

Congress of the United States
Committee on the Budget
Washington, DC 20515

July 14, 2016

The Honorable John B. King, Jr.
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Dear Secretary King:

We write to express concern about the Department of Education's June 16, 2016 Notice of Proposed Rulemaking regarding the borrower "defense to repayment" language in the Higher Education Act.¹ This proposed rulemaking could have a significant effect on student loan program costs and on the Federal budget deficit. Therefore we request the Department promptly arrange a briefing with our Budget Committee staffs to explain the possible costs and consequences of this action.

The one-sentence defense to repayment provision in statute² enables borrowers to cite "acts or omissions" by an institution of higher education as a reason to have their loan obligations discharged. As we understand it, the current law provision – which nods toward State consumer protection laws – drew just a handful of applications from borrowers since it was inserted into the Higher Education Act in 1994. The proposed rulemaking, however, would replace the existing regulation with an expansive regime subject to the whims of the Secretary of Education.³ It threatens to engender a cottage industry of trial lawyers looking to recoup for themselves a share of the \$100 billion in annual Federal student loan originations,⁴ at the expense of students, schools, and taxpayers.

There is universal support for defrauded students receiving appropriate consumer protection. Nevertheless, commentators from *The Wall Street Journal*,⁵ *U.S. News and World Report*,⁶ and other publications^{7,8} who have sifted through the 530 pages of the proposed rulemaking find its sweepingly

¹ U.S. Department of Education, Unofficial Notice of Proposed Rulemaking, 13 June 2016, <http://www2.ed.gov/policy/highered/reg/hearulemaking/2016/bd-unofficial-nprm-061316.pdf>.

² 20 U.S. Code, Sec. 1087e(h), <https://www.law.cornell.edu/uscode/text/20/1087e>.

³ 34 CFR Ch. VI, Sec. 685.206, Borrower responsibilities and defenses, p. 252, <https://www.gpo.gov/fdsys/pkg/CFR-2012-title34-vol4/pdf/CFR-2012-title34-vol4-sec685-206.pdf>.

⁴ U.S. Department of Education, Fiscal Year 2017 Budget: Summary and Background Information, p. 56, <http://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>.

⁵ "Obama's Student Loan Writeoff," *The Wall Street Journal* editorial board, 17 June 2016, <http://www.wsj.com/articles/obamas-student-loan-writeoff-1466119031>.

⁶ Peter Roff, "Taxpayers on the Hook for College Costs," *U.S. News and World Report*, 27 June 2016, <http://www.usnews.com/opinion/articles/2016-06-27/obamas-education-department-has-a-flawed-plan-for-student-debt-forgiveness>.

⁷ Charles Sauer, "Bogus Claims of 'Misrepresentation' Will Create a College Tuition Death Spiral," *The Weekly Standard*, 20 June 2016, <http://www.weeklystandard.com/bogus-claims-of-misrepresentation-will-create-a-college-tuition-death-spiral/article/2002915>.

⁸ "Molly Hensley-Clancy, "Law School Grads Could Be Next To Have Student Loans Cancelled," *BuzzFeed News*, 28 June 2016, <https://www.buzzfeed.com/mollyhensleyclancy/law-school-grads-could-be-next-to-have-student-loans-cancell>.

broad scope could increase tuition (by increasing schools' legal liability), bankrupt proprietary schools, and potentially close down many nonprofit colleges, thus limiting higher education options for students. Indeed, under the proposed rule, even an unintentional misrepresentation or omission of information in a school catalogue could result in the Secretary certifying a claim for a group of thousands of borrowers.

In expansively reinterpreting the defense to repayment provision, and creating a process for borrowers and groups of borrowers to seek loan discharge under its auspices, the Department is – by its own admission – proposing to burden taxpayers on a scale it can only guess at: The Department estimates the proposed defense to repayment regulation could cost the Treasury anywhere from \$646 million to \$41.3 billion over 10 years. Regarding this cost estimate, Under Secretary of Education Ted Mitchell recently stated on a call with reporters: “This is not anywhere close to an exact science... we are learning as we go in this but felt that it was important to at least provide a broad sense of the potential impact.”⁹

This is the latest in a series of administrative actions taken by the Education Department under this administration that have substantially increased the cost of the Federal direct student loan program. The program is scored for budgetary purposes under credit reform procedures described in Title V of the Congressional Budget Act.¹⁰ There are at present no budget control mechanisms to limit the cost of administrative changes to the student loan programs made pursuant to current law, however great the cost or the departure from long-standing policy. This administration has used its discretion to spend billions of unbudgeted dollars, most recently via a loan repayment/forgiveness rule published last October that the Department estimated would cost taxpayers \$15.3 billion over 10 years.¹¹

Notably, the Department has a very poor record of estimating the cost of such proposals. *The Wall Street Journal* concluded recently that “loan-forgiveness expansions have already cost many times more than projections.”¹² Indeed, over the past two years, the Department has been forced to raise its estimates of the direct loan portfolio's costs by \$20 billion, largely due to flawed, internally generated projections that underestimated the extent to which borrowers would respond to clear incentives to lower their monthly payments and pursue loan principal forgiveness.¹³ This does not inspire confidence about the Department's ability to predict how this new proposed rulemaking will affect the behavior of borrowers, schools, and other interested parties – or its ultimate burden on taxpayers.

We have policy concerns regarding the appropriateness of this Notice of Proposed Rulemaking. At the very least, in our capacity as Chairmen of the congressional budget panels, we consider it urgent to better understand the possible fiscal impact of this proposed change. That is why we request that Department of Education officials brief our respective staffs by no later than the end of July. This briefing should include the specific assumptions underlying the estimated cost of the rule, the methodology used to provide the initial estimate, and other relevant information related to additional program costs.

⁹ U.S. Department of Education Press Call Transcript, 13 June 2016, p. 13, <http://www2.ed.gov/news/av/audio/2016/06132016.doc>.

¹⁰ Congressional Budget and Impoundment Control Act of 1974, P.L. 93-344, 12 July 1974, <http://legcounsel.house.gov/Comps/BUDGET.pdf>.

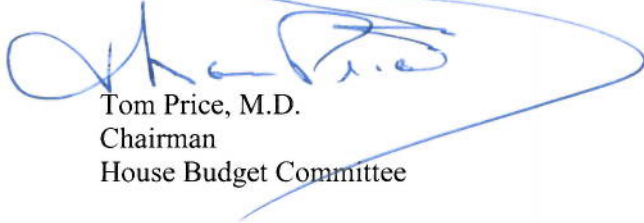
¹¹ Federal Register, Vol. 80, No. 210, 30 October 2015, pp. 26-38, <https://www.gpo.gov/fdsys/pkg/FR-2015-10-30/pdf/2015-27143.pdf>.

¹² “Obama's Student Loan Writeoff,” *The Wall Street Journal* editorial board, 17 June 2016, <http://www.wsj.com/articles/obamas-student-loan-writeoff-1466119031>.

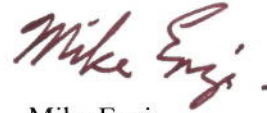
¹³ See net re-estimate of existing loans for fiscal years 2015 and 2016 at U.S. Department of Education, Fiscal Year 2017 Budget: Summary and Background Information, p. 55, <http://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>.

To raise any questions, or to schedule the requested briefing, please contact Emily Goff with the House Budget Committee at (202) 226-7270 or Peter Warren with the Senate Budget Committee at (202) 224-0642. Thank you for your attention to this matter, and we look forward to your timely response.

Sincerely,



Tom Price, M.D.
Chairman
House Budget Committee



Mike Enzi
Chairman
Senate Budget Committee