

**DECISION MEMORANDUM**

Date: October 29, 2023

To: James Kvaal, Under Secretary, Department of Education

From: [REDACTED], Executive Director, Vendor Oversight & Program Accountability

Thru: [REDACTED], Executive Director, Delivery Systems and Extended Workforce  
[REDACTED], Director, Policy Implementation and Oversight  
[REDACTED], Deputy Chief Operating Officer (SEAD)  
Richard Cordray, FSA's Chief Operating Officer

Subject: Request Approval: Use of Secretary's Compromise Authority for Remediating Potential Harm to Borrowers Caused by Return to Repayment Servicing Errors

**Scope**

This decision memo requests approval of certain actions to ensure borrowers are not harmed by servicing errors during Return to Repayment (R2R). Specifically, this memo requests approval to adjust any interest that accrued for affected borrowers while their accounts were being remediated. The memo also requests approval to grant credit toward Income Driven Repayment (IDR) and Public Service Loan Forgiveness (PSLF) for borrowers who were taken out of a repayment status and placed in an administrative forbearance to resolve these servicing errors. The memo treats the populations of below on a group-wide basis because it would not be administratively feasible to correct these errors on an individualized or opt-in basis.

**Background**

Congress and the Department paused collections and interest charged on Department-held loans beginning in March 2020. Consistent with the Fiscal Responsibility Act of 2023, the Department ended the pause at the end of August 2023. Now that the pause has ended, loans, as of September 1, 2023, are accruing interest and, as of October 1<sup>st</sup>, 2023, most borrowers are required to make student loan payments.

Federal student loan programs are complex, and it takes significant resources from both borrowers and servicers to navigate loan terms and conditions and to submit and process applications for programs that will help borrowers succeed in repayment. In preparation for the end of the payment pause, the Department has long been planning several steps to help borrowers manage their student loans, including creating a more affordable IDR plan, the Saving on a Valuable Education (SAVE) plan, through the publication of new regulations.

As part of FSA's ongoing oversight efforts and based on reports from loan servicers, we have identified several cohorts of borrowers returning to repayment who may have been harmed by servicing errors:

- **Errors with Converting to SAVE Plan Caused Incorrect Monthly Bills (78,000 borrowers)**

- When borrowers whose accounts were transferred to new servicers were converted from an older IDR plan to the new SAVE plan, their monthly payments were incorrectly calculated based on incorrect family sizes, family income and spousal loan balances.
- For over 5 million borrowers, their new loan servicers did not have the necessary information to complete the SAVE conversions because it was never transferred by the borrower's previous servicer. These receiving servicers needed to find alternative sources for the IDR information, and many relied on the previous servicer's reporting of IDR information to NSLDS. Unfortunately, approximately 8 percent of the time the prior servicer reported conflicting IDR data to NSLDS.
- For 78,000 borrowers, these conflicting data was used and caused the servicers to miscalculate the borrower's monthly payments.
- For example, one borrower received a bill showing she owed \$355 per month. With her previous servicer, prior to the pandemic, her payment was \$130 per month. Under the new SAVE plan her new payment should have been \$58 per month. The prior servicer inaccurately reported to NSLDS that her family size was only one, when in fact this same servicer had reported to NSLDS in a different record that she was married, had a dependent child and her spouse had eligible loans for spousal proration.
- A subsequent analysis of the inaccurate reporting showed that 90 percent of the time the prior servicer had incorrectly reported the family size as too low (causing the borrower's amount due to be too high). The remaining 10 percent of the time, the family size was too high (causing the borrower's amount due to be too low).
- **Incorrect Monthly Bills (>21,000 borrowers)**
  - Over 21,000 borrowers received monthly billing statements with very high and potentially incorrect amounts due. Hundreds of borrowers received bills stating they owed over \$10,000 per month and a few borrowers over \$100,000 per month.
  - For example, one transferred borrower received a billing statement saying they owed \$108,895.19 that month (the borrower's whole balance) because the borrower's loan servicer erroneously reduced the loan term (how long the borrower has to repay the loan) down to 2 months from 120 months.
  - These borrowers were primarily loan transfers or Fresh Start borrowers and their servicers erroneously set their loans' repayment term to 1-2 months (vs 120-240 months). A handful of these borrowers were affected by "fat fingering" the borrower's annual income (\$500,000 or \$1 million per year) by either the servicer staff or the borrower themselves.
- **Late or No Billing Statements Sent (approximately 2.5 million borrowers)**
  - One loan servicer reported they did not send timely billing statements to approximately 2.5 million borrowers returning to repayment for the first time in 3.5 years. The servicer has reported that as of October 19, 2023, over 830,000 of these borrowers missed making a full payment by their due date and are now considered delinquent.
  - For example, one borrower was sent her first billing statement on September 28<sup>th</sup>, 2023, with a due date of 10 days later (October 7<sup>th</sup>, 2023). This borrower also saw her monthly payment unexpectedly jump from \$167 per month to \$644 per month. The borrower was unable to contact her servicer to resolve the issue.

- Borrowers returning to repayment after such a long hiatus were promised by the Department and their loan servicers that they would be given at least 21 days' notice before their first bill was due.<sup>1</sup>
  - 1.9 million borrowers (79 percent) were sent notices 15-20 days prior to their due date.
  - 499,000 borrowers (20 percent) were sent notices 8-14 days prior to their due date.
  - 16,000 borrowers (1 percent) were sent notices 7 days or less than their due date.
- 30 percent of these affected borrowers (741,000) were mailed billing notices such that the borrower likely received the billing statement even later than the send date. 6,000 of those billing notices were mailed with 7 days or less notice.
- **Borrowers with Pending Borrower Defense (BD) Applications or Discharges Were Not Kept in Forbearance** (approximately 16,000 borrowers)
  - Servicers placed approximately 16,000 borrowers with pending BD applications or discharges in repayment status when those borrowers should have been kept in BD forbearance.
  - For example, one borrower who submitted a BD application in June of 2022 was erroneously taken out of forbearance when borrowers returned to repayment. She was sent a billing statement on September 23, 2023, and made a payment on October 6<sup>th</sup>, 2023.
  - Borrowers with pending BD applications or pending BD discharges, should be in a BD forbearance or other non-pay status, unless the borrower has opted out, has \$0 per month IDR payment or the BD discharge and per or interest credit has already been fully processed. Any loan eligible for group discharge should be in a BD forbearance or other non-pay status, until the discharge has been processed.
  - FSA is prohibited from actively collecting against many borrowers with pending BD applications or discharges due to a court order (e.g., *Manriquez* case) or settlement (e.g., *Sweet* case).
- **No Income Driven Repayment Disclosures Sent** (approximately 153,000 borrowers)
  - When converting borrowers from the older REPAYE IDR plan to the new SAVE plan one servicer failed to send revised disclosures stating the borrower's new monthly payment until after or contemporaneously to the due date.
  - When monthly payments are recalculated, Federal regulations require the Department to send borrowers a written notification that provides the borrower with the borrower's scheduled monthly payment amount and the time period during which this scheduled monthly payment amount will apply.<sup>2</sup>
  - While the IDR regulations and servicer contractual requirements do not specifically state when these disclosures must be sent, FFEL regulations require that commercial lenders must send borrowers loan disclosures "in simple and

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<sup>1</sup> "You'll receive a billing statement from your loan servicer at least 21 days before your payment is due. The statement will include your payment amount and the payment due date."

<https://studentaid.gov/help-center/answers/article/how-much-do-i-need-to-pay-on-loan>  
<https://studentaid.gov/manage-loans/repayment/prepare-payments-restart>

<sup>2</sup> 34 CFR 685.209 Income-contingent repayment plans



understandable terms... not less than 30 days... before the first payment on the loan is due from the borrower”.<sup>3</sup>

- For over 110,000 of these borrowers their first notice of their revised monthly payments under the new IDR plan (which may or may not have been right) was their monthly bill (which may or may not have been sent on time). Additionally, these monthly bills did not state which repayment plan the borrower was on nor did they state the time period during which the scheduled monthly payments would apply.

As was anticipated, borrowers are facing substantial challenges requesting help from their loan servicers when an issue arises. More than 28 million borrowers now owe payments for the first time in at least 3.5 years, more than 20 times greater than the number of borrowers who would typically enter repayment in a single month and five times more borrowers than would normally enter repayment in an entire year. Borrowers’ need for support has been many times greater than in a typical year, which is also juxtaposed within an environment where servicers have diminished call center capacity (e.g., reduced hours, and less experienced call center representatives).

Consequently, FSA and servicer call centers have struggled to handle the volume of borrowers seeking information and making repayment arrangements. While the number of borrower calls are just now returning to pre-pandemic rates, the length and complexity of the calls has extended hold times significantly (on average 58 min per borrower), borrowers are asking their servicers more questions (call lengths are approximately 70 percent longer than 2019) and only half of borrowers trying to call their servicer this week actually got through (approximately 52 percent abandonment rate).

Compounding the issue, during the pause, the Department transferred 24 million borrowers and hundreds of millions of loans between loan servicers during the payment pause. There were sound benefits for these loan transfers, including efforts to strengthen accountability for loan servicers. However, loan transfers interrupt borrowers’ relationships with servicers, requiring them to establish new accounts, seek information from new sources, and send payments to new destinations. Moreover, loans which are transferred between servicers are historically prone to account errors: one study suggested that when borrowers change servicers, as many as one in five borrowers experience problems with inaccurate account information, leading to inaccurate payments.<sup>4</sup> Such issues may be particularly challenging and increase loan repayment over time.<sup>5</sup> Consequently, new servicers may not have ready access to all the necessary information to fix a mistake.

These borrowers are returning to a student loan system that is midstream in making fundamental reforms to student loan servicing and borrower benefits, at a time when FSA is managing multiple management priorities with constrained funding. In sum, returning to repayment after the payment pause is one of the most significant management challenges in FSA’s history.

### **Borrowers Were Harmed by These Servicing Errors.**

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<sup>3</sup> 34 CFR 682.205 Disclosure requirements for lenders

<sup>4</sup> See [https://files.consumerfinance.gov/f/201509\\_cfpb\\_student-loan-servicing-report.pdf](https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf).

<sup>5</sup> See <https://www.aeaweb.org/articles?id=10.1257/app.20200362>.

Affected borrowers who either did not make a full, on-time payment due to an incorrect or missing monthly bill/disclosure or made a payment they did not need to make were harmed in the following ways:

- **Delinquency** - Borrowers who failed to make full, on-time payments are considered and appear as delinquent in servicer and FSA systems. While the on-ramp period will help ensure these borrowers are not reported as delinquent to the credit bureaus, if these borrowers call their servicer or log into their online account, they will see a past due notice. If a borrower does eventually make a payment, that payment will be applied to the previous and erroneous past due amount. The remediation here is to put these borrowers in a retroactive administrative forbearance immediately to remove these delinquencies.
- **Lost IDR/PSLF Credit** – While delinquent borrowers in a repayment status would receive credit toward IDR and PSLF under the IDR adjustment, if these borrowers are placed in retroactive administrative forbearances in a way that does not leave at least one day per month in a repayment status for each month, these borrowers will likely not receive IDR/PSLF credit (unless they qualify for the forbearance exceptions). The remediation here is to ensure these borrowers receive appropriate credit toward IDR and PSLF forgiveness.
- **Lost Interest Subsidy** – Borrowers on the SAVE plan who make full- and on-time payments, will not see their balance increase due to the new 100 percent interest subsidy. If borrowers on the SAVE plan cannot make a payment because the servicer miscalculated their monthly payment and placed them in administrative forbearance these borrowers will lose out on any potential interest subsidies for that month. The remediation for this is to ensure these borrowers' balances do not increase due to interest while the monthly payments are being recalculated.
- **NSF Fees** – For some borrowers, the reason why they did not pay is that their auto-debit payment exceeded their banking balance and then these borrowers were also hit with an nonsufficient fund fee (NSF). FSA will require servicers to refund any NSFs due to servicer error directly to the borrowers.

### **FSA's Remediation Plan Will Ensure Borrowers Are Not Harmed Due to These Servicing Errors**

In order to ensure that affected borrowers are not harmed by these servicing errors identified during the Return to Repayment period, FSA has already instructed the servicers to:

- Place these borrowers in an administrative forbearance until their IDR applications have been reviewed,
- Notify these borrowers of the reason for placing their loan(s) in administrative forbearance,
- Offer to refund any impacted or recent payments made by these borrowers,
- Pay any non-sufficient fund (NSF) fees that may have occurred,
- Reprocess the IDR applications for these borrowers using the correct family size, household income and spousal loan information contained in the file,
- Send these borrowers new IDR disclosures with the revised monthly payment amount (MPA).

Pending your approval FSA intends to instruct servicers to:

- Ensure borrowers receive credit toward IDR/PSLF forgiveness while their monthly payments are being recalculated and
- Ensure affected borrowers effectively do not accrue any interest while their accounts are being corrected.

Many but not all affected borrowers would have been eligible for an interest subsidy under the SAVE and PAYE IDR programs. FSA believes a remediation plan that ensures all affected borrowers are fully remediated and can be easily communicated (e.g., a customer service representative can explain it when a borrower calls in and asks what is happening to their account) is the best approach and prevents putting additional strain on the already strained contact centers. Additionally, FSA believes that addressing these problems now and restoring affected borrowers to the position they should have been in will put those borrowers in the best position to repay their loans in the future.

### Evaluating Factors

When evaluating if approval of corrections to borrower accounts in non-standard situations is warranted, FSA should consider the following factors:<sup>6</sup>

- Statutory/regulatory requirements: What are the relevant statutory and regulatory requirements related to this issue?
- World Class Customer Service: Would using the standard account correction procedures mean that FSA is not providing world class customer service?
- Customer Reliance: Has an unreasonable amount of time passed before the issue was discovered and did the customer reasonably rely on the status quo?
- Good Faith: Did the customer's action substantially contribute to the issue?
- De Minimis Harm: Would using the standard account correction procedures result in unreasonable amount of work for FSA or our vendors to implement while curing only a de minimis amount of harm?
- Potential for litigation: Would using the current regulatory application result in potential litigation risk against the Department or one of FSA's vendors? (e.g., a class action lawsuit)
- Reputational risk: Would using the standard account correction procedures result in substantial reputational risk to FSA? (e.g., unfavorable media coverage)

Below is an evaluation of these approved factors.

**Statutory/regulatory requirements:** *What are the relevant statutory and regulatory requirements related to this issue?*

At the start of the pandemic, the CARES Act suspended collection of Federally held student loan debt and ensured there would be no accrual of interest during the payment pause. The CARES Act also required the Department to "carry out a program to provide not less than six notices by mail, telephone, or electronic communications indicating when the borrower's normal payment obligations will resume; and that the borrower has the option to enroll in income-driven repayment, including a brief description of such options."<sup>7</sup>

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<sup>6</sup> FSA's Vendor Corrective Action Plans (CAPs)/Work Plans, Financial Penalties for Vendors and Corrections to Borrower Accounts: Standard Operating Procedures (SOPs), Approved November 2021

<sup>7</sup> Public Law 116-136 §3513(g)(2). TEMPORARY RELIEF FOR FEDERAL STUDENT LOAN BORROWERS.



The payment pause was extended by Secretary a number of times until on June 3, 2023, the President signed the “Fiscal Responsibility Act of 2023”<sup>8</sup> that ended the payment pause “sixty days after June 30, 2023.” On September 1<sup>st</sup>, 2023, interest began to accrue on borrower accounts and generally borrowers had to make their first payments after the pause during the month of October 2023.

On July 10<sup>th</sup>, 2023, the Secretary issued new regulations<sup>9</sup> making improvements to the Income Driven Repayment (IDR) programs. These regulations amended the Revised Pay as You Earn (REPAYE) repayment plan and gave it the new name of the Saving on a Valuable Education (SAVE) plan. In the first year of implementation, borrowers converted from the old REPAYE plan to the new SAVE plan should see their monthly payments lowered because the amount of protected income increased from 150 percent of the Federal poverty guidelines to 225 percent. Additional changes will be implemented next year.

Starting July 1, 2024, the new regulations will allow borrowers to count certain periods of “administrative forbearance” toward IDR forgiveness. Specifically, borrowers will now receive “up to 60 days” of IDR credit while their servicers “collect and process documentation supporting the borrower’s request for a deferment, forbearance, change in repayment plan, or consolidation loan.”<sup>10</sup>

On November 1, 2022, the Secretary issued new PSLF regulations that allow borrowers to count these same periods of “administrative forbearance” toward PSLF.<sup>11</sup> This change to PSLF was effective July 1, 2023.

According to the Higher Education Act (HEA), 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.”<sup>12</sup>

The Federal Claims Collection Standards (FCCS) regulations state the bases for compromising a borrower’s debt.<sup>13</sup> In this instance the Department “may compromise a debt if the Government cannot collect the full amount because... there is significant doubt concerning the Government’s ability to prove its case in court...If there is significant doubt concerning the Government’s ability to prove its case in court for the full amount claimed, either because of the legal issues involved or because of a bona fide dispute as to the facts, then the amount accepted in compromise of such cases should fairly reflect the probabilities of successful prosecution to judgment, with due regard given to the availability of witnesses and other evidentiary support for the Government’s claim. In determining the litigative risks involved, agencies should consider the probable amount of court costs and attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412, that may be imposed against the Government if it is unsuccessful in litigation.”

Affected borrowers could argue that the servicing errors effectively resulted in notices that did not comply with the notice requirements of the CARES Act and the regulatory requirements for sending disclosures, and FSA believes that these servicing errors pose litigation risks, as addressed below,

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<sup>8</sup> PUBLIC LAW 118–5 §271. FISCAL RESPONSIBILITY ACT OF 2023

<sup>9</sup> <https://www.federalregister.gov/documents/2023/07/10/2023-13112/improving-income-driven-repayment-for-the-william-d-ford-federal-direct-loan-program-and-the-federal/>

<sup>10</sup> 34 CFR 685.205(b)(9)

<sup>11</sup> <https://www.federalregister.gov/documents/2022/11/01/2022-23447/institutional-eligibility-under-the-higher-education-act-of-1965-as-amended-student-assistance>, 34 CFR § 685.219

<sup>12</sup> 20 U.S. Code § 1082(a)(6) - Legal powers and responsibilities

<sup>13</sup> 31 CFR § 902.2 Bases for compromise.

and therefore meet the basis for compromise under the FCCS (see potential for litigation section below).

**World Class Customer Service:** *Would using the standard account correction procedures mean that FSA is not providing world class customer service?*

It has been said that “customers don’t expect your business to be perfect, but they do expect you to own up to your mistakes and make them right.” Providing world class customer service is preventing as many of these issues as possible and when they still happen, ensure that borrowers are not harmed by those servicing errors.

With 28 million borrowers returning to repayment for the first time in over 3.5 years, implementation of the new IDR program and budgetary restraints, borrowers and the public at large likely expected there to be some bumps in the road. Providing world class customer service is acknowledging these servicing errors and making them right for borrowers.

In fact, it was the anticipation of issues like these that lead to the Department authorizing the on-ramp program that prevents the reporting of delinquencies to the credit reporting agencies for one year after the payment pause.

**Customer Reliance:** *Has an unreasonable amount of time passed before the issue was discovered and did the customer reasonably rely on the status quo?*

These customers reasonably relied on their loan servicers to send them accurate monthly bills and repayment disclosures in a timely manner prior to returning to repayment for the first time in over 3.5 years. In some cases, these customers have experienced financial detriment due to the servicers’ failure to provide accurate and timely bills and disclosures.

If any of these borrowers did notice any potential issues with their monthly bills or repayment disclosures only about half of them would have actually been able to get through to their loan servicers after waiting on hold for an average of 1 hour.

FSA’s call monitoring team has listened to several borrowers calls with loan servicers where issues like these were raised and nearly all of the customer service representatives advised the borrower to just submit a new IDR application online (which borrowers were hesitant to do because it may increase their monthly payments due to a larger family income and the months spent processing the new applications would not count toward IDR/PSLF forgiveness).

**Good Faith:** *Did the customer’s action substantially contribute to the issue?*

The issues contributing to these servicing errors were largely out of the borrower’s control (e.g., return to repayment, the transition to the new IDR program, and historic numbers of borrowers transferring loans servicers). Borrowers asking for remediation acted in good faith.

28 million borrowers are returning to a student loan system that is midstream in making fundamental reforms to student loan servicing and borrower benefits, at a time when FSA is managing multiple management priorities with constrained funding.



**De Minimis Harm:** *Would using the standard account correction procedures result in an unreasonable amount of work for FSA or our vendors to implement while curing only a de minimis amount of harm?*

N/A. Either remediation approach, the standard account correction procedure or the proposed non-standard account correction proposed in this memo, will require a significant amount of work to implement.

**Potential for litigation:** *Would using the current regulatory application result in potential litigation risk against the Department or one of FSA's vendors? (e.g., a class action lawsuit)*

If FSA does not fully remediate the harm experienced by borrowers due to servicing errors, there is a significant litigation risk against the Department and/or our vendors.

“We take our oversight role very seriously,” the agency said in a statement, “and when mistakes happen, we work swiftly to resolve them and make sure there is as little impact as possible on borrowers.” The department estimates that 420,000 borrowers have been affected by the miscalculations. Still, it may be difficult to gauge the full extent of the problem, with piles of applications yet to be processed.<sup>14</sup>

It is likely that, if FSA fails to fully remediate these borrower as promised, borrowers who were financially harmed due to servicing errors would seek a legal remedy against their servicers and/or the Department. Although the Department is immune from certain types of borrower claims related to servicing and oversight of servicers, liability for the servicers themselves could also limit the Department's ability to enforce these loans in full in the future.

Additionally, these servicing errors potentially violate several federal and state consumer protection laws. Federal and state regulators who are currently conducting supervisory examinations of FSA's loan servicers to monitor return to repayment have already indicated that if FSA does not fully remediate these borrowers, they will likely find violations of their consumer protection laws and require servicers to remediate the problems experienced by borrowers themselves and impose monetary fines against the servicers, while not fully fixing the problems caused for borrowers. Servicers facing these penalties may file “Requests for Equitable Adjustments” (REAs) demanding that FSA reimburse them for the additional costs beyond those clearly attributable to their own errors, such as receiving conflicting information from prior servicers and unclear or erroneous information from FSA.

**Reputational risk:** *Would using the standard account correction procedures result in substantial reputational risk to FSA?*

Failing to correct these servicing errors would result in substantial reputation risk to the Department and FSA.

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<sup>14</sup> “Rollout of Biden's new student loan repayment plan hits early snags”, Washington Post, October 7, 2023, <https://www.washingtonpost.com/education/2023/10/07/save-student-loan-payment-errors/>

### Level of Approval Required

The Secretary of Education has delegated FSA's Chief Operating Officer (COO) authority for "collection and compromise claims against individuals under the Federal Student Aid (FSA) Programs."

Due to the inability for FSA to accurately estimate the potential compromise amounts associated with remediating these accounts, this decision memo is being directed to the Under Secretary through FSA's COO.

### Conclusion

Based on the evaluation of the factors above, FSA recommends that the Department use the Secretary's compromise authority to adjust any interest that accrued for affected borrowers while their accounts were being remediated. The memo also requests approval to grant credit toward IDR and PSLF for borrowers who were taken out of a repayment status and placed in an administrative forbearance to resolve these servicing errors.

Nothing in this document limits the government's ability to exercise its full settlement and compromise authority under the HEA.



**RECOMMENDATION: FSA should use the Secretary's compromise authority under 20 USC 1082(a) to direct loan servicers to adjust any interest that accrued for affected borrowers while their accounts were being remediated. The memo also requests approval to grant credit toward Income Driven Repayment (IDR) and Public Service Loan Forgiveness (PSLF) for borrowers who were taken out of a repayment status and placed in an administrative forbearance to resolve these servicing errors.**



DECISION

☒ Yes

☐ No

☐ No, with comment

JAMES  
KVAAL



Digitally signed by  
JAMES KVAAL  
Date: 2023.10.29  
21:18:17 -04'00'