UNITED STATES DEPARTMENT OF EDUCATION
Office of Postsecondary Education

Borrower Hardship Issue Paper
Negotiated Rulemaking, Session 2
November 6-7, 2023

Background/Introduction

The Department of Education is sharing draft regulatory text for negotiators' consideration at the second session negotiation session. This regulatory text covers four categories of borrowers discussed in the first negotiating session:

1. Borrowers whose balances are greater than what they originally borrowed;
2. Borrowers whose loans first entered repayment 25 years ago or more;
3. Borrowers who attended programs that did not provide sufficient financial value; and
4. Borrowers who are eligible for relief under programs like income-driven repayment but have not applied.

The first negotiation session discussed a fifth category of borrowers -- those experiencing hardship that is not otherwise addressed by the existing student loan system. The Department has not provided regulatory text addressing this group because additional discussion is needed to define the problem and identify possible solutions. This paper summarizes the discussion around borrower hardship from Session 1, including issues raised by negotiators, and lays out additional questions for discussion in Session 2.

Summary of Session 1

The Department asked the following question in Session 1:

> *Borrowers who experience hardship with respect to their student loans may have certain ways to reduce or delay loan payments or seek forgiveness on their loans. Yet borrowers may continue to experience hardship in ways that the current student loan system does not adequately address. What are potential types of hardship that borrowers may continue to face and how might the Department address those cases of hardship?*

During the session, negotiators provided many ideas for how the Department might address hardship. These included:

- Adopting some of the framework the Departments of Education and Justice used in making improvements to the bankruptcy process.

    - We are providing a copy of that framework alongside this paper. Generally, this involves an individualized review of a borrower's income compared to their expenses to determine if the borrower faces persistent hardship. Persistence can be based on whether a borrower meets certain presumptive categories, such as being over a certain age, not having completed their degree, or their loans having been in repayment for at least 10 years. Finally, the process considers whether the borrower has demonstrated a good faith effort to repay the debt.

- Negotiators also identified several categories for the Department to consider as possible signs of hardship. Examples of such categories included borrowers who:

    - attended institutions that closed.
    - received a Pell Grant.
    - have loans of their own and have borrowed parent loans.
    - are on Medicare and do not have a Medicare Income-Related Monthly Adjustment Amount, meaning their income is below $97,000 as a single individual.
    - receive an Affordable Care Act subsidy, meaning they earn less than 400 percent of the Federal poverty guidelines.
    - have significant child or dependent care expenses.
    - have significant medical expenses.
    - have completed a chapter 11 or chapter 13 bankruptcy process.
    - did not finish their programs.
    - are over a certain age.
    - have loans that predate the switch to 100 percent Direct lending in 2010.
    - have a disability but are not eligible for a total and permanent disability.

Topics for Session 2

The discussion in Session 1 provided a lot of useful information for the Department's consideration. We remain interested in continued discussion and identifying additional evidence to help define with more specificity the types of hardship that are not addressed by existing or proposed loan repayment and forgiveness programs, and the potential redress for these types of hardship. We are providing the questions below to guide the discussion during the second session and hope to identify potential regulatory proposals for the third session or future policymaking efforts.

Questions for discussion

For all the questions below, the Department is interested in what evidence (such as studies, research, or data) it should consider in both defining and remedying hardship, such as full or partial loan cancellation. The most feasible proposals will rely on information already possessed by the Department.

1. Applying a standard used in providing student loan discharges through bankruptcy in the Department's regulations would require the Department to establish a standard for review. At present, bankruptcy discharges are governed by an undue hardship standard, which courts have interpreted using the *Brunner* test (or another, similar test called "totality of the circumstances"). This relies upon three factors: (1) being unable to maintain a minimal standard of living, (2) the financial circumstances are unlikely to change, and (3) there's been a good faith effort to repay their loans. While a hardship process under the Higher Education Act need not be subject to the same test, these standards may be informative of the considerations other policymakers have used to identify hardship. Given that, which elements, if any, of this undue hardship consideration would be appropriate to adopt here? How can they be assessed in a manner consistent with the Department's limited capacity for individualized review?

2. Many of the forms of hardship identified, such as familial wealth or significant expenses for medical or child care, are not obtainable from the Department's administrative records. Given that, what types of administrative data might be available to the Department related to the areas of hardship identified?

3. How should the Department consider operational limitations in administering a hardship process, such as limited resources, the need to rely on other agencies or external parties to provide data, and the challenges in requiring borrowers to complete applications?

4. If the hardship process was based upon an application, what upfront criteria should be put in place before a borrower could apply, given the significant operational limitations on an application-based approach?

5. The Department already offers income-driven repayment plans to assist borrowers who are facing monthly financial hardships over an extended period. Should a hardship approach consider past, present, and future circumstances creating additional financial hardship? How could the Department account for past, present, and future potential borrower situations in a streamlined manner?

6. IDR plans are based on Federal poverty guidelines, which vary by family size. The Department uses the Federal poverty guidelines as an indicator of the amount of income needed for necessities that should be protected from student loan payments, such as food and housing. How should the Department determine whether the Federal poverty guidelines are or are not a reasonable approximation of a particular borrower's necessary expenses?

7. Which of the items proposed by negotiators above in the summary from Session 1 are most indicative of a hardship that would not otherwise be captured by an existing Federal program, such as income-driven repayment, total and permanent disability discharges, or something else?

8. What thresholds or standards should the Department use for the items above to determine if a borrower is experiencing hardship?