period beginning on July 1 and ending on June 30, be determined on the preceding June 1 and be equal to--

(i) the bond equivalent rate of the security with a comparable maturity as established by the Secretary; plus

(ii) 2.1 percent,

except that such rate shall not exceed 9 percent.

(5) Temporary interest rate provision

(A) Rates for FDSL and FDUSL
Notwithstanding the preceding paragraphs of this subsection, for Federal Direct Stafford Loans and Federal Direct Unsubsidized Stafford Loans for which the first disbursement is made on or after July 1, 1998, and before October 1, 1998, the applicable rate of interest shall,

during any 12-month period beginning on July 1 and ending on June 30, be determined on the preceding June 1 and be equal to--

(i) the bond equivalent rate of 91-day Treasury bills auctioned at the final auction held prior to such June 1; plus

(ii) 2.3 percent,

except that such rate shall not exceed 8.25 percent.

(B) In school and grace period rules

Notwithstanding the preceding paragraphs of this subsection, with respect to any Federal Direct Stafford Loan or Federal Direct Unsubsidized Stafford Loan for which the first disbursement is made on or after July 1, 1998, and before October 1, 1998, the applicable rate of interest for interest which accrues--

(i) prior to the beginning of the repayment period of the loan; or

(ii) during the period in which principal need not be paid (whether or not such principal is in fact paid) by reason of a provision described in section 1078(b)(1)(M) or 1077(a)(2)(C) of this title,

shall be determined under subparagraph (A) by substituting "1.7 percent" for "2.3 percent".

(C) PLUS loans

Notwithstanding the preceding paragraphs of this subsection, with respect to Federal Direct PLUS Loan for which the first disbursement is made on or after July 1, 1998, and before October 1, 1998, the applicable rate of interest shall be determined under subparagraph (A)--

(i) by substituting "3.1 percent" for "2.3 percent"; and

(ii) by substituting "9.0 percent" for "8.25 percent".

(6) Interest rate provision for new loans on or after October 1, 1998, and before July 1, 2006

(A) Rates for FDSL and FDUSL

Notwithstanding the preceding paragraphs of this subsection, for Federal Direct Stafford Loans and Federal Direct Unsubsidized Stafford Loans for which the first disbursement is made on or after October 1, 1998, and before July 1, 2006, the applicable rate of interest shall, during any 12-month period beginning on July 1 and ending on June 30, be determined on the preceding June 1 and be equal to--

(i) the bond equivalent rate of 91-day Treasury bills auctioned at the final auction held prior to such June 1; plus

(ii) 2.3 percent,

except that such rate shall not exceed 8.25 percent.

(B) In school and grace period rules

Notwithstanding the preceding paragraphs of this subsection, with respect to any Federal Direct Stafford Loan or Federal Direct Unsubsidized Stafford Loan for which the first disbursement is made on or after October 1, 1998, and before July 1, 2006, the applicable rate of interest for interest which accrues--

(i) prior to the beginning of the repayment period of the loan; or

(ii) during the period in which principal need not be paid (whether or not such principal is in fact paid) by reason of a provision described in section 1078(b)(1)(M) or 1077(a)(2)(C) of this title,

shall be determined under subparagraph (A) by substituting “1.7 percent” for “2.3 percent”.

(C) PLUS loans

Notwithstanding the preceding paragraphs of this subsection, with respect to Federal Direct PLUS Loan for which the first disbursement is made on or after October 1, 1998, and before July 1, 2006, the applicable rate of interest shall be determined under subparagraph (A)--

(i) by substituting "3.1 percent" for "2.3 percent"; and

(ii) by substituting "9.0 percent" for "8.25 percent".

(D) Consolidation loans

Notwithstanding the preceding paragraphs of this subsection, any Federal Direct Consolidation loan for which the application is received on or after February 1, 1999, and before July 1, 2006, shall bear interest at an annual rate on the unpaid principal balance of the loan that is equal to the lesser of--

(i) the weighted average of the interest rates on the loans consolidated, rounded to the nearest higher one-eighth of one percent; or

(ii) 8.25 percent.

(E) Temporary rules for consolidation loans

Notwithstanding the preceding paragraphs of this subsection, any Federal Direct Consolidation loan for which the application is received on or after October 1, 1998, and before February 1, 1999, shall bear interest at an annual rate on the unpaid principal balance of the loan that is equal to--

(i) the bond equivalent rate of 91-day Treasury bills auctioned at the final auction held prior to such June 1; plus

(ii) 2.3 percent,

except that such rate shall not exceed 8.25 percent.

(7) Interest rate provision for new loans on or after July 1, 2006 and before July 1, 2013

(A) Rates for FDSL and FDUSL

Notwithstanding the preceding paragraphs of this subsection, for Federal Direct Stafford Loans and Federal Direct Unsubsidized Stafford Loans for which the first disbursement is made on or after July 1, 2006, and before July 1, 2013, the applicable rate of interest shall be 6.8 percent on the unpaid principal balance of the loan.

(B) PLUS loans

Notwithstanding the preceding paragraphs of this subsection, with respect to any Federal Direct PLUS loan for which the first disbursement is made on or after July 1, 2006, and before July 1, 2013, the applicable rate of interest shall be 7.9 percent on the unpaid principal balance of the loan.

(C) Consolidation loans

Notwithstanding the preceding paragraphs of this subsection, any Federal Direct Consolidation loan for which the application is received on or after July 1, 2006, and before July 1, 2013, shall bear interest at an annual rate on the unpaid principal balance of the loan that is equal to the lesser of--

(i) the weighted average of the interest rates on the loans consolidated, rounded to the nearest higher one-eighth of one percent; or

(ii) 8.25 percent.

(D) Reduced rates for undergraduate FDSL

Notwithstanding the preceding paragraphs of this subsection and subparagraph (A) of this paragraph, for Federal Direct Stafford Loans made to undergraduate students for which the first disbursement is made on or after July 1, 2006, and before July 1, 2013, the applicable rate of interest shall be as follows:

(i) For a loan for which the first disbursement is made on or after July 1, 2006, and before July 1, 2008, 6.8 percent on the unpaid principal balance of the loan.

(ii) For a loan for which the first disbursement is made on or after July 1, 2008, and before July 1, 2009, 6.0 percent on the unpaid principal balance of the loan.

(iii) For a loan for which the first disbursement is made on or after July 1, 2009, and before July 1, 2010, 5.6 percent on the unpaid principal balance of the loan.

(iv) For a loan for which the first disbursement is made on or after July 1, 2010, and before July 1, 2011, 4.5 percent on the unpaid principal balance of the loan.

(v) For a loan for which the first disbursement is made on or after July 1, 2011, and before July 1, 2013, 3.4 percent on the unpaid principal balance of the loan.

(8) Interest rate provisions for new loans on or after July 1, 2013

(A) Rates for undergraduate FDSL and FDUSL

Notwithstanding the preceding paragraphs of this subsection, for Federal Direct Stafford Loans and Federal Direct Unsubsidized Stafford Loans issued to undergraduate students, for which the first disbursement is made on or after July 1, 2013, the applicable rate of interest shall, for loans disbursed during any 12-month period beginning on July 1 and ending on June 30, be determined on the preceding June 1 and be equal to the lesser of--

(i) a rate equal to the high yield of the 10-year Treasury note auctioned at the final auction held prior to such June 1 plus 2.05 percent; or

(ii) 8.25 percent.

(B) Rates for graduate and professional FDUSL

Notwithstanding the preceding paragraphs of this subsection, for Federal Direct Unsubsidized Stafford Loans issued to graduate or professional students, for which the first disbursement is made on or after July 1, 2013, the applicable rate of interest shall, for loans disbursed during any 12-month period beginning on July 1 and ending on June 30, be determined on the preceding June 1 and be equal to the lesser of--

(i) a rate equal to the high yield of the 10-year Treasury note auctioned at the final auction held prior to such June 1 plus 3.6 percent; or

(ii) 9.5 percent.

(C) PLUS loans

Notwithstanding the preceding paragraphs of this subsection, for Federal Direct PLUS Loans, for which the first disbursement is made on or after July 1, 2013, the applicable rate of interest shall, for loans disbursed during any 12-month period beginning on July 1 and ending on June 30, be determined on the preceding June 1 and be equal to the lesser of--

(i) a rate equal to the high yield of the 10-year Treasury note auctioned at the final auction held prior to such June 1 plus 4.6 percent; or

(ii) 10.5 percent.

(D) Consolidation loans

Notwithstanding the preceding paragraphs of this subsection, any Federal Direct Consolidation Loan for which the application is received on or after July 1, 2013, shall bear interest at an annual rate on the unpaid principal balance of the loan that is equal to the weighted average of the interest rates on the loans consolidated, rounded to the nearest higher one-eighth of one percent.

(E) Consultation

The Secretary shall determine the applicable rate of interest under this paragraph after consultation with the Secretary of the Treasury and shall publish such rate in the Federal Register as soon as practicable after the date of determination.

(F) Rate

The applicable rate of interest determined under this paragraph for a Federal Direct Stafford Loan, a Federal Direct Unsubsidized Stafford Loan, or a Federal Direct PLUS Loan shall be fixed for the period of the loan.

(9) Repayment incentives

(A) Incentives for loans disbursed before July 1, 2012

Notwithstanding any other provision of this part with respect to loans for which the first disbursement of principal is made before July 1, 2012,, the Secretary is authorized to prescribe by regulation such reductions in the interest rate or origination fee paid by a borrower of a loan made under this part as the Secretary determines appropriate to encourage on-time repayment of the loan. Such reductions may be offered only if the Secretary determines the reductions are cost neutral and in the best financial interest of the Federal Government. Any increase in subsidy costs resulting from such reductions shall be completely offset by corresponding savings in funds available for the William D. Ford Federal Direct Loan Program in that fiscal year from section 1087h of this title and other administrative accounts.

(B) Accountability

Prior to publishing regulations proposing repayment incentives with respect to loans for which the first disbursement of principal is made before July 1, 2012, the Secretary shall ensure the cost neutrality of such reductions. The Secretary shall not prescribe such regulations in final form unless an official report from the Director of the Office of Management and Budget to the Secretary and a comparable report from the Director of the Congressional Budget Office to the Congress each certify that any such reductions will be completely cost neutral. Such reports shall be transmitted to the authorizing committees not less than

60 days prior to the publication of regulations proposing such reductions.

(C) No repayment incentives for new loans disbursed on or after July 1, 2012

Notwithstanding any other provision of this part, the Secretary is prohibited from authorizing or providing any repayment incentive not otherwise authorized under this part to encourage on-time repayment of a loan under this part for which the first disbursement of principal is made on or after July 1, 2012, including any reduction in the interest or origination fee rate paid by a borrower of such a loan, except that the Secretary may provide for an interest rate reduction for a borrower who agrees to have payments on such a loan automatically electronically debited from a bank account.

(10) Publication

The Secretary shall determine the applicable rates of interest under this subsection after consultation with the Secretary of the Treasury and shall publish such rate in the Federal Register as soon as practicable after the date of determination.

(c) Loan fee

(1) In general

The Secretary shall charge the borrower of a loan made under this part an origination fee of 4.0 percent of the principal amount of loan.

(2) Subsequent reduction

Paragraph (1) shall be applied to loans made under this part, other than Federal Direct Consolidation loans and Federal Direct PLUS loans--

(A) by substituting “3.0 percent” for “4.0 percent” with respect to loans for which the first disbursement of principal is made on or after February 8, 2006, and before July 1, 2007;

(B) by substituting "2.5 percent" for "4.0 percent" with respect to loans for which the first disbursement of principal is made on or after July 1, 2007, and before July 1, 2008;

(C) by substituting "2.0 percent" for "4.0 percent" with respect to loans for which the first disbursement of principal is made on or after July 1, 2008, and before July 1, 2009;

(D) by substituting "1.5 percent" for "4.0 percent" with respect to loans for which the first disbursement of principal is made on or after July 1, 2009, and before July 1, 2010; and

(E) by substituting "1.0 percent" for "4.0 percent" with respect to loans for which the first disbursement of principal is made on or after July 1, 2010.

(d) Repayment plans

(1) Design and selection

Consistent with criteria established by the Secretary, the Secretary shall offer a borrower of a loan made under this part a variety of plans for repayment of such loan, including principal and interest on the loan. The borrower shall be entitled to accelerate, without penalty, repayment on the borrower's loans under this part. The borrower may choose--

(A) a standard repayment plan, consistent with subsection (a)(1) of this section and with section 1078(b)(9)(A)(i) of this title;

(B) a graduated repayment plan, consistent with section 1078(b)(9)(A)(ii) of this title;

(C) an extended repayment plan, consistent with section 1078(b)(9)(A)(iv) of this title, except that the borrower shall annually repay a minimum amount determined by the Secretary in accordance with section 1078(b)(1)(L) of this title;
(D) an income contingent repayment plan, with varying annual repayment amounts based on the income of the borrower, paid over an extended period of time prescribed by the Secretary, not to exceed 25 years, except that the plan described in this subparagraph shall not be

available to the borrower of a Federal Direct PLUS loan made on behalf of a dependent student; and

(E) beginning on July 1, 2009, an income-based repayment plan that enables borrowers who have a partial financial hardship to make a lower monthly payment in accordance with section 1098e of this title, except that the plan described in this subparagraph shall not be available to the borrower of a Federal Direct PLUS Loan made on behalf of a dependent student or a Federal Direct Consolidation Loan, if the proceeds of such loan were used to discharge the liability on such Federal Direct PLUS Loan or a loan under section 1078-2 of this title made on behalf of a dependent student.

(2) Selection by Secretary

If a borrower of a loan made under this part does not select a repayment plan described in paragraph (1), the Secretary may provide the borrower with a repayment plan described in subparagraph (A), (B), or (C) of paragraph (1).

(3) Changes in selections

The borrower of a loan made under this part may change the borrower's selection of a repayment plan under paragraph (1), or the Secretary's selection of a plan for the borrower under paragraph (2), as the case may be, under such terms and conditions as may be established by the Secretary.

(4) Alternative repayment plans

The Secretary may provide, on a case by case basis, an alternative repayment plan to a borrower of a loan made under this part who demonstrates to the satisfaction of the Secretary that the terms and conditions of the repayment plans available under paragraph (1) are not adequate to accommodate the borrower's exceptional circumstances. In designing such alternative repayment plans, the Secretary shall ensure that such plans do not exceed the cost to the Federal Government, as determined on the basis of the present value of future payments by such borrowers, of loans made using the plans available under paragraph (1).

(5) Repayment after default

The Secretary may require any borrower who has defaulted on a loan made under this part to--

(A) pay all reasonable collection costs associated with such loan; and

(B) repay the loan pursuant to an income contingent repayment plan.

(e) Income contingent repayment

(1) Information and procedures

The Secretary may obtain such information as is reasonably necessary regarding the income of a borrower (and the borrower's spouse, if applicable) of a loan made under this part that is, or may be, repaid pursuant to income contingent repayment, for the purpose of determining the annual repayment obligation of the borrower. Returns and return information (as defined in section 6103 of Title 26) may be obtained under the preceding sentence only to the extent authorized by section 6103(l)(13) of Title 26. The Secretary shall establish procedures for determining the borrower's repayment obligation on that loan for such year, and such other procedures as are necessary to implement effectively income contingent repayment.

(2) Repayment based on adjusted gross income

A repayment schedule for a loan made under this part and repaid pursuant to income contingent repayment shall be based on the adjusted gross income (as defined in section 62 of Title 26) of the borrower or, if the borrower is married and files a Federal income tax return jointly with the borrower's spouse, on the adjusted gross income of the borrower and the borrower's spouse.

(3) Additional documents

A borrower who chooses, or is required, to repay a loan made under this part pursuant to income contingent repayment, and for whom adjusted gross income is unavailable or does not reasonably reflect the borrower's current income, shall provide to the Secretary other documentation of income satisfactory to the Secretary, which documentation the Secretary may use to determine an appropriate repayment schedule.

(4) Repayment schedules

Income contingent repayment schedules shall be established by regulations promulgated by the Secretary and shall require payments that vary in relation to the appropriate portion of the annual income of the borrower (and the borrower's spouse, if applicable) as determined by the Secretary.

(5) Calculation of balance due

The balance due on a loan made under this part that is repaid pursuant to income contingent repayment shall equal the unpaid principal amount of the loan, any accrued interest, and any fees, such as late charges, assessed on such loan. The Secretary may promulgate regulations limiting the amount of interest that may be capitalized on such loan, and the timing of any such capitalization.

(6) Notification to borrowers

The Secretary shall establish procedures under which a borrower of a loan made under this part who chooses or is required to repay such loan pursuant to income contingent repayment is notified of the terms and conditions of such plan, including notification of such borrower, that if a borrower considers that special circumstances, such as a loss of employment by the borrower or the borrower's spouse, warrant an adjustment in the borrower's loan repayment, the borrower may contact the Secretary, who shall determine whether such adjustment is appropriate, in accordance with criteria established by the Secretary.

(7) Maximum repayment period

In calculating the extended period of time for which an income contingent repayment plan under this subsection may be in effect for a borrower, the Secretary shall include all time periods during which a borrower of loans under part B, part D, or part E--

> (A) is not in default on any loan that is included in the income contingent repayment plan; and
>
> (B)(i) is in deferment due to an economic hardship described in section 1085(o) of this title;

(ii) makes monthly payments under paragraph (1) or (6) of section 1098e(b) of this title;

(iii) makes monthly payments of not less than the monthly amount calculated under section 1078(b)(9)(A)(i) of this title or subsection (d)(1)(A), based on a 10-year repayment period, when the borrower first made the election described in section 1098e(b)(1) of this title;

(iv) makes payments of not less than the payments required under a standard repayment plan under section 1078(b)(9)(A)(i) of this title or subsection (d)(1)(A) with a repayment period of 10 years; or

(v) makes payments under an income contingent repayment plan under subsection (d)(1)(D).

(8) Automatic recertification

(A) In general

The Secretary shall establish and implement, with respect to any borrower described in subparagraph (B), procedures to--

(i) use return information disclosed under section 6103(l)(13) of Title 26, pursuant to approval provided under section 1098h of this title, to determine the repayment obligation of the borrower without further action by the borrower;

(ii) allow the borrower (or the spouse of the borrower), at any time, to opt out of disclosure under such section 6103(l)(13) and instead provide such information as the Secretary may require to determine the repayment obligation of the borrower (or withdraw from the repayment plan under this subsection); and

(iii) provide the borrower with an opportunity to update the return information so disclosed before the determination of the repayment obligation of the borrower.

(B) Applicability

Subparagraph (A) shall apply to each borrower of a loan made under this part who, on or after the date on which the Secretary establishes procedures under such subparagraph--

(i) selects, or is required to repay such loan pursuant to, an income-contingent repayment plan; or

(ii) recertifies income or family size under such plan.

(f) Deferment

(1) Effect on principal and interest

A borrower of a loan made under this part who meets the requirements described in paragraph (2) shall be eligible for a deferment, during which periodic installments of principal need not be paid, and interest--

(A) shall not accrue, in the case of a--

(i) Federal Direct Stafford Loan; or

(ii) a Federal Direct Consolidation Loan that consolidated only Federal Direct Stafford Loans, or a combination of such loans and Federal Stafford Loans for which the student borrower received an interest subsidy under section 1078 of this title; or

(B) shall accrue and be capitalized or paid by the borrower, in the case of a Federal Direct PLUS Loan, a Federal Direct Unsubsidized Stafford Loan, or a Federal Direct Consolidation Loan not described in subparagraph (A)(ii).

(2) Eligibility

A borrower of a loan made under this part shall be eligible for a deferment during any period--

(A) during which the borrower--

(i) is carrying at least one-half the normal full-time work load for the course of study that the borrower is pursuing, as determined

by the eligible institution (as such term is defined in section 1085(a) of this title) the borrower is attending; or

(ii) is pursuing a course of study pursuant to a graduate fellowship program approved by the Secretary, or pursuant to a rehabilitation training program for individuals with disabilities approved by the Secretary,

except that no borrower shall be eligible for a deferment under this subparagraph, or a loan made under this part (other than a Federal Direct PLUS Loan or a Federal Direct Consolidation Loan), while serving in a medical internship or residency program;

(B) not in excess of 3 years during which the borrower is seeking and unable to find full-time employment;

(C) during which the borrower--

(i) is serving on active duty during a war or other military operation or national emergency; or

(ii) is performing qualifying National Guard duty during a war or other military operation or national emergency,

and for the 180-day period following the demobilization date for the service described in clause (i) or (ii); or

(D) not in excess of 3 years during which the Secretary determines, in accordance with regulations prescribed under section 1085(o) of this title, that the borrower has experienced or will experience an economic hardship.

(3) Deferment for borrowers receiving cancer treatment

(A) Effect on principal and interest

A borrower of a loan made under this part who meets the requirements of subparagraph (B) shall be eligible for a deferment, during which

periodic installments of principal need not be paid, and interest shall not accrue.

(B) Eligibility

A borrower of a loan made under this part shall be eligible for a deferment during--

(i) any period in which such borrower is receiving treatment for cancer; and

(ii) the 6 months after such period.

(C) Applicability

This paragraph shall apply with respect to loans--

(i) made on or after September 28, 2018; or

(ii) in repayment on September 28, 2018.

(4) "Borrower" defined

For the purpose of this subsection, the term "borrower" means an individual who is a new borrower on the date such individual applies for a loan under this part for which the first disbursement is made on or after July 1, 1993.

(5) Deferments for previous part B loan borrowers

A borrower of a loan made under this part, who at the time such individual applies for such loan, has an outstanding balance of principal or interest owing on any loan made, insured, or guaranteed under part B of this subchapter prior to July 1, 1993, shall be eligible for a deferment under section 1077(a)(2)(C) of this title or section 1078(b)(1)(M) of this title as such sections were in effect on July 22, 1992.

(g) Federal Direct Consolidation Loans

(1) In general

A borrower of a loan made under this part may consolidate such loan with the loans described in section 1078-3(a)(4) of this title, including any loan made under part B and first disbursed before July 1, 2010. To be eligible for a consolidation loan under this part, a borrower shall meet the eligibility criteria set forth in section 1078-3(a)(3) of this title.

(2) Separating joint consolidation loans

(A) In general

(i) Authorization

A married couple, or 2 individuals who were previously a married couple, and who received a joint consolidation loan as such married couple under subparagraph (C) of section 1078-3(a)(3) of this title (as such subparagraph was in effect on June 30, 2006), may apply to the Secretary, in accordance with subparagraph (C) of this paragraph, for each individual borrower in the married couple (or previously married couple) to receive a separate Federal Direct Consolidation Loan under this part.

(ii) Eligibility for borrowers in default

Notwithstanding any other provision of this chapter, a married couple, or 2 individuals who were previously a married couple, who are in default on a joint consolidation loan may be eligible to receive a separate Federal Direct Consolidation Loan under this part in accordance with this paragraph.

(B) Secretarial requirements

Notwithstanding section 1078-3(a)(3)(A) of this title or any other provision of law, for each individual borrower who applies under subparagraph (A), the Secretary shall--

(i) make a separate Federal Direct Consolidation Loan under this part that--

(I) shall be for an amount equal to the product of--

(aa) the unpaid principal and accrued unpaid interest of the joint consolidation loan (as of the date that is the day before such separate consolidation loan is made) and any outstanding charges and fees with respect to such loan; and

(bb) the percentage of the joint consolidation loan attributable to the loans of the individual borrower for whom such separate consolidation loan is being made, as determined--

(AA) on the basis of the loan obligations of such borrower with respect to such joint consolidation loan (as of the date such joint consolidation loan was made); or

(BB) in the case in which both borrowers request, on the basis of proportions outlined in a divorce decree, court order, or settlement agreement; and

(II) has the same rate of interest as the joint consolidation loan (as of the date that is the day before such separate consolidation loan is made); and

(ii) in a timely manner, notify each individual borrower that the joint consolidation loan had been repaid and of the terms and conditions of their new loans.

(C) Application for separate direct consolidation loan

(i) Joint application

Except as provided in clause (ii), to receive separate consolidation loans under this part, both individual borrowers in a married couple (or previously married couple) shall jointly apply under subparagraph (A).

(ii) Separate application

An individual borrower in a married couple (or previously married couple) may apply for a separate consolidation loan under subparagraph (A) separately and without regard to whether or when the other individual borrower in the married couple (or previously married couple) applies under subparagraph (A), in a case in which--

(I) the individual borrower certifies to the Secretary that such borrower--

(aa) has experienced an act of domestic violence (as defined in section 12291 of Title 34) from the other individual borrower;

(bb) has experienced economic abuse (as defined in section 12291 of Title 34) from the other individual borrower; or

(cc) is unable to reasonably reach or access the loan information of the other individual borrower; or

(II) the Secretary determines that authorizing each individual borrower to apply separately under subparagraph (A) would be in the best fiscal interests of the Federal Government.

(iii) Remaining obligation from separate application

In the case of an individual borrower who receives a separate consolidation loan due to the circumstances described in clause (ii), the other non-applying individual borrower shall become solely liable for the remaining balance of the joint consolidation loan.

(h) Borrower defenses

Notwithstanding any other provision of State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan.

(i) Loan application and promissory note

The common financial reporting form required in section 1090(a)(1) of this title shall constitute the application for loans made under this part (other than a Federal Direct PLUS loan). The Secretary shall develop, print, and distribute to participating institutions a standard promissory note and loan disclosure form.

(j) Loan disbursement

(1) In general

Proceeds of loans to students under this part shall be applied to the student's account for tuition and fees, and, in the case of institutionally owned housing, to room and board. Loan proceeds that remain after the application of the previous sentence shall be delivered to the borrower by check or other means that is payable to and requires the endorsement or other certification by such borrower.

(2) Payment periods

The Secretary shall establish periods for the payments described in paragraph (1) in a manner consistent with payment of Federal Pell Grants under subpart 1 of part A of this subchapter.

(k) Fiscal control and fund accountability

(1) In general

(A) An institution shall maintain financial records in a manner consistent with records maintained for other programs under this subchapter.
(B) Except as otherwise required by regulations of the Secretary[1] an institution may maintain loan funds under this part in the same account as other Federal student financial assistance.

(2) Payments and refunds

Payments and refunds shall be reconciled in a manner consistent with the manner set forth for the submission of a payment summary report required of institutions participating in the program under subpart 1 of part A, except that

nothing in this paragraph shall prevent such reconciliations on a monthly basis.

(3) Transaction histories

All transaction histories under this part shall be maintained using the same system designated by the Secretary for the provision of Federal Pell Grants under subpart 1 of part A of this subchapter.

(l) Armed Forces and NOAA Commissioned Officer Corps student loan interest payment programs

(1) Authority

Using funds received by transfer to the Secretary under section 2174 of Title 10 or section 3078 of Title 33 for the payment of interest on a loan made under this part to a member of the Armed Forces or an officer in the commissioned officer corps of the National Oceanic and Atmospheric Administration, respectively, the Secretary shall pay the interest on the loan as due for a period not in excess of 36 consecutive months. The Secretary may not pay interest on such a loan out of any funds other than funds that have been so transferred.

(2) Forbearance

During the period in which the Secretary is making payments on a loan under paragraph (1), the Secretary shall grant the borrower forbearance, in the form of a temporary cessation of all payments on the loan other than the payments of interest on the loan that are made under that paragraph.

(m) Repayment plan for public service employees

(1) In general

The Secretary shall cancel the balance of interest and principal due, in accordance with paragraph (2), on any eligible Federal Direct Loan not in default for a borrower who--

(A) has made 120 monthly payments on the eligible Federal Direct Loan after October 1, 2007, pursuant to any one or a combination of the following--

(i) payments under an income-based repayment plan under section 1098e of this title;

(ii) payments under a standard repayment plan under subsection (d)(1)(A), based on a 10-year repayment period;

(iii) monthly payments under a repayment plan under subsection (d)(1) or (g) of not less than the monthly amount calculated under subsection (d)(1)(A), based on a 10-year repayment period; or

(iv) payments under an income contingent repayment plan under subsection (d)(1)(D); and

(B)(i) is employed in a public service job at the time of such forgiveness; and

(ii) has been employed in a public service job during the period in which the borrower makes each of the 120 payments described in subparagraph (A).

(2) Loan cancellation amount

After the conclusion of the employment period described in paragraph (1), the Secretary shall cancel the obligation to repay the balance of principal and interest due as of the time of such cancellation, on the eligible Federal Direct Loans made to the borrower under this part.

(3) Definitions

In this subsection:

(A) Eligible Federal Direct Loan

The term "eligible Federal Direct Loan" means a Federal Direct Stafford Loan, Federal Direct PLUS Loan, or Federal Direct Unsubsidized Stafford Loan, or a Federal Direct Consolidation Loan.

(B) Public service job

The term "public service job" means--

(i) a full-time job in emergency management, government (excluding time served as a member of Congress), military service, public safety, law enforcement, public health (including nurses, nurse practitioners, nurses in a clinical setting, and full-time professionals engaged in health care practitioner occupations and health care support occupations, as such terms are defined by the Bureau of Labor Statistics), public education, social work in a public child or family service agency, public interest law services (including prosecution or public defense or legal advocacy on behalf of low-income communities at a nonprofit organization), early childhood education (including licensed or regulated childcare, Head Start, and State funded prekindergarten), public service for individuals with disabilities, public service for the elderly, public library sciences, school-based library sciences and other school-based services, or at an organization that is described in section 501(c)(3) of Title 26 and exempt from taxation under section 501(a) of such title; or

(ii) teaching as a full-time faculty member at a Tribal College or University as defined in section 1059c(b) of this title and other faculty teaching in high-needs subject areas or areas of shortage (including nurse faculty, foreign language faculty, and part-time faculty at community colleges), as determined by the Secretary.

(4) Ineligibility for double benefits

No borrower may, for the same service, receive a reduction of loan obligations under both this subsection and section 1078-10, 1078-11, 1078-12, or 1087j of this title.

(n) Identity fraud protection

The Secretary shall take such steps as may be necessary to ensure that monthly Federal Direct Loan statements and other publications of the Department do not contain more than four digits of the Social Security number of any individual.

(o) No accrual of interest for active duty service members

(1) In general

Notwithstanding any other provision of this part and in accordance with paragraphs (2) and (4), interest shall not accrue for an eligible military borrower on a loan made under this part for which the first disbursement is made on or after October 1, 2008.

(2) Consolidation loans

In the case of any consolidation loan made under this part that is disbursed on or after October 1, 2008, interest shall not accrue pursuant to this subsection only on such portion of such loan as was used to repay a loan made under this part for which the first disbursement is made on or after October 1, 2008.

(3) Eligible military borrower

In this subsection, the term "eligible military borrower" means an individual who--

(A)(i) is serving on active duty during a war or other military operation or national emergency; or

(ii) is performing qualifying National Guard duty during a war or other military operation or national emergency; and

(B) is serving in an area of hostilities in which service qualifies for special pay under section 310, or paragraph (1) or (3) of section 351(a), of Title 37.

(4) Limitation

An individual who qualifies as an eligible military borrower under this subsection may receive the benefit of this subsection for not more than 60 months.

(p) Disclosures

Each institution of higher education with which the Secretary has an agreement under section 1087c of this title, and each contractor with which the Secretary has a contract under section 1087f of this title, shall, with respect to loans under this part and in accordance with such regulations as the Secretary shall prescribe, comply

with each of the requirements under section 1083 of this title that apply to a lender with respect to a loan under part B.

(q) Eligibility for, and interest charges on, Federal Direct Stafford Loans for new borrowers on or after July 1, 2013

(1) In general

Notwithstanding subsection (a) or any other provision of this subchapter, any borrower who was a new borrower on or after July 1, 2013, shall not be eligible for a Federal Direct Stafford Loan if the period of time for which the borrower has received Federal Direct Stafford Loans, in the aggregate, exceeds the period of enrollment described in paragraph (3). Such borrower may still receive any Federal Direct Unsubsidized Stafford Loan for which such borrower is otherwise eligible.

(2) Accrual of interest on Federal Direct Stafford Loans

Notwithstanding subsection (f)(1)(A) or any other provision of this subchapter and beginning on the date upon which a borrower who is enrolled in a program of education or training (including a course of study or program described in paragraph (3)(B) or (4)(B) of section 1091(b) of this title) for which borrowers are otherwise eligible to receive Federal Direct Stafford Loans, becomes ineligible for such loan as a result of paragraph (1), interest on all Federal Direct Stafford Loans that were disbursed to such borrower on or after July 1, 2013, shall accrue. Such interest shall be paid or capitalized in the same manner as interest on a Federal Direct Unsubsidized Stafford Loan is paid or capitalized under section 1078-8(e)(2) of this title.

(3) Period of enrollment

(A) In general

The aggregate period of enrollment referred to in paragraph (1) shall not exceed the lesser of--

(i) a period equal to 150 percent of the published length of the educational program in which the student is enrolled; or

(ii) in the case of a borrower who was previously enrolled in one or more other educational programs that began on or after July 1,

2013, and subject to subparagraph (B), a period of time equal to the difference between--

(I) 150 percent of the published length of the longest educational program in which the borrower was, or is, enrolled; and

(II) any periods of enrollment in which the borrower received a Federal Direct Stafford Loan.

(B) Regulations

The Secretary shall specify in regulation--

(i) how the aggregate period described in subparagraph (A) shall be calculated with respect to a borrower who was or is enrolled on less than a full-time basis; and

(ii) how such aggregate period shall be calculated to include a course of study or program described in paragraph (3)(B) or (4)(B) of section 1091(b) of this title, respectively.

34 C.F.R. § 685.206. Borrower responsibilities and defenses.

(a) The borrower must give the school the following information as part of the origination process for a Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan:

(1) A statement, as described in 34 CFR part 668, that the loan will be used for the cost of the student's attendance.

(2) Information demonstrating that the borrower is eligible for the loan.

(3) Information concerning the outstanding FFEL Program and Direct Loan Program loans of the borrower and, for a parent borrower, of the student, including any Federal Consolidation Loan or Direct Consolidation Loan.

(4) A statement authorizing the school to release to the Secretary information relevant to the student's eligibility to borrow or to have a parent borrow on the student's behalf (e.g., the student's enrollment status, financial assistance, and employment records).

(b)(1) The borrower must promptly notify the Secretary of any change of name, address, student status to less than half-time, employer, or employer's address; and

(2) The borrower must promptly notify the school of any change in address during enrollment.

(c) Borrower defense to repayment for loans first disbursed prior to July 1, 2017.

(1) For loans first disbursed prior to July 1, 2017, the borrower may assert a borrower defense under this paragraph. A “borrower defense” refers to any act or omission of the school attended by the student that relates to the making of the loan for enrollment at the school or the provision of educational services for which the loan was provided that would give rise to a cause of action against the school under applicable State law, and includes one or both of the following:

(i) A defense to repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part.

(ii) A claim to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(2) The order of objections for defaulted Direct Loans are as described in § 685.222(a)(6). A borrower defense claim under this section must be asserted, and will be resolved, under the procedures in § 685.222(e) to (k).

(3) For an approved borrower defense under this section, except as provided in paragraph (c)(4) of this section, the Secretary may initiate an appropriate proceeding to collect from the school whose act or omission resulted in the borrower defense the amount of relief arising from the borrower defense, within the later of—

(i) Three years from the end of the last award year in which the student attended the institution; or

(ii) The limitation period that State law would apply to an action by the borrower to recover on the cause of action on which the borrower defense is based.

(4) The Secretary may initiate a proceeding to collect at any time if the institution received notice of the claim before the end of the later of the periods described in paragraph (c)(3) of this section. For purposes of this paragraph, notice includes receipt of—

(i) Actual notice from the borrower, from a representative of the borrower, or from the Department;

(ii) A class action complaint asserting relief for a class that may include the borrower; and

(iii) Written notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower.

(d) Borrower defense to repayment for loans first disbursed on or after July 1, 2017, and before July 1, 2020. For borrower defense to repayment for loans first disbursed

on or after July 1, 2017, and before July 1, 2020, a borrower asserts and the Secretary considers a borrower defense in accordance with § 685.222.

(e) Borrower defense to repayment for loans first disbursed on or after July 1, 2020. This paragraph (e) applies to borrower defense to repayment for loans first disbursed on or after July 1, 2020.

(1) Definitions. For the purposes of this paragraph (e), the following definitions apply:

(i) A "Direct Loan" means a Direct Subsidized Loan, a Direct Unsubsidized Loan, or a Direct PLUS Loan.

(ii) "Borrower" means

(A) The borrower; and

(B) In the case of a Direct PLUS Loan, any endorsers, and for a Direct PLUS Loan made to a parent, the student on whose behalf the parent borrowed.

(iii) A "borrower defense to repayment" includes—

(A) A defense to repayment of amounts owed to the Secretary on a Direct Loan, or a Direct Consolidation Loan that was used to repay a Direct Loan, FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act, Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act; and

(B) Any accompanying request for reimbursement of payments previously made to the Secretary on the Direct Loan or on a loan repaid by the Direct Consolidation Loan.

(iv) The term "provision of educational services" refers to the educational resources provided by the institution that are required by an accreditation agency or a State licensing or authorizing agency for the completion of the student's educational program.

(v) The terms "school" and "institution" may be used interchangeably and include an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services.

(2) Federal standard for loans first disbursed on or after July 1, 2020. For a Direct Loan or Direct Consolidation Loan first disbursed on or after July 1, 2020, a borrower may assert a defense to repayment under this paragraph (e),if the borrower establishes by a preponderance of the evidence that—

(i) The institution at which the borrower enrolled made a misrepresentation, as defined in § 685.206(e)(3), of material fact upon which the borrower reasonably relied in deciding to obtain a Direct Loan, or a loan repaid by a Direct Consolidation Loan, and that directly and clearly relates to:

(A) Enrollment or continuing enrollment at the institution or

(B) The provision of educational services for which the loan was made; and

(ii) The borrower was financially harmed by the misrepresentation.

(3) Misrepresentation. A "misrepresentation," for purposes of this paragraph (e), is a statement, act, or omission by an eligible school to a borrower that is false, misleading, or deceptive; that was made with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth; and that directly and clearly relates to enrollment or continuing enrollment at the institution or the provision of educational services for which the loan was made. Evidence that a misrepresentation defined in this paragraph (e) may have occurred includes, but is not limited to:

(i) Actual licensure passage rates materially different from those included in the institution's marketing materials, website, or other communications made to the student;

(ii) Actual employment rates materially different from those included in the institution's marketing materials, website, or other communications made to the student;

(iii) Actual institutional selectivity rates or rankings, student admission profiles, or institutional rankings that are materially different from those included in the institution's marketing materials, website, or other communications made to the student or provided by the institution to national ranking organizations;

(iv) The inclusion in the institution's marketing materials, website, or other communication made to the student of specialized, programmatic, or institutional certifications, accreditation, or approvals not actually obtained, or the failure to remove within a reasonable period of time such certifications or approvals from marketing materials, website, or other communication when revoked or withdrawn;

(v) The inclusion in the institution's marketing materials, website, or other communication made to the student of representations regarding the widespread or general transferability of credits that are only transferrable to limited types of programs or institutions or the transferability of credits to a specific program or institution when no reciprocal agreement exists with another institution or such agreement is materially different than what was represented;

(vi) A representation regarding the employability or specific earnings of graduates without an agreement between the institution and another entity for such employment or sufficient evidence of past employment or earnings to justify such a representation or without citing appropriate national, State, or regional data for earnings in the same field as provided by an appropriate Federal agency that provides such data. (In the event that national data are used, institutions should include a written, plain language disclaimer that national averages may not accurately reflect the earnings of workers in particular parts of the country and may include earners at all stages of their career and not just entry level wages for recent graduates.);

(vii) A representation regarding the availability, amount, or nature of any financial assistance available to students from the institution or any other entity to pay the costs of attendance at the institution that is materially different in availability, amount, or nature from the actual financial assistance available to the borrower from the institution or any other entity to pay the costs of attendance at the institution after enrollment;

(viii) A representation regarding the amount, method, or timing of payment of tuition and fees that the student would be charged for the program that is materially different in amount, method, or timing of payment from the actual tuition and fees charged to the student;

(ix) A representation that the institution, its courses, or programs are endorsed by vocational counselors, high schools, colleges, educational organizations, employment agencies, members of a particular industry, students, former students, governmental officials, Federal or State agencies, the United States Armed Forces, or other individuals or entities when the institution has no permission or is not otherwise authorized to make or use such an endorsement;

(x) A representation regarding the educational resources provided by the institution that are required for the completion of the student's educational program that are materially different from the institution's actual circumstances at the time the representation is made, such as representations regarding the institution's size; location; facilities; training equipment; or the number, availability, or qualifications of its personnel; and

(xi) A representation regarding the nature or extent of prerequisites for enrollment in a course or program offered by the institution that are materially different from the institution's actual circumstances at the time the representation is made, or that the institution knows will be materially different during the student's anticipated enrollment at the institution.

(4) Financial harm. Financial harm is the amount of monetary loss that a borrower incurs as a consequence of a misrepresentation, as defined in § 685.206(e)(3). Financial harm does not include damages for nonmonetary loss, such as personal injury, inconvenience, aggravation, emotional distress, pain and suffering, punitive damages, or opportunity costs. The Department does not consider the act of taking out a Direct Loan or a loan repaid by a Direct Consolidation Loan, alone, as evidence of financial harm to the borrower. Financial harm is such monetary loss that is not predominantly due to intervening local, regional, or national economic or labor market conditions as demonstrated by evidence before the Secretary or provided to the Secretary by the borrower or the school. Financial harm cannot arise from the borrower's voluntary decision to pursue less than full-time work or not to work or result

from a voluntary change in occupation. Evidence of financial harm may include, but is not limited to, the following circumstances:

(i) Periods of unemployment upon graduating from the school's programs that are unrelated to national or local economic recessions;

(ii) A significant difference between the amount or nature of the tuition and fees that the institution represented to the borrower that the institution would charge or was charging and the actual amount or nature of the tuition and fees charged by the institution for which the Direct Loan was disbursed or for which a loan repaid by the Direct Consolidation Loan was disbursed;

(iii) The borrower's inability to secure employment in the field of study for which the institution expressly guaranteed employment; and

(iv) The borrower's inability to complete the program because the institution no longer offers a requirement necessary for completion of the program in which the borrower enrolled and the institution did not provide for an acceptable alternative requirement to enable completion of the program.

(5) Exclusions. The Secretary will not accept the following as a basis for a borrower defense to repayment—

(i) A violation by the institution of a requirement of the Act or the Department's regulations for a borrower defense to repayment under paragraph (c) or (d) of this section or under § 685.222, unless the violation would otherwise constitute the basis for a successful borrower defense to repayment under this paragraph (e); or

(ii) A claim that does not directly and clearly relate to enrollment or continuing enrollment at the institution or the provision of educational services for which the loan was made, including, but not limited to—

(A) Personal injury;

(B) Sexual harassment;

(C) A violation of civil rights;

(D) Slander or defamation;

(E) Property damage;

(F) The general quality of the student's education or the reasonableness of an educator's conduct in providing educational services;

(G) Informal communication from other students;

(H) Academic disputes and disciplinary matters; and

(I) Breach of contract, unless the school's act or omission would otherwise constitute the basis for a successful defense to repayment under this paragraph (e).

(6) Limitations period and tolling of the limitations period for arbitration proceedings.

(i) A borrower must assert a defense to repayment under this paragraph (e) within three years from the date the student is no longer enrolled at the institution. A borrower may only assert a defense to repayment under this paragraph (e) within the timeframes set forth in § 685.206(e)(6)(i) and (ii) and (e)(7).

(ii) For pre-dispute arbitration agreements, as defined in § 668.41(h)(2)(iii), the limitations period will be tolled for the time period beginning on the date that a written request for arbitration is filed, by either the student or the institution, and concluding on the date the arbitrator submits, in writing, a final decision, final award, or other final determination, to the parties.

(7) Extension of limitation periods and reopening of applications. For loans first disbursed on or after July 1, 2020, the Secretary may extend the time period when a borrower may assert a defense to repayment under § 685.206(e)(6) or may reopen a borrower's defense to repayment application to consider evidence that was not previously considered only if there is:

(i) A final, non-default judgment on the merits by a State or Federal Court that has not been appealed or that is not subject to further appeal

and that establishes the institution made a misrepresentation, as defined in § 685.206(e)(3); or

(ii) A final decision by a duly appointed arbitrator or arbitration panel that establishes that the institution made a misrepresentation, as defined in § 685.206(e)(3).

(8) Application and Forbearance. To assert a defense to repayment under this paragraph (e), a borrower must submit an application under penalty of perjury on a form approved by the Secretary and sign a waiver permitting the institution to provide the Department with items from the borrower's education record relevant to the defense to repayment claim. The form will note that pursuant to paragraph (b)(6)(i) of this section, if the borrower is not in default on the loan for which a borrower defense has been asserted, the Secretary will grant forbearance and notify the borrower of the option to decline forbearance. The application requires the borrower to—

(i) Certify that the borrower received the proceeds of a loan, in whole or in part, to attend the named institution;

(ii) Provide evidence that supports the borrower defense to repayment application;

(iii) State whether the borrower has made a claim with any other third party, such as the holder of a performance bond, a public fund, or a tuition recovery program, based on the same act or omission of the institution on which the borrower defense to repayment is based;

(iv) State the amount of any payment received by the borrower or credited to the borrower's loan obligation through the third party, in connection with a borrower defense to repayment described in paragraph (e)(2) of this section;

(v) State the financial harm, as defined in paragraph (e)(4) of this section, that the borrower alleges to have been caused and provide any information relevant to assessing whether the borrower incurred financial harm, including providing documentation that the borrower actively pursued employment in the field for which the borrower's education prepared the borrower if the borrower is a recent graduate (failure to provide such information results in a presumption that the

borrower failed to actively pursue employment in the field); whether the borrower was terminated or removed for performance reasons from a position in the field for which the borrower's education prepared the borrower, or in a related field; and whether the borrower failed to meet other requirements of or qualifications for employment in such field for reasons unrelated to the school's misrepresentation underlying the borrower defense to repayment, such as the borrower's ability to pass a drug test, satisfy driving record requirements, and meet any health qualifications; and

(vi) State that the borrower understands that in the event that the borrower receives a 100 percent discharge of the balance of the loan for which the defense to repayment application has been submitted, the institution may, if allowed or not prohibited by other applicable law, refuse to verify or to provide an official transcript that verifies the borrower's completion of credits or a credential associated with the discharged loan.

(9) Consideration of order of objections and of evidence in possession of the Secretary.

(i) If the borrower asserts both a borrower defense to repayment and any other objection to an action of the Secretary with regard to a Direct Loan or a loan repaid by a Direct Consolidation Loan, the order in which the Secretary will consider objections, including a borrower defense to repayment, will be determined as appropriate under the circumstances.

(ii) With respect to the borrower defense to repayment application submitted under this paragraph (e), the Secretary may consider evidence otherwise in the possession of the Secretary, including from the Department's internal records or other relevant evidence obtained by the Secretary, as practicable, provided that the Secretary permits the institution and the borrower to review and respond to this evidence and to submit additional evidence.

(10) School response and borrower reply.

(i) Upon receipt of a borrower defense to repayment application under this paragraph (e), the Department will notify the school of the pending

application and provide a copy of the borrower's request and any supporting documents, a copy of any evidence otherwise in the possession of the Secretary, and a waiver signed by the student permitting the institution to provide the Department with items from the student's education record relevant to the defense to repayment claim to the school, and invite the school to respond and to submit evidence, within the specified timeframe included in the notice, which shall be no less than 60 days.

(ii) Upon receipt of the school's response, the Department will provide the borrower a copy of the school's submission as well as any evidence otherwise in possession of the Secretary, which was provided to the school, and will give the borrower an opportunity to submit a reply within a specified timeframe, which shall be no less than 60 days. The borrower's reply must be limited to issues and evidence raised in the school's submission and any evidence otherwise in the possession of the Secretary.

(iii) The Department will provide the school a copy of the borrower's reply.

(iv) There will be no other submissions by the borrower or the school to the Secretary, unless the Secretary requests further clarifying information.

(11) Written decision.

(i) After considering the borrower's application and all applicable evidence, the Secretary issues a written decision—

(A) Notifying the borrower and the school of the decision on the borrower defense to repayment;

(B) Providing the reasons for the decision; and

(C) Informing the borrower and the school of the relief, if any, that the borrower will receive, consistent with paragraph (e)(12) of this section, and specifying the relief determination.

(ii) If the Department receives a borrower defense to repayment application that is incomplete and is within the limitations period in § 685.206(e)(6) or (7), the Department will not issue a written decision on the application and instead will notify the borrower in writing that the application is incomplete and will return the application to the borrower.

(12) Borrower defense to repayment relief.

(i) If the Secretary grants the borrower's request for relief based on a borrower defense to repayment under this paragraph (e), the Secretary notifies the borrower and the school that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay or will be reimbursed for amounts paid toward the loan voluntarily or through enforced collection. The amount of relief that a borrower receives may exceed the amount of financial harm, as defined in § 685.206(e)(4), that the borrower alleges in the application pursuant to § 685.206(e)(8)(v). The Secretary determines the amount of relief and awards relief limited to the monetary loss that a borrower incurred as a consequence of a misrepresentation, as defined in § 685.206(e)(3). The amount of relief cannot exceed the amount of the loan and any associated costs and fees and will be reduced by the amount of refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation, compromise, or any other financial benefit received by, or on behalf of, the borrower that was related to the borrower defense to repayment. In awarding relief, the Secretary considers the borrower's application, as described in § 685.206(e)(8), which includes information about any payments received by the borrower and the financial harm alleged by the borrower. In awarding relief, the Secretary also considers the school's response, the borrower's reply, and any evidence otherwise in the possession of the Secretary, which was previously provided to the borrower and the school, as described in § 685.206(e)(10). The Secretary also updates reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan or loans repaid by the borrower's Direct Consolidation Loan.

(ii) The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include one or both of the following, if applicable:

(A) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act and

(B) Eliminating or recalculating the subsidized usage period that is associated with the loan or loans discharged pursuant to § 685.200(f)(4)(iii).

(13) Finality of borrower defense to repayment decisions. The determination of a borrower's defense to repayment by the Department included in the written decision referenced in paragraph (e)(11) of this section is the final decision of the Department and is not subject to appeal within the Department.

(14) Cooperation by the borrower. The Secretary may revoke any relief granted to a borrower under this section who refuses to cooperate with the Secretary in any proceeding under paragraph (e) of this section or under 34 CFR part 668, subpart G. Such cooperation includes, but is not limited to—

(i) Providing testimony regarding any representation made by the borrower to support a successful borrower defense to repayment; and

(ii) Producing, within timeframes established by the Secretary, any documentation reasonably available to the borrower with respect to those representations and any sworn statement required by the Secretary with respect to those representations and documents.

(15) Transfer to the Secretary of the borrower's right of recovery against third parties.

(i) Upon the grant of any relief under this paragraph (e), the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the provision of educational services for which the loan was received, against the school, its principals, its affiliates and their successors, or its sureties, and any private fund, including the portion of a public fund that represents funds received from a private party. If

the borrower asserts a claim to, and recovers from, a public fund, the Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense to repayment and for the same loan for which the discharge was granted under this section.

(ii) The provisions of this paragraph (e)(15) apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(iii) Nothing in this paragraph (e)(15) limits or forecloses the borrower's right to pursue legal and equitable relief arising under applicable law against a party described in this paragraph (e)(15) for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

(16) Recovery from the school.

(i) The Secretary may initiate an appropriate proceeding to require the school whose misrepresentation resulted in the borrower's successful borrower defense to repayment under this paragraph (e) to pay to the Secretary the amount of the loan to which the defense applies in accordance with 34 CFR part 668, subpart G. This paragraph (e)(16) would also be applicable for provisionally certified institutions.

(ii) The Secretary will not initiate such a proceeding more than five years after the date of the final determination included in the written decision referenced in paragraph (e)(11) of this section. The Department will notify the school of the borrower defense to repayment application within 60 days of the date of the Department's receipt of the borrower's application.

34 C.F.R. § 685.222. Borrower defenses and procedures for loans first disbursed on or after July 1, 2017, and before July 1, 2020, and procedures for loans first disbursed prior to July 1, 2017.

(a) General.

(1) For loans first disbursed prior to July 1, 2017, a borrower asserts and the Secretary considers a borrower defense in accordance with the provisions of § 685.206(c), unless otherwise noted in § 685.206(c).

(2) For loans first disbursed on or after July 1, 2017, and before July 1, 2020, a borrower asserts and the Secretary considers a borrower defense in accordance with this section. To establish a borrower defense under this section, a preponderance of the evidence must show that the borrower has a borrower defense that meets the requirements of this section.

(3) A violation by the school of an eligibility or compliance requirement in the Act or its implementing regulations is not a basis for a borrower defense under either this section or § 685.206(c) unless the violation would otherwise constitute a basis for a borrower defense under this section or § 685.206(c), as applicable.

(4) For the purposes of this section and § 685.206(c), "borrower" means—

(i) The borrower; and

(ii) In the case of a Direct PLUS Loan, any endorsers, and for a Direct PLUS Loan made to a parent, the student on whose behalf the parent borrowed.

(5) For the purposes of this section and § 685.206(c), a "borrower defense" refers to an act or omission of the school attended by the student that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided, and includes one or both of the following:

(i) A defense to repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part; and

(ii) A right to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(6) If the borrower asserts both a borrower defense and any other objection to an action of the Secretary with regard to that Direct Loan, the order in which the Secretary will consider objections, including a borrower defense, will be determined as appropriate under the circumstances.

(b) Judgment against the school. The borrower has a borrower defense under this section if the borrower, whether as an individual or as a member of a class, or a governmental agency, has obtained against the school a nondefault, favorable contested judgment based on State or Federal law in a court or administrative tribunal of competent jurisdiction. A borrower may assert a borrower defense under this paragraph at any time.

(c) Breach of contract by the school. The borrower has a borrower defense under this section if the school the borrower received the Direct Loan to attend failed to perform its obligations under the terms of a contract with the student. A borrower may assert a defense to repayment of amounts owed to the Secretary under this paragraph at any time after the breach by the school of its contract with the student. A borrower may assert a right to recover amounts previously collected by the Secretary under this paragraph not later than six years after the breach by the school of its contract with the student.

(d) Substantial misrepresentation by the school.

(1) A borrower has a borrower defense under this section if the school or any of its representatives, or any institution, organization, or person with whom the school has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services, made a substantial misrepresentation in accordance with 34 CFR part 668, subpart F, that the borrower reasonably relied on to the borrower's detriment when the borrower decided to attend, or to continue attending, the school or decided to take out a Direct Loan. A borrower may assert, at any time, a defense to repayment under this paragraph (d) of amounts owed to the Secretary. A borrower may assert a claim under this paragraph (d) to recover funds previously collected by the Secretary not later than six years after the borrower discovers, or reasonably could have discovered, the information constituting the substantial misrepresentation.

(2) For the purposes of this section, a designated Department official pursuant to paragraph (e) of this section or a hearing official pursuant to paragraph (f), (g), or (h) of this section may consider, as evidence supporting the reasonableness of a borrower's reliance on a misrepresentation, whether the

school or any of the other parties described in paragraph (d)(1) engaged in conduct such as, but not limited to:

(i) Demanding that the borrower make enrollment or loan-related decisions immediately;

(ii) Placing an unreasonable emphasis on unfavorable consequences of delay;

(iii) Discouraging the borrower from consulting an adviser, a family member, or other resource;

(iv) Failing to respond to the borrower's requests for more information including about the cost of the program and the nature of any financial aid; or

(v) Otherwise unreasonably pressuring the borrower or taking advantage of the borrower's distress or lack of knowledge or sophistication.

(e) Procedure for an individual borrower.

(1) To assert a borrower defense under this section, an individual borrower must—

(i) Submit an application to the Secretary, on a form approved by the Secretary—

(A) Certifying that the borrower received the proceeds of a loan, in whole or in part, to attend the named school;

(B) Providing evidence that supports the borrower defense; and

(C) Indicating whether the borrower has made a claim with respect to the information underlying the borrower defense with any third party, such as the holder of a performance bond or a tuition recovery program, and, if so, the amount of any payment received by the borrower or credited to the borrower's loan obligation; and

(ii) Provide any other information or supporting documentation reasonably requested by the Secretary.

(2) Upon receipt of a borrower's application submitted under this section, the Secretary—

(i) If the borrower is not in default on the loan for which a borrower defense has been asserted, grants forbearance and—

(A) Notifies the borrower of the option to decline the forbearance and to continue making payments on the loan; and

(B) Provides the borrower with information about the availability of the income-contingent repayment plans under § 685.209 and the income-based repayment plan under § 685.221; or

(ii) If the borrower is in default on the loan for which a borrower defense has been asserted—

(A) Suspends collection activity on the loan until the Secretary issues a decision on the borrower's claim;

(B) Notifies the borrower of the suspension of collection activity and explains that collection activity will resume if the Secretary determines that the borrower does not qualify for a full discharge; and

(C) Notifies the borrower of the option to continue making payments under a rehabilitation agreement or other repayment agreement on the defaulted loan.

(3) The Secretary designates a Department official to review the borrower's application submitted under this section to determine whether the application states a basis for a borrower defense, and resolves the claim through a fact-finding process conducted by the Department official.

(i) As part of the fact-finding process, the Department official notifies the school of the borrower defense application and considers any evidence or argument presented by the borrower and also any additional information, including—

(A) Department records;

(B) Any response or submissions from the school; and

(C) Any additional information or argument that may be obtained by the Department official.

(ii) For borrower defense applications under this section, upon the borrower's request, the Department official identifies to the borrower the records the Department official considers relevant to the borrower defense. The Secretary provides to the borrower any of the identified records upon reasonable request of the borrower.

(4) At the conclusion of the fact-finding process under this section, the Department official issues a written decision as follows:

(i) If the Department official approves the borrower defense in full or in part, the Department official notifies the borrower in writing of that determination and of the relief provided as described in paragraph (i) of this section.

(ii) If the Department official denies the borrower defense in full or in part, the Department official notifies the borrower of the reasons for the denial, the evidence that was relied upon, any portion of the loan that is due and payable to the Secretary, and whether the Secretary will reimburse any amounts previously collected, and informs the borrower that if any balance remains on the loan, the loan will return to its status prior to the borrower's submission of the application. The Department official also informs the borrower of the opportunity to request reconsideration of the claim based on new evidence pursuant to paragraph (e)(5)(i) of this section.

(5) The decision of the Department official under this section is final as to the merits of the claim and any relief that may be granted on the claim. Notwithstanding the foregoing—

(i) If the borrower defense is denied in full or in part, the borrower may request that the Secretary reconsider the borrower defense upon the identification of new evidence in support of the borrower's claim. “New evidence” is relevant evidence that the borrower did not previously provide and that was not identified in the final decision as evidence that was relied upon for the final decision. If accepted for reconsideration by the Secretary, the Secretary follows the procedure in paragraph (e)(2) of this section for granting forbearance and for defaulted loans; and

(ii) The Secretary may reopen a borrower defense application at any time to consider evidence that was not considered in making the previous decision. If a borrower defense application is reopened by the Secretary, the Secretary follows the procedure paragraph (e)(2) of this section for granting forbearance and for defaulted loans.

(6) The Secretary may consolidate applications filed under this paragraph (e) that have common facts and claims, and resolve the borrowers' borrower defense claims as provided in paragraphs (f), (g), and (h) of this section.

(7) The Secretary may initiate a proceeding to collect from the school the amount of relief resulting from a borrower defense under this section—

(i) Within the six-year period applicable to the borrower defense under paragraph (c) or (d) of this section;

(ii) At any time, for a borrower defense under paragraph (b) of this section; or

(iii) At any time if during the period described in paragraph (e)(7)(i) of this section, the institution received notice of the claim. For purposes of this paragraph, notice includes receipt of—

(A) Actual notice from the borrower, a representative of the borrower, or the Department of a claim, including notice of an application filed pursuant to this section or § 685.206(c);

(B) A class action complaint asserting relief for a class that may include the borrower for underlying facts that may form the basis of a claim under this section or § 685.206(c);

(C) Written notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower, for underlying facts that may form the basis of a claim under this section or § 685.206(c).

(f) Group process for borrower defense, generally.

(1) Upon consideration of factors including, but not limited to, common facts and claims, fiscal impact, and the promotion of compliance by the school or

other title IV, HEA program participant, the Secretary may initiate a process to determine whether a group of borrowers, identified by the Secretary, has a borrower defense under this section.

(i) The members of the group may be identified by the Secretary from individually filed applications pursuant to paragraph (e)(6) of this section or from any other source.

(ii) If the Secretary determines that there are common facts and claims that apply to borrowers who have not filed an application under paragraph (e) of this section, the Secretary may identify such borrowers as members of a group.

(2) Upon the identification of a group of borrowers under paragraph (f)(1) of this section, the Secretary—

(i) Designates a Department official to present the group's claim in the fact-finding process described in paragraph (g) or (h) of this section, as applicable;

(ii) Provides each identified member of the group with notice that allows the borrower to opt out of the proceeding;

(iii) If identified members of the group are borrowers who have not filed an application under paragraph (f)(1)(ii) of this section, follows the procedures in paragraph (e)(2) of this section for granting forbearance and for defaulted loans for such identified members of the group, unless an opt-out by such a member of the group is received; and

(iv) Notifies the school of the basis of the group's borrower defense, the initiation of the fact-finding process described in paragraph (g) or (h) of this section, and of any procedure by which the school may request records and respond. No notice will be provided if notice is impossible or irrelevant due to a school's closure.

(3) For a group of borrowers identified by the Secretary, for which the Secretary determines that there may be a borrower defense under paragraph (d) of this section based upon a substantial misrepresentation that has been widely disseminated, there is a rebuttable presumption that each member reasonably relied on the misrepresentation.

(g) Procedures for group process for borrower defenses with respect to loans made to attend a closed school. For groups identified by the Secretary under paragraph (f) of this section, for which the borrower defense under this section is asserted with respect to a Direct Loan to attend a school that has closed and has provided no financial protection currently available to the Secretary from which to recover any losses arising from borrower defenses, and for which there is no appropriate entity from which the Secretary can otherwise practicably recover such losses—

(1) A hearing official resolves the borrower defense under this section through a fact-finding process. As part of the fact-finding process, the hearing official considers any evidence and argument presented by the Department official on behalf of the group and, as necessary to determine any claims at issue, on behalf of individual members of the group. The hearing official also considers any additional information the Department official considers necessary, including any Department records or response from the school or a person affiliated with the school as described in § 668.174(b), if practicable. The hearing official issues a written decision as follows:

(i) If the hearing official approves the borrower defense in full or in part, the written decision states that determination and the relief provided on the basis of that claim as determined under paragraph (i) of this section.

(ii) If the hearing official denies the borrower defense in full or in part, the written decision states the reasons for the denial, the evidence that was relied upon, the portion of the loans that are due and payable to the Secretary, and whether reimbursement of amounts previously collected is granted, and informs the borrowers that if any balance remains on the loan, the loan will return to its status prior to the group claim process.

(iii) The Secretary provides copies of the written decision to the members of the group and, as practicable, to the school.

(2) The decision of the hearing official is final as to the merits of the group borrower defense and any relief that may be granted on the group claim.

(3) After a final decision has been issued, if relief for the group has been denied in full or in part pursuant to paragraph (g)(1)(ii) of this section, an individual borrower may file a claim for relief pursuant to paragraph (e)(5)(i) of this section.

(4) The Secretary may reopen a borrower defense application at any time to consider evidence that was not considered in making the previous decision. If a borrower defense application is reopened by the Secretary, the Secretary follows the procedure in paragraph (e)(2) of this section for granting forbearance and for defaulted loans.

(h) Procedures for group process for borrower defenses with respect to loans made to attend an open school. For groups identified by the Secretary under paragraph (f) of this section, for which the borrower defense under this section is asserted with respect to Direct Loans to attend a school that is not covered by paragraph (g) of this section, the claim is resolved in accordance with the procedures in this paragraph (h).

(1) A hearing official resolves the borrower defense and determines any liability of the school through a fact-finding process. As part of the fact-finding process, the hearing official considers any evidence and argument presented by the school and the Department official on behalf of the group and, as necessary to determine any claims at issue, on behalf of individual members of the group. The hearing official issues a written decision as follows:

(i) If the hearing official approves the borrower defense in full or in part, the written decision establishes the basis for the determination, notifies the members of the group of the relief as described in paragraph (i) of this section, and notifies the school of any liability to the Secretary for the amounts discharged and reimbursed.

(ii) If the hearing official denies the borrower defense for the group in full or in part, the written decision states the reasons for the denial, the evidence that was relied upon, the portion of the loans that are due and payable to the Secretary, and whether reimbursement of amounts previously collected is granted, and informs the borrowers that their loans will return to their statuses prior to the group borrower defense process. The decision notifies the school of any liability to the Secretary for any amounts discharged or reimbursed.

(iii) The Secretary provides copies of the written decision to the members of the group, the Department official, and the school.

(2) The decision of the hearing official becomes final as to the merits of the group borrower defense and any relief that may be granted on the group

borrower defense within 30 days after the decision is issued and received by the Department official and the school unless, within that 30–day period, the school or the Department official appeals the decision to the Secretary. In the case of an appeal—

(i) The decision of the hearing official does not take effect pending the appeal; and

(ii) The Secretary renders a final decision.

(3) After a final decision has been issued, if relief for the group has been denied in full or in part pursuant to paragraph (h)(1)(ii) of this section, an individual borrower may file a claim for relief pursuant to paragraph (e)(5)(i) of this section.

(4) The Secretary may reopen a borrower defense application at any time to consider evidence that was not considered in making the previous decision. If a borrower defense application is reopened by the Secretary, the Secretary follows the procedure in paragraph (e)(2) of this section for granting forbearance and for defaulted loans.

(5)(i) The Secretary collects from the school any liability to the Secretary for any amounts discharged or reimbursed to borrowers under this paragraph (h).

(ii) For a borrower defense under paragraph (b) of this section, the Secretary may initiate a proceeding to collect at any time.

(iii) For a borrower defense under paragraph (c) or (d) of this section, the Secretary may initiate a proceeding to collect within the limitation period that would apply to the borrower defense, provided that the Secretary may bring an action to collect at any time if, within the limitation period, the school received notice of the borrower's borrower defense claim. For purposes of this paragraph, the school receives notice of the borrower's claim by receipt of—

(A) Actual notice of the claim from the borrower, a representative of the borrower, or the Department, including notice of an application filed pursuant to this section or § 685.206(c);

(B) A class action complaint asserting relief for a class that may include the borrower for underlying facts that may form the basis of a claim under this section or § 685.206(c); or

(C) Written notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower, of underlying facts that may form the basis of a claim under this section or § 685.206(c).

(i) Relief. If a borrower defense is approved under the procedures in paragraph (e), (g), or (h) of this section, the following procedures apply:

(1) The Department official or the hearing official deciding the claim determines the appropriate amount of relief to award the borrower, which may be a discharge of all amounts owed to the Secretary on the loan at issue and may include the recovery of amounts previously collected by the Secretary on the loan, or some lesser amount.

(2) For a borrower defense brought on the basis of—

(i) A substantial misrepresentation, the Department official or the hearing official will factor the borrower's cost of attendance to attend the school, as well as the value of the education the borrower received, the value of the education that a reasonable borrower in the borrower's circumstances would have received, and/or the value of the education the borrower should have expected given the information provided by the institution, into the determination of appropriate relief. A borrower may be granted full, partial, or no relief. Value will be assessed in a manner that is reasonable and practicable. In addition, the Department official or the hearing official deciding the claim may consider any other relevant factors;

(ii) A judgment against the school—

(A) Where the judgment awards specific financial relief, relief will be the amount of the judgment that remains unsatisfied, subject to the limitation provided for in § 685.222(i)(8) and any other reasonable considerations; and

(B) Where the judgment does not award specific financial relief, the Department will rely on the holding of the case and applicable law to monetize the judgment; and

(iii) A breach of contract, relief will be determined according to the common law of contracts, subject to the limitation provided for in § 685.222(i)(8) and any other reasonable considerations.

(3) In a fact-finding process brought against an open school under paragraph (h) of this section on the basis of a substantial misrepresentation, the school has the burden of proof as to any value of the education.

(4) In determining the relief, the Department official or the hearing official deciding the claim may consider—

(i) Information derived from a sample of borrowers from the group when calculating relief for a group of borrowers; and

(ii) The examples in Appendix A to this subpart.

(5) In the written decision described in paragraphs (e), (g), and (h) of this section, the designated Department official or hearing official deciding the claim notifies the borrower of the relief provided and—

(i) Specifies the relief determination;

(ii) Advises that there may be tax implications; and

(iii) Advises the borrower of the requirements to file a request for reconsideration upon the identification of new evidence.

(6) Consistent with the determination of relief under paragraph (i)(1) of this section, the Secretary discharges the borrower's obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay and, if applicable, reimburses the borrower for amounts paid toward the loan voluntarily or through enforced collection.

(7) The Department official or the hearing official deciding the case, or the Secretary as applicable, affords the borrower such further relief as appropriate under the circumstances. Such further relief includes, but is not limited to, one or both of the following:

(i) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(ii) Updating reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan.

(8) The total amount of relief granted with respect to a borrower defense cannot exceed the amount of the loan and any associated costs and fees and will be reduced by the amount of any refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation, compromise, or any other financial benefit received by, or on behalf of, the borrower that was related to the borrower defense. The relief to the borrower may not include non-pecuniary damages such as inconvenience, aggravation, emotional distress, or punitive damages.

(j) Cooperation by the borrower. To obtain relief under this section, a borrower must reasonably cooperate with the Secretary in any proceeding under paragraph (e), (g), or (h) of this section. The Secretary may revoke any relief granted to a borrower who fails to satisfy his or her obligations under this paragraph (j).

(k) Transfer to the Secretary of the borrower's right of recovery against third parties.

(1) Upon the granting of any relief under this section, the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the contract for educational services for which the loan was received, against the school, its principals, its affiliates, and their successors, its sureties, and any private fund. If the borrower asserts a claim to, and recovers from, a public fund, the Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense and for the same loan for which the discharge was granted under this section.

(2) The provisions of this paragraph (k) apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(3) Nothing in this paragraph (k) limits or forecloses the borrower's right to pursue legal and equitable relief against a party described in this paragraph (k) for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged."