

Congress of the United States

Washington, DC 20515

October 5, 2022

Dr. Dominic Mancini
Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
715 17th Street NW
Washington, D.C. 20503

Re: Department of Education's Contemplated Borrower Defense Rule (RIN: 1840-AD53)

Dear Acting Administrator Mancini:

We have concerns about the Department of Education's (Department)'s Borrower Defense to Repayment (BDR) rule (RIN: 1840-AD53). The Department has submitted for approval a final rule based on a notice of proposed rulemaking (NPRM) that did not (and could not) adequately assess the budgetary and regulatory impacts of its proposal.

The Office of Information and Regulatory Affairs (OIRA) is at the heart of ensuring that agencies issue regulations "without imposing unacceptable or unreasonable costs on society."¹ President Clinton's Executive Order 12866 tasks OIRA with reviewing agency proposed regulatory actions and ensuring that they adequately analyze the costs and benefits of rules.² President Obama's Executive Order 13563 further demands that agencies "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."³ Executive Order 13563 also directs agencies to "afford the public a meaningful opportunity to comment" on, among other things, the costs and benefits of regulation, "with a comment period that should generally be at least 60 days."⁴

The Department's proposed BDR rule falls well short of these standards.⁵ Rushed through a thirty-day comment period in the midst of sweeping changes to the federal student loan program, the proposed rule fails to analyze what are some of the most critical aspects of the costs and benefits of its proposal. This lack of analysis deprives the public of the meaningful opportunity to comment on this potential regulation. That thirty-day comment period was inadequate when it was announced and is even more problematic in light of subsequent developments.

First and foremost, after the close of the abbreviated thirty-day comment period for the BDR rule, President Biden announced a student loan cancellation program by which approximately 43 million borrowers would receive loan forgiveness up to \$20,000.⁶ The program would have the effect of

¹ Executive Order 12866: Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

² *Id.* at § 6.

³ Executive Order 13563: Improving Regulation and Regulatory Review, § 1(c), 76 Fed. Reg. 3,821 (Jan. 21, 2011),

⁴ *Id.* at § 2(b).

⁵ See Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 87 Fed. Reg. 41,878 (July 13, 2022).

⁶ See The White House, Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden->

cancelling the full loan balance of approximately 20 million borrowers.⁷ According to the Congressional Budget Office, the President's cancellation proposal alone will cost \$400 billion over the next decade.⁸

Neither the Department nor the public have had the opportunity to assess the effect of the loan relief program on the BDR Rule. The loan relief provided to borrowers could affect, among other things, the amount of loans discharged, the total amount of dollars discharged, and the number of borrowers who may apply for a discharge. These effects may in turn interact in different ways for different types of schools, and they certainly affect the budgetary impact of the BDR rule. For example, although certain borrowers may have less debt due to the loan relief program, they may have a greater incentive to seek to have their remaining debt discharged and may become more aware of loan relief programs. This occurred previously when the announcement of the settlement of a borrower defense class action a few months ago spurred more borrower defense claims in a week than the Department had received in all of 2021.⁹

Indeed, in addition to the student loan bailout announced in the middle of the thirty-day comment letter period for the BDR rule, a federal district court preliminarily approved a settlement agreement with a class of hundreds of thousands of borrowers to discharge their loans.¹⁰ Specifically, the settlement agreement would automatically discharge all the loans of approximately 200,000 borrowers and process another approximately 68,000 loan discharge applications under borrower-friendly presumptions and procedures.¹¹ The Department has never quantified the dollar amount of loans that could be discharged under this settlement, stating in the NPRM that "any effects of that agreement [were] not contemplated" in the proposed rule.¹² That was inadequate at the time of the NPRM's issuance, and it is unacceptable for the Department not to at least attempt to quantify its effects now, especially given the preliminary approval of the settlement agreement. Excluding the settlement's effects would render invalid nearly all the Department's assumptions for the approval of claims. There is simply no way to calculate the regulatory and budgetary impact of the proposed BDR rule without accounting for the settlement, let alone the other sweeping changes to the loan program enacted by the Department that were not accounted for in the analysis.

Moreover, if these omissions were not enough to illustrate the problems with the analysis, the Government Accountability Office recently issued a major report on the Department's repeated failures in estimating the true cost of the Direct Loan program.¹³ The report chronicled that the Department's estimates of the program's costs have changed from generating \$114 billion in income to costing \$197 billion.¹⁴ GAO attributed two-thirds of the \$311 billion swing to the uncollected payments from programs existing well before the pandemic.¹⁵

announces-student-loan-relief-for-borrowers-who-need-it-most/ (Aug. 24, 2022).

⁷ *Id.*

⁸ <https://www.cbo.gov/publication/58494>

⁹ See Michael Stratford, Inside the Deal That Could Revamp Loan Forgiveness For Defrauded Borrowers, Politico (July 5, 2022), <https://www.politico.com/newsletters/weeklyeducation/2022/07/05/inside-the-deal-that-could-revamp-loan-forgiveness-for-defrauded-borrowers-00043893>.

¹⁰ See Order, *Sweet v. Cardona*, No. 19-cv-03674, Dkt. No. 307 (N.D. Cal. Aug. 4, 2022).

¹¹ See Settlement Agreement, *Sweet v. Cardona*, No. 19-cv-03674, Dkt. No. 246 (N.D. Cal. June 22, 2022).

¹² See 87 Fed. Reg. at 41,960.

¹³ GAO, Student Loans: Education Has Increased Federal Cost Estimates of Direct Loans by Billions Due to Programmatic and Other Changes 6 (July 2022) ("A forthcoming report will examine government and private sector estimation methods and Education's approach to estimating Direct Loan costs.").

¹⁴ *Id.* at 1.

¹⁵ *Id.*

In addition to the timing of GAO’s findings and the rushed comment period, the Department is in the process of significantly revising its cost estimates for the Direct Loan program, which is estimated to be available by 2026. It would be impossible for the Department to provide an accurate estimate of the budgetary impact of a significant BDR rule in the midst of a major revision to its overall estimate of the costs of the Direct Loan program.

As such, we request OIRA hold the Department to the requirements of the Information Quality Act (also known as the Data Quality Act).¹⁶ That Act requires the Department to rely on “accurate and reliable” information that is “objective,” reliable, and unbiased. It also requires the Department to explain its proposals with “peer-reviewed” data.¹⁷

The Department has not satisfied these obligations. The NPRM’s cost-benefit analysis lacks supporting data and documentation and as discussed above, omits analyses of entire categories of information that affect the relevant costs and benefits of the proposed rule. Further, the Department also failed to put forward adequate empirical data to support various aspects of the proposed BDR rule. OIRA must require the Department to comply with the Act and release a compliant NPRM for notice and comment by the public.

Each one of these issues by itself warrant re-publication of an NPRM for the Department to assess adequately the costs and benefits of regulatory action. Together, they mean the Department is seeking OIRA’s approval of a rule that fails to consider and solicit public comment on sweeping regulations in the midst of the most significant budgetary developments in the program’s history. We request that OIRA hold the Department to its legal obligations and set forth a revised NPRM for public comment.

Sincerely,



Lisa C. McClain
Member of Congress



Glenn Grothman
Member of Congress



Mariannette Miller-Meeks
Member of Congress



Elise M. Stefanik
Member of Congress



Rick W. Allen
Member of Congress



Fred Keller
Member of Congress

¹⁶ Consolidated Appropriations Act, Pub. L. No. 106-554, § 515(a), 114 Stat. 2763 (2001).

¹⁷ See, e.g., 67 Fed. Reg. 8,452 (Feb. 22, 2002) (OMB guidance on Data Quality Act).



Mary E. Miller
Member of Congress



Bob Good
Member of Congress



Diana Harshbarger
Member of Congress



Chris Jacobs
Member of Congress

/s/

Joseph Sempolinski
Member of Congress



Randy K. Weber, Sr.
Member of Congress



Julia Letlow
Member of Congress