Student Loan Sidebar

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Wow! The landscape surrounding federal student loans could not be more confusing and uncertain. Every day something new is announced or something else is halted and we don't know exactly what that means.

As I'm writing this, the Department of Education ("ED") announced a $25,000 buyout option to most of its employees a few days ago which expires at midnight tonight. Talk is rampant about dismantling ED.

> The Dept. of Ed.'s regulatory actions, including forgiveness expansions, are likely to be rolled back, affecting programs like PSLF and IBR, although discharge guidance remains in place for now.

Student loan borrowers should be counseled to plan for worst case scenarios. Anyone with pending forgiveness opportunities should not plan on making it through those goalposts. That includes anyone with pending IDR Recount time toward forgiveness, anyone in forbearance pending the SAVE outcome, anyone in ICR or PAYE awaiting forgiveness, anyone awaiting buyback of PSLF time, or trying a double consolidation to avoid a high ICR payment. In other words, have a Plan B if Plan A doesn't work out as planned.

While we are not seeing forgiveness already granted being reversed, clawbacks under discontinued program interpretations are not entirely off the table. There may be serious reliance defenses available though for those who consolidated or took action to obtain benefits that may be removed down the road. I am hopeful that those in existing programs will be grandfathered in even though substantial limits may be placed on loan forgiveness going forward for new applicants or borrowers.

The big questions are what is still working at the Department of Education and what might we expect going forward?

The Secretary of Education is required by the Higher Education Act to do certain things. Those things will continue – at least until a new law is passed. Things that are 'laws' will likely continue in some fashion where mere 'rules', 'interpretation' or 'guidance' likely will not continue as-is.

Regulatory action by ED over the past few years to create new areas of forgiveness or expansion to existing congressional action will almost certainly be rolled back. That is likely to include double consolidation, elimination of post-discharge income monitoring under the Total and Permanent Disability discharge program, elimination of the buy-back provisions under the PSLF etc.

Of course, this may present more opportunities in bankruptcy to show an undue hardship and obtain a court order of discharge that could withstand political shifts.

What is a "law"? The Income Based Repayment plan ("IBR") was congressionally passed and signed into law in 2009. Nothing in the present judicial injunctions over SAVE and various regulations stops IBR implementation or forgiveness.

Public Service Loan Forgiveness ("PSLF") is also a law. Both IBR and PSLF are expected to continue. Yet, IBR and PSLF may look very different going forward and it can be problematic getting forgiveness under either at the moment due to the online systems being halted, employee turnover, servicer misdirection etc. Some expansion of these programs through agency decisions may be rolled back – we are already seeing that with the buyback provisions of PSLF no longer functioning, the SAVE injunction and now PAYE and ICR injunctions.

While PLSF is a law, its purpose was to encourage government service – something not valued by a Trump administration attempting to downsize the federal government. We particularly don't know what to expect going forward for PSLF.

Functions performed by ED will likely be moved to other federal or even state agencies, or discontinued altogether. This will cause ED's work to be diminished but ED is not expected to be disbanded entirely as it relates to student loans.

IBR paper applications appear to be eligible for processing, although we are hearing mixed results. Even if there is a delay in processing an IBR application, at least the app would be in the queue. It is possible that a borrower may be told that IDRs are not being processed right now and they will be given the options of a Standard or Extended payment. A borrower would be left with forbearance options, perhaps a Borrower Defense to Repayment

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application forbearance, bankruptcy or other means to avoid an eventual default in 270 days if the Standard or Extended payment is too much.

What has been halted? Too much to name here, but the biggies are: the IDR recount, SAVE, processing of all IDR plans which includes recertification of income, TPD and many new regulations scheduled to go into effect July 1, 2024. We do not believe we will see any Borrower Defense approvals even possibly for those post-class Sweet v. Cardona plaintiffs. Post-class members have three years for adjudication, not necessarily approval.

I believe double consolidation for those with Parent Plus loans remains in doubt. Section 685.209(c)(5)(iii) was implemented by ED in July 2023 to provide that a Direct Consolidation loan made on or after July 1, 2025, that repaid a Parent Plus loan or repaid a consolidation loan that paid off a Parent Plus loan is not eligible for any IDR plan except ICR. I believe this created a "safe harbor" for anyone to avoid the more expensive ICR payment and a way to get into one of the other IDR plans such as SAVE, PAYE or IBR. However, Congress specially provided that those with Parent Plus loans would only be eligible for ICR, and not any of the less expensive income driven plans. As an expansive agency action, we believe that anyone trying to use the double consolidation loophole and not already in an Income Driven Plan, and even those in a plan other than ICR may have their forgiveness options removed.

Bottom line, I would not want to wait around to see what the SAVE litigation will allow. I would try to get into IBR and hope that by keeping my head down, remaining in IBR that I would eventually obtain the forgiveness that IBR allows. There may of course be other options as well, but it is pretty clear that remaining in a SAVE forbearance is likely not a good long term solution.

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How does ED make sense going forward? It needs to make money for the country. Certain programs may cease to exist. Parent Plus loans for instance look very profitable on paper with its higher interest rates. But its high rate of default makes it unprofitable. I would not be surprised if Parent Plus go away entirely.

ED is presently the largest bank in the United States. It is ill equipped for that unintended role. Perhaps privatizing student loans, while capping the interest rates and limiting bankruptcy discharge opportunities to only those with an undue hardship, will save the government money but still allow for reasonably priced adequate education funding.
Expansion of various Income Driven Plans through ICR, PAYE, REPAYE and SAVE is already being rolled back. Other government agency rules are expected to hit the chopping block shortly. Hopefully those who needed the benefits provided by ED obtained them over the past few years.

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Simplification of the entire system has been needed for years. Perhaps something as simple as a national interest rate of 3%, non-compounding, would go a long way toward eliminating high balances while avoiding the politically charged forgiveness environment.

Discharging student loans via a bankruptcy adversary. This policy change effective November 22, 2022 was not an amendment to a statute or rule, but merely the Department of Justice's and ED's guidelines for interpreting "undue hardship" found at 11 U.S.C. Section 523(a)(8) for purposes of discharge. It specifically reads "it is not intended to and does not create any rights, substantive, or procedural, enforceable at law by any party in any manner." See Footnote 22 of the Guidance. Normally, I would expect for such Guidance to be rolled back, but as of a couple days ago, following a brief pause, the DOJ and ED are back in the game to review the attestation forms for partial or full discharge.

The Total and Permanent Disability Program is supposedly restarting in March 2025. A new TPD application is now available on studentaid.gov reflecting the 2023 regulatory changes. Importantly, it states that loan amounts discharged due to TPD are not considered taxable income by the IRS for federal tax purposes. Now rather than using Nelnet as its TPD servicer, the TPD applications should be sent directly to ED at TPD Servicing, P.O. Box 300010, Greenville TX 75403. Hopefully, this program will survive and only the recent expansions to the types of physicians who can certify a disability and the removal of the income monitoring post discharge will be rolled back.

Hang in there, student debt relief is still available, but it will likely take much more effort to find the best path forward!

The information provided in this Sidebar does not, and is not intended to, constitute legal advice. For a 1-on-1 consultation, please email info@christiearkovich.com or call (813) 258-2808.