

*Bankruptcy, Out-of-Court Options  
and the Student Loan Debt Problem*

**Avoiding Bankruptcy:  
What Options Exist  
(and Are Accessible)?**

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**Administrative Alternatives to Bankruptcy Discharges of Student Loan Debt**

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## General Overview of Student Loans

- Higher Education Act of 1965, passed in response to a perceived need for financial assistance to students in higher education
- The original purpose of the HEA is to “keep the college door open to all students of ability,” regardless of socioeconomic background
- With nearly a \$1 trillion\* at stake, focus of the federal program has become as much about managing debt as it is about access to education.

\* This figure doesn’t include private student loans.

## Some Student Loan Borrowers Experience Difficulty in Repayment

- Three-year default rate for FY 2009 was 13.4%, according to U.S. Dep't of Education
- For-profit institutions had the highest average three-year default rates at 22.7%

*Source: U.S. Dep't of Education, September 28, 2012, Press Release*

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## Types of Loans

A basic understanding of the different types of loans is critical for determining application of DOE program rules and regulations.

- Federal vs. Private Loans
- Different types of Federal Loans
- Check out NSLDS ([www.nsls.ed.gov](http://www.nsls.ed.gov))  
(PIN number needed)

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### Direct v. FFEL

- Federal Direct Loans are made directly by the federal government to students.
- Federal Family Education Loans (FFELs) are guaranteed loans made by private lenders.
  - No more new FFELs after July 2010.
  - Loans made prior to 2010 still out there.
- FFELs often confused with Private Loans
  - Private loans have TILA disclosures and not on NSLDS; also often have high interest rates and co-signers

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### Non-Bankruptcy Discharges

- Closed School Discharge
- False Certification Discharge
- Death Discharge
- Teacher Loan Forgiveness Program
- Public Service Loan Forgiveness Program
- September 11 Survivors Discharge
- Total and Permanent Disability (TPD)

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## Total and Permanent Disability Discharge (TPD)

- Two Ways to Request
  1. Physician (MD or DO) must certify that the borrower (1) is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that (i) can be expected to result in death; (ii) has lasted for a continuous period of not less than 60 months; or (iii) can be expected to last for a continuous period of not less than 60 months; or (2) has been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability.
  2. Certification with Social Security Award Letter
- If the TPD request is approved, there is a three-year post-monitoring period, running from the date the loan is assigned to Dep't of Education. During this three-year period, borrowers cannot earn more than 100% of the federal poverty guidelines for a family of two (in 2011 = \$14,710) and cannot have obtained any new federal student loans.
- Veterans who have a 100% service-connected disability are immediately eligible for discharge
- Agency Review of TPD Discharge Request – New July 1, 2013
- [www.disabilitydischarge.com](http://www.disabilitydischarge.com)

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## Total and Permanent Disability Discharge (TPD) (cont.)

- Former TPD Regulations Inconsistent with Social Security Administration Regulations
- New regulations effective July 1, 2013, address this inconsistency
- 3-year monitoring period will remain

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### **Public Service Loan Forgiveness Program**

- Only Direct Loans qualify; must not be in default
- Must make 120 payments AFTER Oct. 1, 2007
- Payments must be made through eligible repayment plans
- Public service includes employment with most local, state, federal, tribal government organizations, or § 501(c)(3) corporations
- Must be employed in a public service job at time of forgiveness and during period in which borrower made each of the 120 payments
- Forgiveness amount not taxable

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### **Loan Rehabilitation**

- Defaulted borrowers may receive a one-time chance to bring loans out of default
- Payments based on a “reasonable rate”
- Nine on time payments over a ten month period.
- Restore loans to pre-default status, reestablish eligibility for deferment, forbearance, alternative repayments, Title IV aid, credit report rehabilitation.

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### **Consolidation**

- Benefits by spreading out the payments
- New consolidation loans available only through Direct Loan Program
- Can consolidate defaulted FFEL loans into Direct Loan program
- Parent Plus loans should not be included in consolidated loan if borrower planning to use income-driven repayment plans

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### **Repayment Options: In or Out of Bankruptcy**

- Standard
- Graduated
- Extended
- Consolidation (technically a new loan, but can lower payments)
- Payment programs tied to debtor's income:
  - Income Based Repayment (IBR)
  - Income Contingent Repayment (ICR)
- Deferment/forbearance

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### **Income-Driven Repayment Programs**

- Income Based Repayment (IBR)
- Income Contingent Repayment (ICRP)
- Pay as You Earn (PAYE)
- Income-Sensitive Repayment Plan (ISRP)

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### **Income Based Repayment (IBR)**

- Borrower must show “partial financial hardship” (PFH) (most borrowers whose loan balance exceeds annual income will satisfy PFH requirement)
- Payments based on formula tied to borrower’s adjusted gross income (AGI) and family size
- Recalculated annually based on prior year’s household AGI
- Unlike ICR, married borrowers filing taxes separately base payment on individual AGI (rather than household AGI)
- Repayment term is 25 years, at which point remaining debt is forgiven
- <http://studentaid.ed.gov/repay-loans/understand/plans> (plan details and loan calculators)

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### **Income Contingent Repayment (ICR)**

- Unlike IBR, no requirement of partial financial hardship
- Like IBR, payments based on borrower's AGI and family size (slightly less favorable than IBR)
- Unlike IBR, available to certain borrowers ineligible for IBR (e.g., parent PLUS loans)
- Unlike IBR, includes all household income, even for married borrowers filing separately
- 25-year repayment term, with remaining balance forgiven

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### **Pay As You Earn (PAYE)**

- Only Direct Loans
- 10% of discretionary income – forgiveness after 20 years
- New Borrowers: Borrowers who were borrowers in 2008 or after and received disbursement in 2012 or after

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### **Income-Sensitive Repayment Plan (ISRP)**

- FFEL Only
- Payments increase or decrease based on annual income and only for a ten year period
- Just a temporary fix

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### **Practice Tips**

Who holds the debt?

- NSLDS

Who Should be Named in an Undue Hardship Case or Listed on a Consolidation Application?

- Not the servicer
- Not just the lender – guarantors have notice rights

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## Student Loan Resources

- National Student Loan Data System ([www.nslds.ed.gov](http://www.nslds.ed.gov))
- ED PIN website: ([www.pin.ed.gov](http://www.pin.ed.gov))
- Federal Student Aid (government website): (<http://studentaid.ed.gov>)
- FinAid (consumer financial aid website): ([www.finaid.org](http://www.finaid.org))
- Department of Education ([www.ed.gov](http://www.ed.gov))
- Department of Education Ombudsman Office ([www.ombudsman.ed.gov](http://www.ombudsman.ed.gov))
- William D. Ford Direct Loan Program ([www.loanconsolidation.ed.gov](http://www.loanconsolidation.ed.gov))
- Consumer Financial Protection Bureau ([www.consumerfinance.gov/students/](http://www.consumerfinance.gov/students/))
- National Counsel of Higher Education Resources ([www.ncher.us](http://www.ncher.us))
- Educational Credit Management Corporation ([www.ecmc.org](http://www.ecmc.org))
- FFEL Forms: (<http://www.ecmc.org/topic/mainForms.html>)
- Direct Loan (Ford program) Forms: (<https://www.dl.ed.gov/borrower>)

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**American Bankruptcy Institute  
Student Loan Debt Crisis Symposium  
Georgetown Law Center**

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**“The first thing we do, let’s kill all the lawyers.”**

*Shakespeare, Henry the Sixth, Part 2 Act 4, Scene 2, 71–78*

**Administrative Alternatives to  
Bankruptcy Discharges of Student Loan Debt<sup>1</sup>**

**May 30, 2014**

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<sup>1</sup> These materials are based upon materials developed by Julie K. Swedback, a Senior Attorney at Educational Credit Management Corporation in Oakdale, MN for presentation at the American Bankruptcy Institute’s Fourth Annual Memphis Consumer Bankruptcy Conference to be held June 6, 2014. The authors, who appeared on a panel with Ms. Swedback in 2013, are grateful for Ms. Swedback’s assistance in the preparation of these materials.

## I. GENERAL OVERVIEW OF STUDENT LOANS

**A. Higher Education Act of 1965:** In 1965, Congress, in response to a perceived need for financial assistance to students in higher education, passed the Higher Education Act of 1965 (the “HEA”). The purpose of the HEA is to “keep the college door open to all students of ability,” regardless of socioeconomic background.

**B. (There Were) Two Federal Student Loan Programs:** The HEA governs two federally-backed student loan programs: the Federal Family Education Loan Program (the “FFEL Program”) and the William D. Ford Federal Direct Loan Program (the Direct Loan Program). Under the Health Care and Education Reconciliation Act of 2010, Congress eliminated the FFEL Program, effective July 1, 2010. Currently, the total debt at stake in the two federal student loan programs exceeds one trillion dollars.

**1. FFEL Program:** Under the FFEL Program, eligible lenders make guaranteed loans on favorable terms to students or parents to help finance student education. The loans are guaranteed by guaranty agencies (state agencies or private non-profit corporations), which are ultimately reinsured by the United States Department of Education (“ED”).

**2. The Direct Loan Program:** Under the Direct Loan Program, ED makes loans directly from the federal treasury to student and parent borrowers. Thus ED is both the lender and the guarantor.

### C. Types of Federal Loans:

**1. HEA:** Loans under the HEA include Perkins Loans, Stafford (subsidized and unsubsidized) Loans, parent PLUS Loans, graduate PLUS Loans, and Consolidation Loans. Grants include Pell Grants and Supplemental Education Opportunity Grants. The terms of Stafford, parent PLUS, graduate PLUS, and Consolidation loans in both the FFEL Program and the Direct Loan Program are similar except that the Direct Loan Program offers a Public Service Loan Forgiveness Program and offers both an income based and an income contingent repayment option. *See* below at II.F.

**2. Health and Human Services Loans:** The United States Department of Health and Human Services (“HHS”) also administered a student loan program, Health Education Access Loan program, (“HEAL”), for borrowers engaged in health related studies. This program is no longer active. Like FFEL Program loans, HEAL loans are also presumptively nondischargeable. Courts have construed the dischargeability standard of “unconscionability” for HEAL loans as being a “higher standard” than that of FFEL Program/Direct Loan Program loans, which require a showing of “undue hardship.” Even though HEAL loans are administered by HHS, HEAL loans are eligible for consolidation along with FFEL Program loans in the Direct Loan program.

**D. Non-HEA Loans: Private Loans:** Private loan programs have also emerged onto the scene to provide educational funds to students who have exhausted their federal loan limits or are otherwise ineligible to borrow under the federal loan programs. A distinguishing feature of private student loans is that they typically have a co-signer. *See* Consumer Financial Protection Bureau, “Mid-year update on student loan complaints,” April 2014 (“Approximately 90% of private student loans were co-signed in 2011”). Since 2005, private loans that are “qualified education loans” under 26 U.S.C. § 221(d)(1) enjoy the presumption of nondischargeability under 11 U.S.C. § 523(a)(8). Private loans are not eligible for administrative relief discussed below and may not be consolidated under federally-backed consolidation programs. Private loan consolidation programs are available.

## II. ADMINISTRATIVE DISCHARGE AND FORGIVENESS REMEDIES

There are numerous administrative remedies for student loan borrowers to consider in lieu of seeking discharge through bankruptcy. Unlike relief under 11 U.S.C. § 523(a)(8), borrowers may be entitled to administrative relief irrespective of whether they’ve filed bankruptcy.<sup>2</sup>

Borrowers, who want to challenge or appeal from a ruling on an administrative remedy must seek relief through the HEA, the Administrative Procedures Act, or federal district court.

**A. Total and Permanent Disability Discharge:** Borrowers may be eligible to have their federal student loan debt discharged because of a Total and Permanent Disability (a “TPD”).

**1. Eligibility Criteria:** A person meets TPD eligibility if that individual (1) is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that (i) can be expected to result in death, (ii) has lasted for a continuous period of not less than 60 months, or (iii) can be expected to last for a continuous period of not less than 60 months; or (2) has been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability. 34 C.F.R. § 682.200(b).

**2. Requesting a TPD Discharge:** There are two ways to request agency review for a TPD discharge:

**a. Doctor certification on a TPD application:** A medical doctor or doctor of osteopathy must certify that the borrower meets the definition of TPD as described in 34 C.F.R. § 682.200(b).

**b. Certification with a social security award letter:** As of July 1, 2013, borrowers who receive Social Security Disability Income or Supplemental Security Income benefits may use their social security award (“SSA”) letter in lieu of obtaining a separate certification from a physician on the TPD discharge application. The SSA award letter must state that the

<sup>2</sup> The discharge provisions described here are illustrative only of the administrative relief available under the HEA. For full detail of requirements necessary for relief, see 34 C.F.R. §§ 682.100 *et seq.* and 685.100 *et seq.* These administrative options are available for both FFEL Program and Direct Loan Program loans, unless otherwise noted.

borrower's next scheduled disability review will be within five to seven years from the date of the borrower's most recent SSA disability determination.

Borrowers may also submit a Benefits Planning Query ("BPQY") if the SSA award letter is unavailable. The BPQY must also state that the next disability review will be within *five to seven years*. A BPQY summary can be obtained by calling 800.772.1213.

Borrowers must still complete their section of the TPD application and submit it with their SSA award letter or their BPQY summary.

**3. Veterans with service-connected disabilities:** Veterans who have been determined by the U.S. Department of Veterans Affairs (the "VA") to be unemployable due to a service-connected disability or have a service-connected disability that is 100 percent disabling are eligible for immediate discharge of their federal student loans. They need only provide their Veteran's Administration disability paperwork along with their TPD application.

**4. Agency review of TPD discharge request:** ED has designated Nelnet, Inc. as its disability servicer for all TPD applications submitted after July 1, 2013. Under the new TPD process, borrowers must submit a single TPD discharge application directly to ED/Nelnet rather than to their individual loan holders. Borrowers may initiate the TPD process by going to [www.disabilitydischarge.com](http://www.disabilitydischarge.com). Once informed of a TPD request, ED/Nelnet will notify the loan holders and place an automatic 120-day hold on collection activity. ED and guaranty agencies for FFEL loans may stop or reduce administrative wage garnishments or Treasury offsets during this period.

If the TPD request is approved, the account is immediately discharged by ED.<sup>3</sup> There is still a three-year post-discharge monitoring period. During this three-year period, borrowers cannot earn more than 100 percent of the federal poverty guidelines for a family of two (in 2014 = \$15,730) and cannot have obtained any new federal student loans. Borrowers must notify Nelnet of any address change during the three-year period. Typically, Nelnet will contact the borrower when the three-year mark is approaching to update the disability status and financial status to ensure that the borrower's discharge criteria have not changed. Borrowers who fail to respond with updated information will have their TPD request cancelled and their loans reinstated until they comply with the request for updated information so their account can be finally reviewed. Borrowers receive an IRS form 1099-C for the cancellation of debt income when the TPD request is approved and the debt is discharged by ED, not at the end of the three-year monitoring period.

**B. Closed School Discharge:** Borrowers whose school closed before they could complete the program of study may be eligible for discharge. The borrower must show they were enrolled at the time of closure or that they withdrew from the school not more than 90 days prior to the date the school closed and that they were unable to complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school.

**C. False Certification Discharge:** A borrower's student loans can be discharged if a school falsely certified the student's eligibility for a federal student loan on the basis of ability to

<sup>3</sup> Under the Internal Revenue Code, student loan debt forgiven or discharged by TPD may constitute a taxable event, although the taxpayer may qualify for an insolvency exclusion from such event. *See* 11 U.S.C. § 108(a)(1)(B).

benefit from the education, signed the borrower's name without authorization by the borrower on the loan application or promissory note, or because of identity theft, another person obtained a federal student loan using the borrower's identity.

**D. Death Discharge:** If an individual borrower dies or the student for whom a parent received a PLUS loan dies, the obligation of the borrower and any endorser to make any further payments on the loan is discharged.

**E. Teacher Loan Forgiveness Program:** Teachers who meet the requirements in 34 C.F.R. § 685.217 are eligible for forgiveness of up to \$17,500 of federal student loans. Typically, this provision is for teachers in low-income areas and those who teach math or science at schools designated eligible by the U.S. Department of Education. (Direct Loan Program only).

**F. Public Service Loan Forgiveness Program ("PSLFP")** (Direct Loan Program only): Borrowers who make 120 qualifying payments under the IBR, ICR, or 10-year fixed payment schedule while employed in the public sector are eligible to have any balance remaining on their student loan debt forgiven. Public service includes employment with most local, state, federal, tribal nation, or § 501(c)(3) corporations. Borrowers who have FFEL Program loans and wish to take advantage of this program may consolidate their FFEL Program loans into the Direct Loan Program to become eligible for the PSLFP. *See* 34 C.F.R. § 685.219. There is specific language in this regulation that exempts any forgiven debt from constituting a taxable event.

**G. September 11 Survivors Discharge:** Survivors of or eligible victims of the September 11 attacks may request discharge of their student loan debt. (Direct Loan Program loans only).

### III. FLEXIBLE, AFFORDABLE PAYMENT OPTIONS: INSIDE OR OUTSIDE OF BANKRUPTCY

Both the FFEL Program and the Direct Loan Program have flexible, affordable payment options for borrowers who have financial hardship. These payment options are available whether or not the borrower has filed bankruptcy. Student loan guarantors normally rely on the most affordable payment amount available to a borrower when defending undue hardship discharge cases.

**A. Loan Rehabilitation:** Federal regulations allow borrowers who default on repayment of their loan a one-time opportunity to bring their loans out of a default status. Payment amounts are set at a reasonable rate as set forth by regulation<sup>4</sup> and borrowers must make nine on-

<sup>4</sup> New regulations regarding the federal loan rehabilitation program will go into effect on July 1, 2014. Relevant changes include the calculation of a borrower's reasonable and affordable ("R&A") rehabilitation payment. For rehabilitation agreements entered into after July 1, 2014, the borrower's R&A will be based on the 15 percent rule, which means that the R&A payment will be 15 percent of the amount that the borrower's AGI exceeds 150 percent of the federal poverty level for the borrower's family size. The minimum payment is \$5.00.

If the borrower objects to the 15 percent rule payment, then the borrower must complete the Financial Disclosure form and the agency will determine the new R&A payment. Borrowers who reject both payment options or timely fail to provide any required documentation will not be eligible to rehabilitate their loans.

time payments over a 10-month period. Borrowers are entitled to pay only what is reasonable and affordable for them based on their total financial circumstances. 34 C.F.R. §§ 682.405(b) (FFEL), 685.211(f)(1) (Direct Loan). For FFELs, after the borrower makes the required timely monthly payments under the new plan and requests rehabilitation, the guarantor or ED must sell the loan to an eligible lender if practicable. 20 U.S.C. § 1078-6(a)(1)(A)(ii); 34 C.F.R. § 682.405(a)(1), (2) (ii). When loans are rehabilitated, collection fees of up to 18.5 percent of the unpaid principal and accrued interest at the time of sale may be added to the new loan, if the fees are not waived or paid by ED on Direct Loans. 20 U.S.C. § 1078-6(a)(1)(D)(i)(II); 34 C.F.R. § 682.405(b)(1).

Successfully completing a loan rehabilitation program restores loans to their pre-default status, it reestablishes eligibility for deferment, forbearance, alternative repayment options, title IV financial aid, and shows positive payment progress on a borrower’s credit report, which may repair some of the damage done by default.

**B. Consolidation:** Consolidation benefits a borrower by spreading the payments over a term of up to 30 years, depending on the total loan balance and type of consolidation plan chosen.<sup>5</sup> Since July 1, 2010, new consolidation loans are available only through the Direct Loan Program. Borrowers who have previously consolidated their loans in the FFEL Program may reconsolidate their loans (even if defaulted) into the Direct Loan Program but not vice-versa. Borrowers in default *either* have to make three on-time reasonable and affordable payments based on their total financial circumstances or agree to select an income-contingent repayment plan (ICRP) or income-based repayment (IBR) plan. 34 C.F.R. § 685.220(d)(1)(ii)(C), (D). Some borrowers are erroneously told by collectors that they must make three payments before consolidation. Up to 18.5 percent is typically added to the amount due for collection charges when a borrower in default consolidates a loan. 20 U.S.C. § 1078(c)(6)(B); 34 C.F.R. § 685.220(f)(iii) (Direct); 34 C.F.R. § 682.401(b)(27) (FFEL).

**C. Income-Driven Payments:** In addition to fixed, amortized extended and graduated payment terms, there are three payment options that are based on a borrower’s income and family size: the Income Based Repayment plan (“IBR”) (available in both the FFEL Program and Direct Loan Program), the Income Contingent Repayment (“ICR”) plan, the Pay as You Earn plan (“PAYE”) (ICR and PAYE available only in the Direct Loan Program), and the Income-Sensitive Repayment Plan (“ISRP”) (only available in the FFEL Program).

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Additionally, the new regulations provide that borrowers who are in an active wage garnishment may have their garnishment suspended after making five qualifying payments under a rehabilitation agreement.

5 See 34 C.F.R. § 685.208(j).

<u>Loan Balance</u>	<u>Maximum Loan Term</u>
Less than \$7,500	10 years
\$7,500 to \$9,999	12 years
\$10,000 to \$19,999	15 years
\$20,000 to \$39,999	20 years
\$40,000 to \$59,999	25 years
\$60,000 or more	30 years

1. **Income Based Repayment:**

a. **Eligible Loans:** Most federally-backed, *nondefaulted* loans are eligible for the IBR:

- Direct Subsidized Loans
- Direct Unsubsidized Loan,
- Direct PLUS loans made to graduate or professional students
- Direct Consolidation Loans without underlying parent PLUS loans
- Subsidized Federal Stafford Loans
- Unsubsidized Federal Stafford Loans
- FFEL Program PLUS loans made to graduate or professional students
- FFEL Program Consolidation Loans without underlying parent PLUS loans
- Perkins loans that are or have been consolidated into a new consolidation loan.

b. **Ineligible Loans:** Defaulted student loans, parent PLUS loans, or federal consolidation loans that contain underlying parent PLUS loans or a mix of Stafford loans and parent PLUS loans are not eligible for the IBR in either the FFEL Program or the Direct Loan Program. Private loans that are not federally-backed are not eligible. Stand-alone Perkins loans are also not eligible for the IBR, unless they are included in a consolidation loan that is IBR-eligible.

c. **Restoring IBR eligibility to defaulted loans:** Borrowers who have defaulted FFEL Program loans and want to opt into the IBR may re-consolidate their defaulted loans into the Direct Loan Program and elect the IBR in the Direct Loan Program. (re-consolidation removes the default because the borrower has a new loan). Borrowers who have defaulted FFEL Program *and* Direct Loan Program loans may consolidate both sets of loans into a new Direct Loan Program consolidation loan. See above in III.B. Borrowers with defaulted loans also have a one-time opportunity to rehabilitate their loan to remove the default status and regain eligibility for the IBR in either federal student loan program. See above in III.A.

d. **Partial Financial Hardship Threshold:** Borrowers who have IBR-eligible loans who wish to elect the IBR must first demonstrate partial financial hardship (“PFH”). Borrowers can demonstrate PFH if the annual amount due on all eligible student loans under a 10-year repayment schedule is more than 15 percent of their adjusted gross income (“AGI”). Most borrowers whose total loan balance exceeds their annual earnings will usually satisfy the PFH requirement.

e. **IBR Calculation and Terms:** The IBR payment is calculated using the borrower’s AGI, from the most recent federal tax return or alternative documentation of income, and family size. The required monthly loan payment under the IBR is capped at 15 percent of an-

nual household earnings above 150 percent of the applicable poverty level divided by 12. The IBR payment is recalculated annually and updated to reflect in changes in household AGI and family size. Borrowers who earn less than 150 percent of the poverty level for their family size will have a \$0 IBR payment but will still be considered “in repayment” and in good-standing.

Borrowers may contact their lender/servicer at any time if they experience a change in financial circumstances that could impact their required IBR payment. The IBR repayment term for most loan balances is 25 years. At the conclusion of the 25-year repayment period, any remaining balance is forgiven.<sup>6</sup> *But see* above in II.F (discussing 10-year repayment term for the Public Service Loan Forgiveness Program).

Although interest continues to accrue at the contract rate in the IBR, the government will pay unpaid accrued interest on FFEL Program subsidized loans to the loan holder or will not charge the borrower interest on Direct Loan Program subsidized loans for up to three consecutive years from the date the borrower enters the IBR.

**i. Documenting income:** Borrowers who do not file, or are not required to file, a federal tax return may provide alternative documentation of their income such as pay stubs, letter(s) from employer(s) stating income, bank statements, etc. Untaxed income such as SSDI, SSI, child support, federal or state public assistance is not included in the IBR calculation. Borrowers who have no income or have only untaxed income may self-certify their income on the IBR request form.

**ii. Special income rule for married borrowers:** Married borrowers who file separate tax returns may have their IBR payments based on their own respective incomes but may still count each other and any dependents in the family size.

## 2. Income Contingent Repayment (Direct Loan Program only):

**a. Terms and conditions:** The required monthly loan payment under the ICR is capped at 20 percent of annual household earnings above 100 percent of the applicable poverty level divided by 12 months. Like the IBR, the ICR is recalculated annually. If the AGI is below 100 percent of the poverty level for the borrower’s family size, then the ICR payment is \$0, but the borrower is still considered “in repayment” and in good-standing. For most balances, the term is 25 years. At the conclusion of the 25-year repayment period, any remaining balance is forgiven. *But see* above in II.F (discussing 10-year repayment term for the Public Service Loan Forgiveness Program).

Interest continues to accrue at the contract rate and is capitalized until the loan balance is 10 percent higher than the original loan balance when the borrower entered repayment. After that, interest continues to accrue but is not capitalized. Interest that accrues during forbearance or deferral does not count toward the 10 percent capitalization rule.

<sup>6</sup> Under the Internal Revenue Code, student loan debt forgiven at the end of the IBR (and ICR, unless it is forgiven under the Public Service Loan Forgiveness Program, discussed below) term may constitute a taxable event. This is a nonissue in most cases because any forgiven debt is taxable only to the extent the borrower is solvent. Thus, it is unlikely that borrowers with large student loan debts will have assets that exceed the debt forgiven 25 years into the future.

**b. Special rule for married borrowers:** Married borrowers who file separate tax returns may have their ICR payments based on their own respective incomes but may still count each other and any dependents in the family size. 34 C.F.R. § 685.209(b).

**c. Plus Loans Are Eligible for ICRP:** The ICR is the only income-driven payment option available to parent PLUS loan borrowers, who consolidated their PLUS loans into a Direct Consolidation Loan on or after July 1, 2006.

**3. Pay As You Earn:** As of December 2012, the Pay As You Earn repayment plan is available to qualified borrowers. Only Direct Loans are eligible for repayment under PAYE. Under the PAYE plan, eligible borrowers can elect to pay 10 percent of their discretionary income and be eligible for forgiveness after 20 years. “Eligible borrowers” are defined as people who were new borrowers in 2008 or after and received a disbursement of a loan in 2012 or after. New borrowers include borrowers who had never received a federal loan prior to October 1, 2007, as well as borrowers who did not have an outstanding balance on a federal loan as of the date the borrower received a loan after October 1, 2007. 34 C.F.R. § 685.209(a)(1)(iii).

**4. Income-Sensitive Repayment Plan (“ISRP”) (FFEL Program only):** Payments increase or decrease based on a borrower’s annual income and are made for a maximum period ten years.

**a. Payment Calculation:** The monthly loan payment in the ISRP is pegged to a fixed percentage of gross monthly income, between four percent and 25 percent. The percentage is determined by the borrower and the resulting monthly payment must be greater than or equal to the interest that accrues.

**b. Meant as a Temporary Fix:** Because income sensitive repayment decreases the monthly payment, as compared with standard repayment, and is limited to a ten year repayment term, it increases the size of the rest of the monthly payments to compensate. This will also increase the total amount of interest paid over the lifetime of the loan may be higher than with standard repayment. Borrowers who believe they may need income sensitive repayment for more than a year should also consider extended or graduated repayment, which reduce the size of the monthly payment by increasing the term of the loan.

**5. Annual Certification Requirements.** Under IBR, ICR and PAYE, borrowers are required to submit updated income documentation annually. Borrowers also must annually certify their family size. The reevaluation date is based on when the borrower initially entered the plan (anniversary date). The ISRP is a year-by-year program and borrowers must reapply for the ISRP each year.

**C. Alternative Payment Arrangements:** Borrowers who believe that none of the payment options are suitable may request an alternative repayment plan from the Secretary of Education. *See* 34 C.F.R. § 685.208(l).

**D. Suspension of Payments:** In addition to the different types of repayment plans, borrowers may seek deferment or forbearance. Deferment or forbearance may be granted for specific bases stated in federal regulations, which include, but are not limited to, poor health, economic

hardship, federal student loan payments equal to or greater than 20 percent of monthly gross income, full time student status, or other reasons acceptable to ED.

During a deferment period, the government pays the interest accruing on subsidized loans. The borrower is responsible for interest that accrues on unsubsidized loans during a deferment. The borrower may pay the accruing interest on any unsubsidized loans or have it added to the principal when the deferment expires.

Forbearance postpones or reduces the monthly repayment for a limited, specific period, during which interest on subsidized and unsubsidized loans continues to accrue and is owed by the borrower. If the interest is not paid during the forbearance, it is added to the principal balance when the forbearance period ends.

#### IV. PRACTICE TIPS

**A. Who Has My Loans?** ED maintains an information repository called National Student Loan Data Systems (“NSLDS”). NSLDS is a database that contains information, including chain of custody, interest rate, loan type, loan status, etc., regarding every *federal* student loan a person has borrowed. Lenders, servicers, and guarantors have access to borrower NSLDS reports if they hold the loan. Borrowers may access their own NSLDS reports by going to [www.nsls.ed.gov](http://www.nsls.ed.gov). They must first obtain a PIN at [www.pin.ed.gov](http://www.pin.ed.gov).

**B. Know Who to Name:** When initiating a dischargeability action, debtors should consult NSLDS to determine what entities hold a valid interest in their federally-backed loans. Debtors often mistakenly name their student loan servicers in lieu of ED, the lender, and/or the guarantor likely because the servicer was the last entity who contacted them. Servicers do not hold any right, title, or interest in the loans and, therefore, are not proper parties in a dischargeability adversary proceeding.

For federally-backed loans obtained through the Direct Loan Program, ED is usually—if not always—the only party to hold a valid interest in a Direct Loan. But, in the FFEL Program, debtors who have nondefaulted loans should be sure to name both the lender *and* the guarantor. Naming just the lender will be problematic because the guarantor has a contingent interest in the student loan debt and is a creditor in its own right. Thus, the guarantor is entitled to separate notice and a right to defend its rights separate and apart from the lender. *See Alfes v. Educ. Credit Mgmt. Corp. (In re Alfes)*, 709 F. 3d 631 (6th Cir. 2013). In *Alfes*, the Sixth Circuit held that student loan guarantors had rights separate and apart from those received by assignment from the original lender. In affirming the district court, the court ruled that these guarantor rights were not extinguished by a default judgment against the lender while the lender held the loan.

#### V. RESOURCES

- National Student Loan Data System: [www.nsls.ed.gov](http://www.nsls.ed.gov)
- ED PIN website: [www.pin.ed.gov](http://www.pin.ed.gov)
- Federal Student Aid: <https://studentaid.ed.gov>; <https://studentloans.gov>.
- Finaid (consumer financial aid website): [www.finaid.org](http://www.finaid.org)
- Department of Education [www.ed.gov](http://www.ed.gov)

## STUDENT LOAN DEBT CRISIS SYMPOSIUM 2014

- Department of Education Ombudsman Office [www.ombudsman.ed.gov](http://www.ombudsman.ed.gov)
- William D. Ford Federal Direct Loan Program: [www.direct.ed.gov](http://www.direct.ed.gov)
- Consumer Financial Protection Bureau: [www.consumerfinance.gov/students/](http://www.consumerfinance.gov/students/)
- National Counsel of Higher Education Resources ([www.ncher.us](http://www.ncher.us))
- Educational Credit Management Corporation ([www.ecmc.org](http://www.ecmc.org))
- FFEL Program Forms: (<http://www.ecmc.org/topic/mainForms.html>)
- Direct Loan Forms: <https://studentloans.gov> or contact your federal loan servicer

## VI.

## CONTACT INFORMATION

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