

**PAYING THE DEBT: THE GOVERNMENT’S OBLIGATION TO OUR
SERVICEMEMBERS AND ITS DUTY TO SIMPLIFY THE VARIOUS
BENEFITS PROVIDED TO SERVICEMEMBERS WITH STUDENT
LOANS**

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TABLE OF CONTENTS

Introduction.....	179
I. The Present State of the Law	180
A. The Servicemembers Civil Relief Act.....	180
1. Protected Class Under the SCRA.....	180
2. Substantive Protections Under the SCRA.....	181
3. The Six Percent Rule and its Application to the Student Loans of Servicemembers Under the SCRA.....	184
B. Other Student Loan Benefits for Members of the Armed Services Not Included in the SCRA.....	186
1. Military Service Deferments	186
2. Public Service Loan Forgiveness	191
3. Deferments After Active Duty	194
4. 0% Interest for Servicemembers Serving in Hostile Areas.....	195
5. Repayment Based on Income.....	197
6. HEROES Act Waiver.....	201
7. Department of Defense Repayment of Servicemembers Loans	204
8. Veterans Total and Permanent Disability Discharge	205
II. Problems With and Existing Critiques of the Current State of the Law	209
III. Proposal.....	214
Conclusion	216

INTRODUCTION

The men and women of the United States armed services sacrifice a great deal to serve our country, both abroad and at home. These individuals deserve our respect and should be adequately compensated through both direct pay and benefits for the sacrifices they make for our country. The goal of this paper is to examine the relationship between servicemembers and their student loans in order to decide if the government is taking adequate steps to serve those who serve us.

This paper will examine the various benefits offered to servicemembers dealing with their various debts, with a focus on student loans. There will be a brief overview

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of each of these benefits and an examination of the requirements of the servicemember under each. Once each of these benefits has been examined, this paper will then review the shortfalls of the current student loan benefits for servicemembers and take a look at existing critiques of the current program. Lastly, this paper will offer a proposal to change the current program to ensure that our servicemembers receive benefits befitting their service to our country.

I. THE PRESENT STATE OF THE LAW

A. *The Servicemembers Civil Relief Act*

Congress has enacted a number of laws providing protection and benefits to help manage the civil and administrative liabilities of servicemembers when they are called to serve their country.¹ Some of these efforts have been codified in the Servicemembers Civil Relief Act ("SCRA") through amendments enacted in 2003.² The purpose of the SCRA is to provide servicemembers some sort of relief from certain civil obligations, among other liabilities and debts, "when military service materially affects the ability of a servicemember to meet or attend to civil matters."³

1. Protected Class Under the SCRA

To find out who is eligible for the protections of the SCRA, several statutes must be referenced. However, it seems clear that a "servicemember is a member of the uniformed services, which includes the: (a) Army, Navy, Air Force, Marine Corps and Coast Guard; (b) the commissioned corps of the National Oceanic and Atmospheric Administration; and (c) the commissioned corps of the Public Health Service."⁴ Furthermore, the SCRA only protects servicemembers who are on active duty, which is defined by reference to 10 U.S.C. § 101(d)(1). The Code section states:

The term "active duty" means full-time duty in the active military service of the United States. Such term includes full-time training

¹ See HOLLISTER PETRAEUS & ROHIT CHOPRA, CONSUMER FED. PROT. BUREAU, THE NEXT FRONT? STUDENT LOAN SERVICING AND THE COST TO OUR MEN AND WOMEN IN UNIFORM 2 (2012) (emphasizing the importance of ensuring that active-duty servicemembers have "access to clear information about how to successfully manage" student loan debt).

² See Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501–515, 516–597b (2012) (originally enacted as Soldiers' and Sailors' Civil Relief Act of 1940, Oct. 17, 1940, ch. 888, 54 Stat. 1178, as amended by Pub.L. 108–89, § 1, Dec. 19, 2003, 117 Stat. 2835).

³ PAUL K. CHARLTON, US ATTORNEY'S OFFICE, DIST. OF ARIZ., SERVICEMEMBERS CIVIL RELIEF ACT, available at http://www.justice.gov/sites/default/files/usao-az/legacy/2011/01/07/Servicemembers_Civil_Relief_Act.pdf (highlighting the importance of the Act for those servicemembers "who have recently come on active duty, or are preparing for a long-term deployment" because their situation might impact previously-made financial commitments).

⁴ Susan H. Seabury & Jack F. Williams, *Bankruptcy and Debt Under the Servicemembers Civil Relief Act*, NORTON ANNUAL SURVEY OF BANKR. LAW 441, 445 (William L. Norton, Jr. ed., 2008).

duty, annual training duty and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.⁵

The SCRA goes further to protect the spouses or dependents of servicemembers in certain situations. This requirement seems necessary to ensure that the stated purpose of the SCRA, "to put the minds of active duty servicemembers at ease while they are on duty," is met.⁶ The SCRA defines "included dependents" as:

- (A) The servicemember's spouse;
- (B) The servicemember's child (as defined in 38 U.S.C. § 101(4));⁷
- or
- (C) An individual for whom the servicemember provided more than one-half of the individual's support for 180 days immediately preceding an application for relief under this Act.⁸

While difficult to apply, these protections are afforded not only to spouses and dependents, but also to anyone whom the servicemember provides more than half of their support, such as an elderly parent or an infirm sibling.⁹

It is also important to note that the SCRA does not apply to members of the National Guard, Air National Guard, and reserve units not in active duty as defined earlier.¹⁰ Nor does the SCRA provide protections to retired servicemembers or those incarcerated in military prisons.¹¹

2. Substantive Protections Under the SCRA

The protections under the SCRA are far reaching, but those that are most applicable provide protection "in recognition of the economic strain that military service can place on the servicemember and the servicemember's family."¹² Further, most of these protections apply only to obligations incurred prior to entering active military service.¹³ One of the best known of these provisions allows a servicemember

⁵ *Id.* (citing 10 U.S.C. § 101(d)(1)).

⁶ Seabury, *supra* note 4, at 446; *see also* 50 U.S.C. app. § 502 (stressing the purpose of enabling servicemembers "to devote their entire energy to the defense needs of the Nation . . .").

⁷ 38 U.S.C. § 101(4)(A) (defining a "child" as, *inter alia*, an unmarried person "who is under the age of eighteen years," and who is a legitimate child of the servicemember).

⁸ 50 U.S.C. app. § 511(4) (sections A–C in the text can be found in this source).

⁹ *See* Seabury, *supra* note 4, at 446–47.

¹⁰ *See* Seabury, *supra* note 4, at 447 (discussing servicemembers not covered by the SCRA).

¹¹ *See* Seabury, *supra* note 4, at 447 (same).

¹² Seabury, *supra* note 4, at 455.

¹³ *See* Seabury, *supra* note 4, at 455 (highlighting the requirements needed to take advantage of the SCRA provisions, including, but not limited to, the limitation on interest applying only to obligations incurred prior to enlistment, and requiring the servicemember to provide the creditor with a written notice).

to reduce the interest on pre-service obligations to six percent by meeting a number of requirements.¹⁴ The SCRA provides in section 527 that an obligation incurred by a servicemember prior to entry into active duty cannot bear interest in excess of six percent:

(a) Interest rate limitation

(1) Limitation to 6 percent

An obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember's spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent . . . during the period of military service.¹⁵

"Further, any interest in excess of 6 percent cannot be deferred or added to the principal amount; it must be forgiven[.]"¹⁶

(a) Interest rate limitation

(2) Forgiveness of interest in excess of 6 percent

Interest at a rate in excess of 6 percent per year that would otherwise be incurred but for the prohibition in paragraph (1) is forgiven.

(3) Prevention of acceleration of principal

The amount of any periodic payment due from a servicemember under the terms of the instrument that created an obligation or liability covered by this section shall be reduced by the amount of the interest forgiven under paragraph (2) that is allocable to the period for which such payment is made.¹⁷

To enforce this Six Percent Rule, the servicemember has a private right of action to sue the creditor for not applying the proper interest rate.¹⁸ In *Moll v. Ford Consumer Finance Company Inc.*, the District Court of Illinois concluded that, in enacting the SCRA, Congress gave the servicemember the right to sue to enforce the right.¹⁹ In order to obtain the benefits of the Six Percent Rule, it is required that the

¹⁴ See Seabury, *supra* note 4, at 455.

¹⁵ 50 U.S.C. app. § 527(a)(1)(B) (2012).

¹⁶ Seabury, *supra* note 4, at 455.

¹⁷ 50 U.S.C. app. § 527(a)(2)–(3).

¹⁸ See *Moll v. Ford Consumer Fin. Co. Inc.*, No. 97 C 5044, 1998 WL 142411, at *4–5 (N.D. Ill. March 23, 1998) ("Since the creditor cannot defer the interest that exceeds six percent without changing the terms of the obligation, § 526 confers a benefit on a military person that is not otherwise available to civilians.").

¹⁹ See *id.* (determining that Congress "must have intended that a private right of action be available under § 526, because otherwise the relief would [be] of no value at all" (internal quotations omitted)).

servicemember provide written notice to the appropriate creditors and that the servicemember include with the written notice a copy of the relevant orders within 180 days of leaving for active duty.²⁰

(b) Implementation of Limitation

(1) Written Notice to Creditor

In order for an obligation or liability of a servicemember to be subject to the interest rate limitation in subsection (a), the servicemember shall provide to the creditor written notice and a copy of the military orders calling the servicemember to military and any orders further extending military service, not later than 180 days after the date of the servicemember's termination or release from military service.

(2) Limitation Effective as of Date of Order to Active Duty

Upon receipt of written notice and a copy of orders calling a servicemember to service, the creditor shall treat the debt in accordance with subsection (a), effective as of the date on which the servicemember is called to military service.²¹

In order to receive the benefits of the Six Percent Rule, notice should be provided to any lenders holding a debt of the servicemember.²² After the creditor has received notice from the servicemember, "the creditor must re-amortize the obligation so as to charge only six-percent²³ from the 'date on which the servicemember is called to military service.'"²⁴ This means that the date of the re-amortization should be the date the servicemember is informed rather than the date which the servicemember actually reports.²⁵

There are, however, limitations on the Six Percent Rule. If a creditor can carry the burden of proof and show the court that the servicemember's military service has not significantly impaired the servicemember's ability to pay interest in excess of six percent,²⁶ the SCRA states:

(c) Creditor Protection

²⁰ See 50 U.S.C. app. § 527(b)(1).

²¹ *Id.* § 527(b).

²² See *id.* § 527(a), (b)(1) (subsection (a) describes benefits of the Six Percent Rule, including limitation on interest rates, forgiveness of interest in excess of six percent, and prevention of acceleration of payment).

²³ Seabury, *supra* note 4, at 457 (advising servicemembers to promptly notify "appropriate creditors" to obtain full benefit of interest relief).

²⁴ 50 U.S.C. app. § 527(b)(2).

²⁵ See Seabury, *supra* note 4, at 457 (recognizing that due to the language of § 527(b)(2), it is an open issue whether the effective date of the re-amortization should be the date the servicemember is informed of an upcoming duty to report or deployment date rather than the actual date on which the servicemember reports).

²⁶ See Seabury, *supra* note 4, at 457 ("Occasionally, activation or enlistment is not materially detrimental to the servicemember's income.").

A court may grant a creditor relief from the limitations of this section if, in the opinion of the court, the ability of the servicemember to pay interest upon the obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of the servicemember's military service.²⁷

This section will apply if activation or enlistment is not materially detrimental to the servicemember's income. As stated by the court in *In re Watson*, the interest rate reduction under section 526 is automatic. The only exception "to th[e] reduced rate is if in the opinion of the court, and upon application by the obligee, the ability of the person in military service to pay interest in excess of 6% is not affected by reason of such service."²⁸

3. The Six Percent Rule and its Application to the Student Loans of Servicemembers Under the SCRA

In the initial adoption of the SCRA, the Six Percent Rule did not apply to federally-insured student loans. This fact raised concerns in the original Senate version of the SCRA. Senator Spector stated that "the Higher Education Act of 1965 prohibits the . . . six percent interest cap form [sic] applying to federally-insured student loans."²⁹ There continued to be concerns regarding the application of the Six Percent Rule to the student loans of servicemembers until the adoption of the Higher Education Opportunity Act in August of 2008.

In 2007, Congresswoman Susan A. Davis of California spoke on the House floor to introduce her bill, the Servicemember Student Loan Interest Relief Act – "a bill to ease the financial burden on our [Nation's] men and women in uniform."³⁰ Rep. Davis put it best when she noted, "[w]hen our men and women in uniform return from months and sometimes years of service, many of them come home to student loan debt that has ballooned during their absence and that they will have to struggle to pay back."³¹ Unfortunately, her efforts to pass this bill never came to fruition after it failed to come to a vote in the 110th Congress.³²

The concern regarding student loans was finally overcome with the adoption of the Higher Education Opportunity Act signed by President Bush on August 14,

²⁷ 50 U.S.C. app. § 527(c).

²⁸ *In re Watson*, 292 B.R. 441, 444 (Bankr. S.D. Ga. 2003) ("Generally, this requirement means that the person is making less money in the military than he did as a civilian.").

²⁹ Seabury, *supra* note 4, at 458 (internal citations omitted).

³⁰ 110 CONG. REC. 26850 (2007) (statement of Rep. Davis) (noting that it is unfair for servicemembers to make sacrifices at our benefit only to return home and be burdened by debt collectors seeking student loan payments).

³¹ *Id.*

³² See Servicemember Student Loan Interest Relief Act, H.R. 3748, 110th Cong. (1st Sess. 2007).

2008.³³ The Six Percent rule was in effect extended to student loans by amending section (g) of the Higher Education Act of 1965.³⁴ The amendment to the Higher Education Opportunity Act stated:

- (g) Applicability of Usury Laws.—
 - (1) Amendment.—Section 428(d) (20 U.S.C. 1078(d)) is amended by insertion "and section 207 of the Servicemembers Civil Relief Act (50 U.S.C. App. 627)" after "this Act."
 - (2) Conforming Amendment.—Section 438 (20 U.S.C. 1087-1) is amended by adding at the end the following subsection:
- "(g) Special Rule.—With respect to any loan made under this part for which the interest rate is determined under the Servicemembers Civil Relief Act (50 U.S.C. App. 527), the applicable interest rate to be subtracted in calculating the special allowance for such loan under this section shall be the interest rate determined under that Act for such loan."³⁵

As amended the Higher Education Act of 1965 read as follows:

- (a) Usury Laws inapplicable:

No provision of any law of the United States (other than this chapter and section 207 of the Servicemembers Civil Relief Act (50 U.S.C. App. 527)) or of any other State (other than a statute applicable principally to such State's student loan insurance program) which limits the rate or amount of interest payable on loans shall apply to a loan—

 - (1) which bears interest (exclusive of any premium for insurance) on the unpaid principal balance at a rate not in excess of the rate specified in this part; and
 - (2) which is insured (i) by the United States under this part, or (ii) by a guaranty agency under a program covered by an agreement made pursuant to subsection (b) of this section.³⁶

³³ See The Higher Education Opportunity Act, 20 U.S.C. § 1001 (2008) (originally enacted as the Higher Education Act of 1965, Nov. 8, 1965, 79 Stat. 1219, as amended by Pub. L. 110-315, § 3, Aug. 14, 2008, 122 Stat. 3083) (providing that the 2008 amendment was made effective as of August 14, 2008).

³⁴ See H.R. 4137, 110th Cong. § 422 (2008) (enacted as The Higher Education Opportunity Act, 20 U.S.C. § 1001).

³⁵ *Id.*

³⁶ 20 U.S.C. § 1078(d)(1)–(2).

This amendment extended the Six Percent Rule to the student loan debt of servicemembers currently serving on active duty for both federal and private loans.³⁷

B. Other Student Loan Benefits for Members of the Armed Services Not Included in the SCRA.

Congress has made efforts to help those who forego more lucrative careers to serve their country beyond the SCRA. The protections beyond the SCRA include Military Service Deferment, Public Service Loan Forgiveness, Deferments After Active Duty, 0% Interest for Servicemembers in Hostile Areas, Income-Contingent Repayment Plans, Waivers Under the HEROES Act, Department of Defense Repayment of a Servicemember's Loans, and Veterans Total and Permanent Disability Discharge.³⁸ However, a majority of these opportunities are limited to federal student loans exclusively.³⁹ This paper will outline a step-by-step analysis of each avenue available to servicemembers beyond the SCRA, where they are codified, and the requirements to receive such benefits.

1. Military Service Deferments

The Military Service Deferment allows postponement of federal student loan repayment during certain periods of active duty, such as during war, other military operation, or national emergency, and immediately following active duty.⁴⁰ Title 34 of the Code of Federal Regulations states:

A [d]irect [l]oan borrower is eligible for a deferment during any period in which the borrower . . . is [s]erving on active duty during a war or other military operation or national emergency; or . . . is [p]erforming qualifying National Guard duty during a war or other military operation or national emergency⁴¹

³⁷ See *id.* (stating that the Six Percent Rule, as defined in section 527 of the appendix to title 50, is an exception to the provisions that are prohibited towards limiting loans).

³⁸ See generally U.S. DEPT OF EDUC., FOR MEMBERS OF THE U.S. ARMED FORCES: WHAT YOU NEED TO KNOW ABOUT YOUR FEDERAL STUDENT LOAN BENEFITS, *available at* <https://studentaid.ed.gov/sa/sites/default/files/military-student-loan-benefits.pdf>.

³⁹ See *id.* (listing loan and service eligibility as applying to mostly federal loans and some private loans).

⁴⁰ See *id.*

⁴¹ 34 C.F.R. § 685.204(h)(1)(i), (ii) (2016).

The statute further states "the deferment period ends 180 days after the demobilization date for each period of the service described in paragraphs (h)(1)(i)⁴² and (h)(1)(ii)⁴³" ⁴⁴ As used in paragraph (h) of the statute, active duty means:

[S]erving on active duty during a war or other military operation or national emergency means service by an individual who is . . . [a] reserve of an Armed Force ordered to active duty under 10 U.S.C.

⁴² *Id.* § 685.204(h)(1)(i) ("Serving on active duty during a war or other military operation or national emergency.").

⁴³ *Id.* § 685.204(h)(1)(ii) ("Performing qualifying National Guard duty during a war or other military operation or national emergency.").

⁴⁴ *Id.* § 685.204(h)(2).

12301(a),⁴⁵ 12301(g),⁴⁶ 12302,⁴⁷ 12304,⁴⁸ or 12306⁴⁹ . . . [a] retired member of an Armed Force ordered to active duty under 10 U.S.C.

⁴⁵ 10 U.S.C. § 12301(a) (2012):

In time of war or of national emergency declared by Congress, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty for the duration of the war or emergency and for six months thereafter.

⁴⁶ 10 U.S.C. § 12301(g):

- (1) A member of a reserve component may be ordered to active duty without his consent if the Secretary concerned determines that the member is in a captive status. A member ordered to active duty under this section may not be retained on active duty, without his consent, for more than 30 days after his captive status is terminated.
- (2) The Secretary of Defense shall prescribe regulations to carry out this section. Such regulations shall apply uniformly among the armed forces under the jurisdiction of the Secretary. A determination for the purposes of this subsection that a member is in a captive status shall be made pursuant to such regulations.
- (3) In this section, the term 'captive status' means the status of a member of the armed forces who is in a missing status . . . which occurs as the result of a hostile action and is related to the member's military status.

⁴⁷ 10 U.S.C. § 12302(a):

In time of national emergency declared by the President . . . or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve under the jurisdiction of that Secretary to active duty for not more than 24 consecutive months.

⁴⁸ 10 U.S.C. § 12304(a):

Notwithstanding the provisions of section 12302(a) or any other provision of law, when the President determines that it is necessary to augment the active forces for any named operational mission that it is necessary to provide assistance referred to in subsection (b) (not included), he may authorize the Secretary of Defense and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, without the consent of the members concerned, to order any unit, and any member not assigned to a unit organized to serve as a unit of the Selected Reserve . . . , or any member in the Individual Ready Reserve mobilization category and designated as essential under regulations prescribed by the Secretary concerned, under their respective jurisdictions, to active duty for not more than 365 days.

⁴⁹ 10 U.S.C. § 12306(a)–(b):

- (a) Units and members in the Standby Reserve may be ordered to active duty only as provided in section 12301 of this title, but subject to the limitations in subsection (b).
- (b) In time of emergency—
 - (1) No unit in the Standby Reserve organized to serve as a unit or any member thereof may be ordered to active duty under section 12301(a) of this title, unless

688⁵⁰ for service in connection with a war or other military operation or national emergency, regardless of the location at which such active duty service is performed; or . . . [a]ny other member of an Armed Force on active duty in connection with such emergency or subsequent actions or conditions who has been assigned to a duty station at a location other than the location at which the member is normally assigned.⁵¹

The statute further defines qualifying National Guard duty in pertinent part:

As a member of the National Guard on full-time national guard duty . . . as defined in 10 U.S.C. 101(d)(5)⁵² under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under 32 U.S.C. 502(f)⁵³ in

the Secretary concerned, with the approval of the Secretary of Defense in the case of a Secretary of a military department, determines that there are not enough of the required kinds of units in the Ready Reserve that are readily available; and

- (2) Notwithstanding section 12301(a) of this title, no other member in the Standby Reserve may be ordered to active duty as an individual under such section without his consent, unless the Secretary concerned, with the approval of the Secretary of Defense in the case of a Secretary of a military department, determines that there are not enough qualified members in the Ready Reserve in the required category who are readily available.

⁵⁰ 10 U.S.C. § 688a(a):

- (a) Authority—Under regulations prescribed by the Secretary of Defense, a member described in subsection (b) may be ordered to active duty by the Secretary of the military department concerned at any time.

⁵¹ 34 C.F.R. § 685.204(h)(5)(i)(A)–(C) (2016).

⁵² 10 U.S.C. § 101(d)(5) (2012):

The term "full-time National Guard duty" means active duty performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

⁵³ 32 U.S.C. § 502(f):

- (1) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—
 - (A) without his consent, but with the pay and allowances provided by law; or
 - (B) with his consent, either with or without pay and allowances;
 - be ordered to perform training or other duty in addition to that prescribed under subsection (a).
- (2) The training or duty ordered to be performed under paragraph (1) may include the following:

connection with a war, other military operation, or national emergency declared by the President and supported by Federal funds.⁵⁴

Active duty under the statute means "[a]ctive duty as defined by 10 U.S.C. 101(d)(1)⁵⁵ except that it does not include active duty for training or attendance at a service school."⁵⁶ The statute defines military operation as "a contingency operation as defined in 10 U.S.C. 101(a)(13)."⁵⁷ ⁵⁸ Lastly, "[n]ational emergency means the national emergency by reason of certain terrorist attacks declared by the President on September 14, 2001, or subsequent national emergencies declared by the President by reason of terrorist attacks."⁵⁹

There are however limitations on the Military Service Deferment. The statute says that "[f]or a borrower whose active duty service includes October 1, 2007, or begins on or after that date, the deferment period ends 180 days after the demobilization date for each period of the service described in paragraph (h)(1)(i)⁶⁰

(A) Support of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense.

(B) Support of training operations and training missions assigned in whole or in part to the National Guard by the Secretary concerned, but only to the extent that such training missions and training operations—

- (i) are performed in the United States or the Commonwealth of Puerto Rico or possessions of the United States; and
- (ii) are only to instruct active duty military, foreign military (under the same authorities and restrictions applicable to active duty troops), Department of Defense contractor personnel, or Department of Defense civilian employees.

(3) Duty without pay shall be considered for all purposes as if it were duty with pay.

⁵⁴ 34 C.F.R. § 685.204(h)(5)(ii).

⁵⁵ 10 U.S.C. § 101(d)(1):

The term "active duty" means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.

⁵⁶ 34 C.F.R. § 685.204(h)(5)(iii).

⁵⁷ 10 U.S.C. § 101(a)(13):

The term "active-duty list" means a single list for the Army, Navy, Air Force, or Marine Corps (required to be maintained under section 620 of this title) which contains the names of all officers of that armed force, other than officers described in 641 of this title, who are serving on active duty.

⁵⁸ 34 C.F.R. § 685.204(h)(5)(iv).

⁵⁹ *Id.* § 685.204(h)(5)(v).

⁶⁰ *Id.* § 685.204(h)(1)(i).

and (h)(1)(ii)⁶¹ of this Section."⁶² The statute further states, "[t]he provisions of paragraph (h) of this section do not authorize the refunding of any payments made by or on behalf of a borrower during a period for which the borrower qualified for a military service deferment."⁶³

Lastly, "[w]ithout supporting documentation, the military service deferment will be granted to an otherwise eligible borrower for a period not to exceed the initial 12 months from the date the qualifying eligible service began based on a request from the borrower or the borrower's representative."⁶⁴

The regulations set forth in section (h) of the statute allow for a deferment on "Direct Loans" granted under the Federal loan program.⁶⁵ However, as evidenced through the analysis of this statute, a servicemember ensuring receipt of these benefits can be a difficult and convoluted process. As will be seen, this statute is no exception to the difficulties our servicemembers face in receiving the aid to which they are entitled. These regulations are also codified in the Federal Family Education Loan Program ("FFEL").⁶⁶

2. Public Service Loan Forgiveness

The Public Service Loan Forgiveness Program allows for forgiveness of the remaining balance of any Direct Loans when the servicemember has made 120 qualifying payments after October 1, 2007, while employed in public service, including military service.⁶⁷ Title 34 of the Code of Federal Regulations provides guidance for the application of the Public Service Loan Forgiveness program.⁶⁸

The intent of the Public Service Loan Forgiveness Program is to "encourage individuals to enter and continue in full-time public service employment by forgiving balance of their Direct loans after they satisfy the public service and loan payment requirements of this section."⁶⁹ Military service is included in the types of employment covered, and the statute defines military service as

[m]ilitary service, for uniformed members of the U.S. Armed Forces or the National Guard, means "active duty" service or "full-time

⁶¹ *Id.* § 685.204(h)(1)(ii).

⁶² *Id.* § 685.204(h)(2).

⁶³ *Id.* § 685.204(h)(4).

⁶⁴ *Id.* § 685.204(h)(3).

⁶⁵ See *id.* § 685.204(h) (explaining that a Direct Loan borrower is eligible for a deferment during any period).

⁶⁶ See Federal Family Education Loan Program, codified at 34 C.F.R. § 682.210(b)(i), (i), (s), (t).

⁶⁷ See U.S. DEP'T OF EDUC., *supra* note 38, at 1.

⁶⁸ See William D. Ford Federal Direct Loan Program, codified at 34 C.F.R. § 685.219 (2016).

⁶⁹ *Id.* § 685.219(a).

National Guard duty" as defined in section 101(d)(1)⁷⁰ and (d)(5)⁷¹ of title 10 in the United States Codes, but does not include active duty for training or attendance at a service school. For civilians, "Military service" means service on behalf of the U.S. Armed Forces or the National Guard performed by an employee of a public service organization.⁷²

The loans eligible under this repayment plan include "a Direct Subsidized Loan, Direct Unsubsidized Loan, Direct PLUS loan, or a Direct Consolidated loan."⁷³ The Program also applies to any private organization that provides military service; and "[i]s not a business organized for profit, a labor union, a partisan political organization, or an organization engaged in religious activities, unless the qualifying activities are unrelated to religious instruction . . . or any form of proselytizing."⁷⁴

In order for a military member to be eligible under this Program, the borrower must not be "in default on the loan for which forgiveness is requested,"⁷⁵ must be employed full-time by a public service organization,⁷⁶ and must make "120 separate monthly payments after October 1, 2007, on eligible Direct loans for which forgiveness is sought . . . [so long as] the borrower [has made] the monthly payments within 15 days of the scheduled due date for the full scheduled installment amount."⁷⁷ Moreover, a servicemember is an eligible borrower only if:

[The servicemember] makes the required 120 monthly payments under one or more of the following repayment plans. . . . Except for a parent PLUS borrower, an income-based repayment plan, as determined in accordance with § 685.221⁷⁸ . . . [e]xcept for a parent PLUS borrower, an income-contingent repayment plan, as determined in accordance with § 685.209⁷⁹ . . . [a] standard repayment plan, as determined in accordance with § 685.208(b)⁸⁰ .

⁷⁰ 10 U.S.C. § 101(d)(1) (2012) (defining the term "active duty" as "full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty").

⁷¹ *Id.* § 101(d)(5) (defining the term "full-time National Guard duty" as active duty "performed by a member of the Army National Guard of the United States of a State or territory, the commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 of which the member is entitled to pay from the United States or for which the member has waived pay from the United States").

⁷² 34 C.F.R. § 685.219(b)(2).

⁷³ *Id.* § 685.219(b).

⁷⁴ *Id.* § 685.219(b)(5)(i)–(ii).

⁷⁵ *Id.* § 685.219(c)(i).

⁷⁶ *See id.* § 685.219(c)(ii).

⁷⁷ *Id.* § 685.219(c)(iii).

⁷⁸ *Id.* § 685.219(c)(iv)(A).

⁷⁹ *Id.* § 685.219(c)(iv)(B).

⁸⁰ *Id.* § 685.219(c)(iv)(C).

. . . or, any other repayment plan if the monthly payment amount is not less than would have been paid under the Direct Loan standard repayment plan described in § 685.208(b)⁸¹ ⁸².

The Program determines the amount to be forgiven by stating "[t]he Secretary forgives the principal and accrued interest that remains on all eligible loans for which loan forgiveness is requested by the borrower. The Secretary forgives this amount after the borrower makes the 120 monthly qualifying payments under paragraph (c) of this section."⁸³

Lastly, the application of the Program is determined in section (e) of the statute. The statute states:

- (1) After making the 120 monthly qualifying payments on the eligible loans for which loan forgiveness is requested, a borrower may request loan forgiveness on a form provided by the secretary.
- (2) If the Secretary determines that the borrower meets the eligibility requirements for loan forgiveness under this section, the Secretary—
 - (i) Notifies the borrower of this determination; and
 - (ii) Forgives the outstanding balance of the eligible loans.
- (3) If the Secretary determines that the borrower does not meet the eligibility requirements for loan forgiveness under this section, the Secretary resumes collection of the loan and grants forbearance of payment on both principal and interest for the period in which collection activity was suspended. The Secretary notifies the borrower that the application has been denied, provides the basis for the denial, and informs the borrower that the Secretary will resume collection of the loan. The Secretary

-
- (b) Standard Repayment plan for all Direct Subsidized Loan, Direct Unsubsidized Loan, and Direct PLUS Loan borrowers, regardless of when they entered repayment, and for Direct Consolidation Loan borrowers who entered repayment before July 1, 2006.
- (1) Under this repayment plan, a borrower must repay a loan in full within ten years from the date the loan entered repayment by making fixed monthly payments
 - (2) A borrower's payments under this repayment plan are at least \$50 per month, except that a borrower's final payment may be less than \$50.
 - (3) The number of payments or the fixed monthly repayment amount may be adjusted to reflect changes in the variable interest rate identified in § 685.202(a).

Id. § 685.208(b).

⁸¹ *Id.* § 685.219(c)(iv)(D).

⁸² *Id.* § 685.219(c)(iv)(A)–(D).

⁸³ *Id.* § 685.219(d).

may capitalize any interest accrued and not paid during this period.⁸⁴

The application of the statute is clear in its determination that the ultimate decision rests with the Secretary. If the Secretary determines that the servicemember has met the requirements of section (e), they will notify the servicemember of the forgiveness of their outstanding debt.⁸⁵

3. Deferments After Active Duty

Servicemembers can postpone repayment of any student debts while they prepare to return to school following their active duty.⁸⁶ The FFEL entitles a borrower "to have periodic installment payments of principal deferred during authorized periods after the beginning of the repayment period"⁸⁷ The statute provides:

Effective October 1, 2007 a borrower who receives a FFEL Program and is serving on active duty on that date, or begins serving on or after that date, is entitled to receive a post-active duty student deferment for 13 months following the conclusion of the borrower's active duty military service and any applicable grace period if . . . [t]he borrower is a member of the National Guard or other reserve component of the Armed Forces of the United States or a member of such forces in retired status; and . . . [t]he borrower was enrolled, on at least a half-time basis, in a program of instruction at an eligible institution at the time, or within six months prior to the time, the borrower was called to active duty.⁸⁸

Under this section, active duty is defined in section 101(d)(1) of title 10, United States Code⁸⁹ for at least a 30-day period, except that

[a]ctive duty includes active State duty for members of the National Guard under which a Governor activates National Guard personnel based on State or policy and the activities of the National Guard are paid for with state funds; . . . [a]ctive duty includes full-time National Guard duty under which a Governor is authorized, with the approval of the President or the U.S. Secretary of Defense, to order a member to State active duty and the activities of the National Guard are paid for with Federal Funds; . . . [a]ctive duty does not include active duty

⁸⁴ *Id.* § 685.219(e).

⁸⁵ *See id.* § 685.219(e)(2).

⁸⁶ *See* U.S. DEP'T OF EDUC., *supra* note 38, at 1.

⁸⁷ *See* 34 C.F.R. § 682.210(a)(1)(i).

⁸⁸ *Id.* § 682.210(u)(1)(i)–(ii).

⁸⁹ *See* 10 U.S.C. § 101(d)(1) (2012); *see also supra* note 55 and accompanying text.

for training or attendance at a service school; and . . . [a]ctive duty does not include employment in a full-time, permanent position in the National Guard unless the borrower employed in such a position is reassigned to active duty under paragraph (u)(2)(i)⁹⁰ of this section or full-time National Guard duty under paragraph (u)(2)(ii)⁹¹ of this section.⁹²

"If a borrower qualifies for both a military service deferment and a post-active duty student deferment, the 180-day post-demobilization military service deferment period and the 13-month post-active duty student deferment period apply concurrently."⁹³ For a servicemember to receive a post-active duty student deferment, "the borrower must request the deferment and provide the lender with all information and documents required to establish eligibility for the deferment, except that a lender may grant a borrower a post-active duty student deferment under the procedures specified in paragraphs (s)(1)(iii) through (s)(1)(v) of [FFEL]."⁹⁴

The post-active duty deferment is limited in its application. The statute states, "[i]f the borrower returns to enrolled student status, on at least a half-time basis, during the 13-month deferment period, the deferment expires at the time the borrower returns to enrolled student status, on at least a half-time basis."⁹⁵ Lastly, after granting a deferment under section 682.210(s)(1)(iii), the lender must "notify the borrower that the deferment has been granted and that the borrower has the option to pay interest that accrues on an unsubsidized FFEL loan or to cancel the deferment and continue to make payments on the loan."⁹⁶

4. 0% Percent Interest for Servicemembers Serving in Hostile Areas

While a servicemember is serving in a hostile area that qualifies the servicemember for special pay, the servicemember may not have to pay interest on Direct Loans made on or after October 1, 2008, for up to sixty months.⁹⁷ The William D. Ford Federal Direct Loan Program⁹⁸ states, "[n]otwithstanding any other provision of this part and in accordance with paragraphs (2)⁹⁹ and (4)¹⁰⁰, interest shall not accrue for an eligible military borrower on a loan made under this part for which the first disbursement is made on or after October 1, 2008."¹⁰¹

⁹⁰ See 34 C.F.R. § 682.210(u)(2)(i).

⁹¹ See *id.* § 682.210(u)(2)(ii).

⁹² *Id.* § 682.210(u)(2)(i)–(iv).

⁹³ *Id.* § 682.210(u)(4).

⁹⁴ *Id.* § 682.210(u)(5).

⁹⁵ *Id.* § 682.210(u)(3).

⁹⁶ *Id.* § 682.210(s)(1)(v).

⁹⁷ See U.S. DEPT OF EDUC., *supra* note 38, at 2.

⁹⁸ See William D. Ford Federal Direct Loan Program, 20 U.S.C. § 1087e et seq. (2012).

⁹⁹ See *infra* note 105.

¹⁰⁰ See *infra* note 106.

¹⁰¹ 20 U.S.C. § 1087e(o)(1).

In this section an eligible military borrower means:

[A]n individual who . . . is serving on active duty during a war or other military operation or national emergency; or . . . is performing qualifying National Guard duty during a war or other military operation; and . . . is serving in an area of hostilities in which service qualifies for special pay under section 310 of Title 37^{102 103}.

This section applies only to Eligible Federal Direct Loans. Eligible Federal Direct Loan means "a Federal Direct Stafford Loan, Federal Direct PLUS Loan, or Federal Direct Unsubsidized Stafford Loan, or a Federal Direct Consolidated Loan."¹⁰⁴

The statute only applies to loans made after October 1, 2008. The statute states:

In the case of any consolidation loan made under this part that is disbursed on or after October 1, 2008, interest shall not accrue pursuant to this subsection only on such portion of such loan as was used to repay a loan made under this part for which the first disbursement is made on or after October 1, 2008.¹⁰⁵

Lastly, "an eligible military borrower under this subsection may receive the benefit of this subsection for not more than 60 months."¹⁰⁶

¹⁰² 37 U.S.C. § 310(a):

- (a) ELIGIBILITY.—Under regulations prescribed by the Secretary of Defense, a member of a uniformed service may be paid special pay under subsection (b) for any day or portion of a day in which—
 - (1) the member was entitled to basic pay or compensation under section 204 or 206 of this title; and
 - (2) the member—
 - (A) was subject to hostile fire or explosion of hostile mines;
 - (B) was on duty in an area in which the member was in imminent danger of being exposed to hostile fire or explosion of hostile mines and in which, during the period the member was on duty in the area, other members of the uniformed services were subject to hostile fire or explosion of hostile mines;
 - (C) was killed, injured, or wounded by hostile fire, explosion of a hostile mine, or any other hostile action; or
 - (D) was on duty in a foreign area in which the member was subject to the threat of physical harm or imminent danger on the basis of civil insurrection, civil war, terrorism, or wartime conditions.

¹⁰³ 20 U.S.C. § 1087e(o)(3).

¹⁰⁴ *Id.* § 1087e(m)(3)(A).

¹⁰⁵ *Id.* § 1087e(o)(2).

¹⁰⁶ *Id.* § 1087e(o)(4).

5. Repayment Based on Income

Repayment plans that determine the monthly payment based on a servicemember's income are available as well.¹⁰⁷ Under these plans a servicemember may qualify for a low or zero amount payment with the possibility of forgiveness of the remaining balance in the future.¹⁰⁸ These payment plans are also known as the "Pay As You Earn repayment plan."¹⁰⁹ The "Pay As You Earn repayment plan is an income-contingent repayment plan for eligible new borrowers."¹¹⁰ An eligible new borrower is defined as an individual who

[h]as no outstanding balance on a Direct Loan Program Loan or a FFEL Program loan as of October 1, 2007, or who has no outstanding balance on such a loan on the date he or she receives a new loan after October 1, 2007; and . . . [h]as no outstanding balance on a Direct Loan Program loan or a FFEL Program loan as of October 1, 2007, or who has no outstanding balance on such a loan on the date he or she receives a new loan after October 1, 2007; or . . . [r]eceives a disbursement of a Direct Subsidized Loan, Direct Unsubsidized Loan, or student Direct PLUS Loan on or after October 1, 2011; or . . . [r]eceives a Direct Consolidation Loan based on an application received on or after October 1, 2011, except that a borrower is not considered an eligible new borrower if the Direct Consolidation Loan repays a loan that would otherwise make the borrower ineligible under paragraph (a)(1)(iii)(A) of this section¹¹¹

In order to qualify for a Pay As You Earn repayment plan, "[a] borrower may select the Pay As You Earn repayment plan only if the borrower has a partial financial hardship."¹¹² Under this statute, partial financial hardship means a circumstance in which,

[f]or an unmarried borrower or a married borrower who files an individual Federal tax return, the annual amount due on all of the borrower's eligible loans, as calculated under a standard repayment plan based on a 10-year repayment period, using the greater of the amount due at the time the borrower initially entered repayment or at

¹⁰⁷ See U.S. DEP'T OF EDUC., *supra* note 38, at 2 (discussing additional loan repayment plans available for a military borrower that base monthly payments on the borrower's income).

¹⁰⁸ See U.S. DEP'T OF EDUC., *supra* note 38, at 2 (explaining possible payment options for military borrowers when repayment is based on income, including low to zero monthly payments and loan forgiveness for remaining balances in twenty to twenty-five years).

¹⁰⁹ See 34 C.F.R. § 685.209(a) (2016).

¹¹⁰ *Id.*

¹¹¹ *Id.* § 685.209(a)(1)(iii).

¹¹² *Id.* § 685.209(a)(2)(i).

the time the borrower elects the Pay As You Earn repayment plan, exceeds 10 percent of the difference between the borrower's AGI and 150 percent of the poverty guideline for the borrower's family size; or . . . [f]or a married borrower who files a joint Federal tax return with his or her spouse, the annual amount due on all of the borrower's eligible loans and, if applicable, the spouse's eligible loans, as calculated under a standard repayment plan based on a 10-year repayment period, using the greater of the amount due at the time the loans initially entered repayment or at the time the borrower or spouse elects the Pay As You Earn repayment plan, exceeds 10 percent of the difference between the borrowers and spouse's AGI and 150 percent of the poverty guideline for the borrower's family size¹¹³

Adjusted gross income ("AGI") means "the borrower's adjusted gross income as reported to the Internal Revenue Service. For a married borrower filing jointly, AGI includes both the borrower's and spouse's income. For a married borrower, filing separately, AGI includes only the borrower's income" ¹¹⁴

Under the Pay As You Earn repayment plan, "[t]he borrower's aggregate monthly loan payments are limited to no more than 10 percent of the amount by which the borrower's AGI exceeds 150 percent of the poverty guideline applicable to the borrower's family size, divided by 12."¹¹⁵ Family size is defined as "the number that is determined by counting the borrower, the borrower's spouse, and the borrower's children, including unborn children who will be born during the year the borrower certifies family size, if the children receive more than half their support from the borrower."¹¹⁶ Family size can also include other individuals if, "at the time the borrower certifies family size, the other individuals . . . [l]ive with the borrower; and . . . [r]eceive more than half their support from the borrower and will continue to receive this support from the borrower for the year the borrower certifies family size."¹¹⁷ The statute goes on to say that the Secretary adjusts the calculated monthly payment if,

[e]xcept for borrowers provided for in paragraph (a)(2)(ii)(B)¹¹⁸ of this section, the total amount of the borrower's eligible loans are not Direct Loans, in which the Secretary determines the borrower's adjusted monthly payment by multiplying the calculated payment by

¹¹³ *Id.* § 685.209(a)(1)(v)(A)–(B).

¹¹⁴ *Id.* § 685.209(a)(1)(i).

¹¹⁵ *Id.* § 685.209(a)(2)(i).

¹¹⁶ *Id.* § 685.209(a)(1)(iv).

¹¹⁷ *Id.* § 685.209(a)(1)(iv)(A).

¹¹⁸ *Id.* § 685.209(a)(2)(ii)(B).

the percentage of the total outstanding principal amount of the borrower's eligible loans that are Direct Loans.¹¹⁹

The Secretary will also adjust the calculated monthly payment if

[b]oth the borrower and borrower's spouse have eligible loans and filed a joint Federal tax return, in which case the Secretary determines . . . [e]ach borrower's percentage of the couple's total eligible loan debt; . . . [t]he adjusted monthly payment for each borrower by multiplying the calculated payment by the percentage determined in paragraph (a)(2)(ii)(B)(1)¹²⁰ of this section; and . . . [i]f the borrower's loan are held by multiple holders, the borrowers adjusted monthly Direct Loan payment by multiplying the payment determined in paragraph (a)(2)(ii)(B)(2)¹²¹ of this section by the percentage of the total outstanding principal amount of the borrower's eligible loans that are Direct Loans.¹²²

If the calculated amount "under paragraph (a)(2)(i),¹²³ (a)(2)(ii)(A),¹²⁴ or (a)(2)(ii)(B)¹²⁵ of this section is less than \$5.00 the amount the borrower will have a monthly payment of \$0.00."¹²⁶ If the calculated amount under the same provisions is "equal to or greater than \$5.00 but less than \$10.00, . . . the borrower's monthly payment is \$10.00."¹²⁷

The servicemembers payments are applied under the Pay As You Earn repayment plan in the following order: first, accrued interest; second, collection costs; third, late charges; and lastly, the principal of the loan.¹²⁸ The servicemember may also prepay "all or part of a loan at any time without penalty, as provided under § 685.211(a)(2)."¹²⁹ Further, "[i]f the prepayment amount equals or exceeds a monthly payment of \$10.00 or more under the repayment schedule established for the loan, the Secretary applies the prepayment consistent with the requirements of § 685.211(a)(3)."¹³⁰

In some circumstances, a servicemember may qualify for loan forgiveness under the Pay As You Earn repayment plan. In order to qualify for loan forgiveness, a

¹¹⁹ *Id.* § 685.209(a)(2)(ii)(A).

¹²⁰ *Id.* § 685.209(a)(2)(ii)(B)(1).

¹²¹ *Id.* § 685.209(a)(2)(ii)(B)(2).

¹²² *Id.* § 685.209(a)(2)(ii)(B).

¹²³ *Id.* § 685.209(a)(2)(i).

¹²⁴ *Id.* § 685.209(a)(2)(ii)(A).

¹²⁵ *Id.* § 685.209(a)(2)(ii)(B).

¹²⁶ *Id.* § 685.209(a)(2)(ii)(C).

¹²⁷ *Id.* § 685.209(a)(2)(ii)(D).

¹²⁸ *See id.* § 685.209(a)(3)(i)(A)–(D) (detailing application of payments under the Pay As You Earn repayment plan).

¹²⁹ *Id.* § 685.209(a)(3)(ii).

¹³⁰ *Id.* § 685.209(a)(3)(iii).

borrower must have participated in the Pay As You Earn repayment plan for twenty years and must satisfy any one of a number of listed conditions.¹³¹ The conditions include:

- (A) Made reduced monthly payments under a partial financial hardship as provided in paragraph (a)(2)(i)¹³² or (a)(2)(ii)¹³³ of this section, including a monthly payment amount of \$0.00, as provided under paragraph (a)(2)(ii)(C)¹³⁴ of this section.
- (B) Made reduced monthly payments after the borrower no longer had a partial financial hardship or stopped making income-contingent payments as provided in paragraph (a)(4)(i)¹³⁵ of this section.
- (C) Made monthly payments under any repayment plan, that were not less than the amount required under the Direct Loan standard repayment plan described in § 685.208(b)¹³⁶ with a 10-year repayment period.
- (D) Made monthly payments under the Direct Loan standard repayment plan described in § 685.208(b)¹³⁷ for the amount of the borrower's loans that were outstanding at the time the borrower first selected the Pay As You Earn repayment plan . . .
- (E) Made monthly payments under the income-contingent repayment plan described in paragraph (b) of this section, the Revised Pay As You Earn repayment plan described in paragraph (c) of this section, or the income-based repayment plan described in § 685.221,¹³⁸ including a calculated monthly payment of \$0.00.
- (F) Made monthly payments under the alternative repayment plan described in paragraph (c)(4)(v)¹³⁹ of this section prior to changing to a repayment plan described under this section or § 685.221.¹⁴⁰
- (G) Received an economic hardship deferment on eligible Direct Loans.¹⁴¹

¹³¹ See *id.* § 685.209(a)(6) (specifying requirements for loan forgiveness).

¹³² *Id.* § 685.209(a)(2)(i).

¹³³ *Id.* § 685.209(a)(2)(ii).

¹³⁴ *Id.* § 685.209(a)(2)(ii)(C).

¹³⁵ *Id.* § 685.209(a)(4)(i).

¹³⁶ *Id.* § 685.208(b).

¹³⁷ *Id.*

¹³⁸ *Id.* § 685.221.

¹³⁹ *Id.* § 685.209(c)(4)(v).

¹⁴⁰ *Id.* § 685.221.

¹⁴¹ *Id.* § 685.209(a)(6)(i)(A)–(G).

If the Secretary determines that a servicemember has satisfied the "loan forgiveness requirements under paragraph (a)(6) of this section on an eligible loan, the Secretary cancels the outstanding balance and accrued interest on that loan."¹⁴² The statute further reads:

No later than six months prior to the anticipated date that the borrower will meet the forgiveness requirements, the Secretary sends the borrower a written notice that includes . . . [a]n explanation that the borrower is approaching the date that he or she is expected to meet the requirements to receive loan forgiveness; . . . [a] reminder that the borrower must continue to make the borrower's scheduled monthly payments; and . . . [g]eneral information on the current treatment of the forgiveness amount for tax purposes, and instructions for the borrower to contact the Internal Revenue Service for more information.¹⁴³

If the servicemember satisfies all of these requirements under the Pay As You Earn repayment plan or the Revised Pay As You Earn repayment plan, his or her loan may be forgiven.¹⁴⁴

This is just a brief overview of the income-contingent repayment plans. This overview covers the pertinent parts of the Pay As You Earn repayment plans as it relates to servicemembers' rights in regards to their student debt. At the time this paper was drafted, the Pay As You Earn repayment plan was in transition between where the law previously stood, and the amendments that went into effect July 1, 2016.¹⁴⁵ The provisions cited above refer to those amendments that have since gone into effect as of July 1, 2016.¹⁴⁶

6. HEROES Act Waiver

The Higher Education Relief Opportunities For Students Act of 2003 ("HEROES Act") allows for the Department of Education to waive many of the documentation requirements attached to receipt of statutory benefits for a servicemember while on active duty.¹⁴⁷ For example, if a servicemember is on a payment plan based on their income, and their military service prevents the servicemember from providing updated information on their family size and income, the servicemember can request

¹⁴² *Id.* § 685.209(a)(6)(v)(A).

¹⁴³ *Id.* § 685.209(a)(6)(v)(A)(1)–(3).

¹⁴⁴ *See id.* § 685.209(a)(6)(v)(C) (providing that once the Secretary has determined that a servicemember has satisfied all the loan forgiveness requirements, the Secretary will notify that servicemember that the obligations on the loans have been satisfied).

¹⁴⁵ *See generally* 34 C.F.R. § 685.209 (2016).

¹⁴⁶ *See id.*

¹⁴⁷ *See* U.S. DEP'T OF EDUC., *supra* note 38, at 1 (describing various types of benefits for members of the armed forces).

to have their monthly payment amount maintained.¹⁴⁸ The motivation for the passage of this Act is stated in the initial findings of the Act. As stated, "[t]here is no more important cause for this Congress than to support the members of the United States military and provide assistance with their transition into and out of active duty and active service."¹⁴⁹ As a preliminary matter, "[r]eferences in [the HEROES Act] to 'the Act' are references to the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.)."¹⁵⁰

The HEROES Act states generally:

Notwithstanding any other provision of law, unless enacted with specific reference to this section, the Secretary of Education (referred to in [the HEROES Act] as the "Secretary") may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act . . . as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2).¹⁵¹

Under the HEROES Act, the term affected individual means an individual who "is serving on active duty during a war or other military operation or national emergency . . . is performing qualifying National Guard duty during a war or other military operation or national emergency."¹⁵² The term affected individual also means an individual who "resides or is employed in an area . . . declared a disaster area by any [governmental] official in connection with a national emergency; or . . . suffered direct economic hardship as a direct result of a war[,] military operation or national emergency, as determined by the Secretary."¹⁵³

Under the HEROES Act:

The Secretary is authorized to waive or modify any provision described in paragraph (1) as may be necessary to ensure that – (A) recipients of student financial assistance under title IV of the Act who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals; (B) administrative requirements placed on affected individuals who are recipients of student financial assistance are minimized, to the extent possible without impairing the integrity of the student financial assistance programs, to ease the burden on such students and avoid inadvertent, technical violations or defaults;

¹⁴⁸ See U.S. DEP'T OF EDUC., *supra* note 38, at 1.

¹⁴⁹ Higher Education Relief Opportunities for Students Act, 20 U.S.C. § 1098aa(b)(6) (2012).

¹⁵⁰ *Id.* § 1098aa(c).

¹⁵¹ *Id.* § 1098bb(a)(1).

¹⁵² *Id.* § 1098ee(2)(A)–(B).

¹⁵³ *Id.* § 1098ee(2)(C)–(D).

(C) the calculation of "annual adjusted family income" and "available income," as used in the determination of need for student financial assistance under title IV of the Act for any such affected individual (and the determination of such need for his or her spouse and dependents, if applicable), may be modified to mean the sums received in the first calendar year of the award year for which such determination is made, in order to reflect more accurately the financial condition of such affected individual and his or her family; (D) the calculation under section 484B(b)(2) of the Act (20 U.S.C. 1091b(b)(2)) of the amount a student is required to return in the case of an affected individual may be modified so that no overpayment will be required to be returned or repaid if the institution has documented (i) the student's status as an affected individual in the student's file, and (ii) the amount of any overpayment discharged; and (E) institutions of higher education, eligible lenders, guaranty agencies, and other entities participating in the student assistance programs under title IV of the Act that are located in areas that are declared disaster areas by any Federal, State or local official in connection with a national emergency, or whose operations are significantly affected by such a disaster, may be granted temporary relief from requirements that are rendered infeasible or unreasonable by a national emergency, including due diligence requirements and reporting deadlines.¹⁵⁴

The HEROES Act also states that if a servicemember is an affected individual who, for a portion of a period of instruction, was unable to complete a period of instruction or failed to receive academic credit as a result of being an affected individual, the servicemember shall be provided a full refund from any institution offering postsecondary education.¹⁵⁵ The HEROES Act further states that "if affected individuals withdraw from a course of study as a result of such active duty or active service, such institutions should make every effort to minimize deferral of enrollment or reapplication requirements and should provide the greatest flexibility possible with administrative deadlines related to those applications."¹⁵⁶ Full refund is defined as "a refund of required tuition and fees, or a credit in a comparable amount against future tuition and fees."¹⁵⁷

The HEROES Act allows for protection of servicemembers who are called to active duty by providing servicemembers with avenues to have their debts and obligations reorganized to accommodate for their service.¹⁵⁸ The provisions cited are

¹⁵⁴ *Id.* § 1098bb(a)(2)(A)–(E).

¹⁵⁵ *Id.* § 1098cc(a)(1).

¹⁵⁶ *Id.* § 1098cc(a)(2).

¹⁵⁷ *Id.* § 1098cc(b).

¹⁵⁸ *Id.* § 1098aa(b)(5)–(6) (recognizing the sacrifices servicemembers make and the importance of assisting servicemembers in the transition out of active service); *see also* U.S. DEP'T OF EDUC., *supra* note 38.

an overview of the full extent of the HEROES Act. However, what is clear from the provisions is that there are protections available to servicemembers to allow for the readjustment of the documentation requirements attached to other program benefits.

7. Department of Defense Repayment of Servicemembers Loans

In certain circumstances, as determined by the Department of Defense, all or a portion of a servicemember's loans may be repaid by the Department of Defense.¹⁵⁹ Subject to the provisions of 10 U.S.C. § 2171,¹⁶⁰ the Secretary of Defense may repay:

(A) [A]ny loan made, insured, or guaranteed under Part B of title IV of the Higher Education Act of 1965 . . . (B) any loan made under part D of such title (the William D. Ford Federal Direct Loan Program) . . . (C) any loan made under part E of such title; or . . . (D) any loan incurred for educational purposes made by a lender that is— (i) an agency or instrumentality of a State; (ii) a financial or credit institution (including an insurance company) that is subject to examination and supervision by an agency of the United States or any State; (iii) a pension fund approved by the Secretary for purposes of this section; or (iv) a non-profit private entity designated by a State, regulated by such State, and approved by the Secretary for purposes of this section.¹⁶¹

The "[r]epayment of any such loan shall be made on the basis of each complete year of service performed by the borrower."¹⁶² "The Secretary may repay loans described in paragraph (1) in the case of any person for service performed on active duty as a member in an officer program or military specialty specified by the Secretary."¹⁶³ Lastly, "[i]f a portion of a loan is repaid under this section for any year, interest on the remainder of such loan shall accrue and be paid in the same manner as is otherwise required."¹⁶⁴

The limitation on the amount of the loan to be repaid under "subsection (a) is $33\frac{1}{3}$ percent or \$1,500, whichever is greater, for each year of service."¹⁶⁵ Repayments under this plan are also limited by language stating, "[n]othing in this section shall be construed to authorize refunding any repayment of a loan."¹⁶⁶ In determining how the allocation of funds shall be made, the Secretary of Defense shall:

¹⁵⁹ See generally U.S. DEP'T OF EDUC., *supra* note 38.

¹⁶⁰ 10 U.S.C. § 2171.

¹⁶¹ *Id.* § 2171(a)(1)(A)–(D).

¹⁶² *Id.* § 2171(a)(1).

¹⁶³ *Id.* § 2171(a)(2).

¹⁶⁴ *Id.* § 2171(c).

¹⁶⁵ *Id.* § 2171(b).

¹⁶⁶ *Id.* § 2171(d).

[B]y regulation, prescribe a schedule for the allocation of funds made available to carry out the provisions of loans under section 16301¹⁶⁷ of this title, during any year for which funds are not sufficient to pay the sum of the amounts eligible for repayment under subsection (a)¹⁶⁸ and section 16301(a)¹⁶⁹ of this title.¹⁷⁰

Lastly, "[t]he Secretary of Defense may prescribe, by regulations, procedures for implementing this section, including standards for qualified loans and authorized payees and other terms and conditions for making loan repayments."¹⁷¹ These regulations "may include exceptions that would allow for the payment as a lump sum of any loan repayment due to a member under a written agreement that existed at the time of a member's death or disability."¹⁷²

8. Veterans Total and Permanent Disability Discharge

If a servicemember has a service-connected disability, the servicemember may qualify for discharge of their federal student loans.¹⁷³ This provision is codified in the borrower provisions of the William D. Ford Federal Direct Loan Program.¹⁷⁴ Generally, "[a] borrower's Direct Loan is discharged if the borrower becomes totally and permanently disabled, as defined in section 685.102(b)¹⁷⁵, and satisfies the eligibility requirements in this section."¹⁷⁶ The statute differentiates between an application for discharge of a borrower under paragraph (1) of section 685.102(b) and an application for discharge of a veteran under paragraph (2) of section 685.102(b).¹⁷⁷

¹⁶⁷ *Id.* § 16301.

¹⁶⁸ *Id.* § 2171(a).

¹⁶⁹ *Id.* § 16301(a).

¹⁷⁰ *Id.* § 2171(f).

¹⁷¹ *Id.* § 2171(h).

¹⁷² *Id.*

¹⁷³ *See* U.S. DEP'T OF EDUC., *supra* note 38, at 2.

¹⁷⁴ *See* William D. Ford Federal Direct Loan Program, 34 C.F.R. § 685.213 (2016).

¹⁷⁵ *Id.* § 685.102(b):

Total and permanently disabled: The condition of an individual who—

- (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.

¹⁷⁶ *Id.* § 685.213(a)(1).

¹⁷⁷ *See id.* § 685.213(a)(2)–(3) (explaining that non-veteran borrowers have their discharge applications processed through section 685.213(b), while veteran borrowers have their discharge applications processed through section 685.213(c)).

The discharge application process for a borrower as described in paragraph (1) is stated in the statute as follows:

To qualify for a discharge of a Direct Loan based on a total and permanent disability, a borrower must submit a discharge application to the Secretary on a form approved by the Secretary. If the borrower notifies the Secretary that the borrower claims to be totally and permanent[ly] disabled prior to submitting a total and permanent disability discharge application, the Secretary . . . [p]rovides the borrower with information needed for the borrower to apply for a total and permanent disability discharge . . . [s]uspends collection activity on any of the borrower's title IV loans held by the Secretary, and notifies the borrower's other title IV loan holders to suspend collection activity on the borrower's title IV loans for a period not to exceed 120 days; and . . . [i]nforms the borrower that the suspension of collection activity will end after 120 days and collection will resume on the loans if the borrower does not submit a total and permanent disability discharge application to the Secretary within that time.¹⁷⁸

The borrower must "submit the application described in paragraph (b)(1)¹⁷⁹ of this section to the Secretary within 90 days of the date the physician certifies the application, if applicable."¹⁸⁰ Along with this certification, the application must contain

[a] certification by a physician, who is a doctor of medicine or osteopathy legally authorized to practice in a State, that the borrower is a totally and permanently disabled as described in paragraph (1) of the definition of that term in § 685.102(b)¹⁸¹; or . . . An SSA notice of award for Social Security Disability Insurance or Supplemental Security Income benefits indicating that the borrower's next scheduled disability review will be within five to seven years.¹⁸²

If, after the application is processed, the Secretary determines that the borrower is totally and permanently disabled:

[T]he Secretary discharges the borrower's obligation to make any further payments on the loan, notifies the borrower that the loan has

¹⁷⁸ *Id.* § 685.213(b)(1).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* § 685.213(b)(3).

¹⁸¹ *See supra* note 175 and accompanying text.

¹⁸² *Id.* § 685.213(b)(2).

been discharged, and returns to the person who made the payments on the loan any payments received after the date the physician certified the borrower's loan discharge application or the date the Secretary received the SSA notice award for SSDI or SSI benefits. The notification to the borrower explains the terms and conditions under which the borrower's obligation to repay the loan will be reinstated, as specified in paragraph (b)(7)(i)¹⁸³ of this section.¹⁸⁴

Under certain circumstances, the Secretary may reinstate a borrower's obligation to repay a loan that was discharged if,

within three years after the date the Secretary granted the discharge, the borrower . . . [h]as annual earnings from employment that exceed 100 percent of the poverty guidelines for a family of two, as published annually by the United States Department of Health and Human Services pursuant to 42 U.S.C. § 9902(2)¹⁸⁵ [or] . . . [r]eceives a notice from the SSA indicating that the borrower is no longer disabled or that the borrower's continuing disability review will no longer be the five- to seven-year period indicated in the SSA notice of awards for SSDI or SSI benefits.¹⁸⁶

If the Secretary determines that a borrower's obligation should be reinstated, the Secretary must notify the borrower of the reason or reasons for the reinstatement.¹⁸⁷

The discharge application process for a veteran as described in paragraph (2) of section 685.102(b) is stated in the statute as follows:

[A] veteran must submit a discharge application to the Secretary on a form approved by the Secretary. The application must be

¹⁸³ See *infra* note 185 (defining "poverty line," as stated in 42 U.S.C.A. § 9902(2)).

¹⁸⁴ 34 C.F.R. § 685.213 (b)(4)(iii).

¹⁸⁵ 42 U.S.C. § 9902(2) (2012):

The term "poverty line" means the official poverty line defined by the Office of Management and Budget based on the most recent data available from the Bureau of the Census. The Secretary shall revise annually (or at any shorter interval the Secretary determines to be feasible and desirable) the poverty line, which shall be used as a criterion of eligibility in the community services block grant program established under this chapter. The required revision shall be accomplished by multiplying the official poverty line by the percentage change in the Consumer Price Index for All Urban Consumers during the annual or other interval immediately preceding the time at which the revision is made. Whenever a State determines that it serves the objectives of the block grant program established under this chapter, the State may revise the poverty line to not to exceed 125 percent of the official poverty line otherwise applicable under this paragraph.

¹⁸⁶ 34 C.F.R. § 685.213(b)(7)(i)(A), (D).

¹⁸⁷ *Id.* § 685.213(b)(7)(ii), (iii) (providing that if the borrower's obligation is reinstated, then the borrower does not have to pay interest on the loan for the period for which the loan was discharged).

accompanied by documentation from the Department of Veterans Affairs showing that the Department of Veterans Affairs has determined that the veteran is unemployable due to a service-connected disability. The Secretary does not require the veteran to provide any additional documentation related to the veteran's disability.¹⁸⁸

Once the Secretary has received the veteran's application, the Secretary

[i]dentifies all title IV loans owed by the veteran and notifies the lenders that the Secretary has received a total and permanent disability discharge application from the borrower; . . . [i]f the application is incomplete, [the Secretary] requests the missing information from the veteran and does not make a determination of eligibility for discharge until the application is complete; . . . [n]otifies the veteran that no payments are due on the loan while the Secretary determines the veteran's eligibility for discharge; and . . . [e]xplains the Secretary's process for reviewing total and permanent disability discharge applications.¹⁸⁹

If the Secretary determines that the veteran's obligation should be discharged, the Secretary shall notify the veteran not to make any further payments on the loan, and to return any loan payments received on or after the effective date of the determination by the Department of Veteran Affairs that the veteran is unemployable due to a service-connected disability.¹⁹⁰

The Secretary may, after a review of the documentation from the Department of Veterans Affairs, determine that the veteran is not totally and permanently disabled as described in paragraph (2) of the definition of that term in section 685.102(b).¹⁹¹ If the Secretary makes this determination, the Secretary must notify the veteran that the application for a disability discharge has been denied.¹⁹² The notification must include:

(A) The reason or reasons for the denial; (B) An explanation that the loan is due and payable to the Secretary under the terms of the promissory note and that the loan will return to the status it was in at the time the veteran applied for a total and permanent disability discharge; (C) The date that the veteran must resume making payments; (D) An explanation that the veteran is not required to

¹⁸⁸ *Id.* § 685.213(c)(1).

¹⁸⁹ *Id.*

¹⁹⁰ *See id.* § 685.213(c)(2)(i).

¹⁹¹ *See id.* § 685.213(c)(2)(ii).

¹⁹² *See id.*

submit a new total and permanent disability discharge application if the veteran requests that the Secretary re-evaluate the veteran's application for discharge by providing, within 12 months of the date of the notification, additional documentation from the Department of Veterans Affairs that supports the veteran's eligibility for discharge; and (E) Information on how the veteran may reapply for a total and permanent disability discharge in accordance with the procedures described in paragraph (b) of this section if the documentation from the Department of Veterans Affairs does not indicate that the veteran is totally and permanently disabled as described in paragraph (2) of the definition of that term in § 685.102(b), but indicates that the veteran may be totally and permanently disabled as described in paragraph (1) of the definition of that term.¹⁹³

If the Secretary meets all of these requirements, the discharge of the servicemember's loan may be denied.¹⁹⁴ However, the servicemember will have an opportunity to reapply for the disability discharge if he follows the steps provided for in the statute.¹⁹⁵

II. PROBLEMS WITH AND EXISTING CRITIQUES OF THE CURRENT STATE OF THE LAW

As can be seen from this long and winding tour through our servicemember's various avenues for relief from student loan debt, there is a complex array of benefits for servicemembers with student loans. Ultimately, it is unclear "whether student loan servicers are providing sufficient information for military borrowers to make the best decisions regarding the options and benefits available to them."¹⁹⁶ For example, the Department of Education has received complaints from servicemembers "stating that they were guided into military deferments or forbearances and were unaware that upon the completion of their active-duty service their total loan debt would balloon due to the accumulation of unpaid interest."¹⁹⁷

Military deferment and forbearance do eliminate the obligation of a servicemember to make monthly payments on a loan, "[h]owever, if the loan is an unsubsidized federal loan or a private loan, then deferment and forbearance do not stop interest from accruing on the outstanding student loan debt or from capitalizing

¹⁹³ *See id.*

¹⁹⁴ *See id.* § 685.213(4)(B)(iv) (describing the requirements for and the process in which the Secretary denies a borrower's application for disability discharge of a loan).

¹⁹⁵ *See id.* § 685.213(4)(B)(v) ("If the borrower requests re-evaluation . . . the request must include new information regarding the borrower's disabling condition that was not provided to the Secretary in connection with the prior application at the time the Secretary reviewed the borrower's initial application for total and permanent disability discharge.").

¹⁹⁶ PETRAEUS & CHOPRA, *supra* note 1, at 4.

¹⁹⁷ PETRAEUS & CHOPRA, *supra* note 1, at 4.

into the loan."¹⁹⁸ While a military forbearance may be a good short-term avenue for relief for the servicemember, as a long-term solution, the forbearance is often a detriment that can add a large sum to the amount of the loan.¹⁹⁹ Ultimately, a servicemember should be able to rely on their loan servicer to provide them with adequate information when they are determining the best course of action to take in regard to their student loans; however, complaints to the Department of Education ("DOE") and the Consumer Financial Protection Bureau ("CFPB") have shown that this has not been the case.

To make matters worse, the CFPB has heard from borrowers whose loans were placed in forbearance automatically, without an affirmative request from the servicemember and without the servicemember's permission.²⁰⁰ As one servicemember stated, "I did not ask for my account to be placed in forbearance and as a result of this action, it is currently accumulating interest. To make matters worse, my account is accumulating interest at an incorrect and higher interest rate."²⁰¹ Moreover, in a recent class action, *Olson v. Citibank*, filed in 2012, the plaintiffs alleged loan servicers were placing servicemembers into forbearance without their affirmative request.²⁰² This case was ultimately settled with Citibank agreeing to pay \$2.3 million to settle the class action which alleged Citibank charged excessive interest on servicemember's student loans.²⁰³ Although Citibank denied any allegation of wrongdoing, the plaintiffs alleged that the bank charged an interest rate in excess of the six percent cap under the SCRA while the servicemember's loan was in forbearance.²⁰⁴

Servicemembers also run into problems with differing application criteria, policies, and procedures between various student loan servicers and various student loan types.²⁰⁵ The differing requirements among the various servicers can result in

¹⁹⁸ PETRAEUS & CHOPRA, *supra* note 1, at 4.

¹⁹⁹ PETRAEUS & CHOPRA, *supra* note 1, at 4.

²⁰⁰ See PETRAEUS & CHOPRA, *supra* note 1, at 4 (providing one example out of "a number of scenarios that servicemembers face illustrat[ing] the significant savings that may be achieved when a military borrower has the necessary information to make [an] informed decision about his or her best loan repayment options").

²⁰¹ PETRAEUS & CHOPRA, *supra* note 1, at 5.

²⁰² See *Olson v. Citibank*, No. 10-2992, 2012 WL 1231787, at *1 (D. Minn. Apr. 12, 2012) (alleging that the defendant's mandatory requirement to place the plaintiff's loan on forbearance in order to receive the interest rate reduction allowed to plaintiff by the Servicemembers Civil Relief Act was an illegal pre-condition forbidden by the Act).

²⁰³ See Jeff Overley, *Citibank Pays \$2.3M To End Suit Over Military Student Loans*, LAW 360, Mar. 16, 2012, <https://www.law360.com/articles/319987/citibank-pays-2-3m-to-end-suit-over-military-student-loans> ("[Citibank] was accused of flouting the 2003 Servicemembers Civil Relief Act, which applied a 6 percent interest rate cap to the loans of deployed military personnel.").

²⁰⁴ See *id.* (the lead plaintiff, Lyndsey Olson, alleged an interest rate as high as 9.25% while she was deployed in Iraq).

²⁰⁵ See HOLLISTER PETRAEUS & SETH FROTMAN, CONSUMER FED. PROT. BUREAU, OVERSEAS & UNDERSERVED: STUDENT LOAN SERVICING AND THE COST TO OUR MEN AND WOMEN IN UNIFORM 8 (2015) (explaining that many servicemembers have multiple loans from multiple companies which can lead to problems including differing application criteria and different companies interpreting statutory requirements differently).

some deferment applications being approved and others being denied.²⁰⁶ In cases where divergent outcomes may result from differences between certain loans being federal or private, customer service personnel may contribute to servicemembers' confusion "by failing to clearly disclose eligibility criteria or mishandling applications for these benefits."²⁰⁷

The Income-Contingent Repayment plan ("ICR") would be a much more beneficial option for many servicemembers, but without a clear indication by the loan servicer that this avenue is available to servicemembers, servicemembers may not be aware that this repayment plan exists. If the ICR plan is utilized by the servicemember, the servicemember may be able to reduce his or her monthly payments while ensuring that his or her overall debt doesn't balloon.²⁰⁸ By allowing a servicemember to adjust his or her monthly payments at a fixed amount relative to his or her income and family size, "[ICR] allows servicemembers to make affordable monthly loan payments while still chipping away at their loan debt and limiting the increase in principal that comes with deferment and forbearance."²⁰⁹ This is an excellent avenue for the servicemember, but without more information from the loan servicer, the servicemember may never be made aware of this option.

Servicemembers may also face barriers when requesting and retaining protections afforded by the SCRA.²¹⁰ As noted above, the six-percent interest rate cap applies to all student loans.²¹¹ The CFPB has received complaints from servicemembers, "on active duty for multiple years, who reported that they were told that their interest-rate cap would expire annually, and were subsequently required to submit additional orders in order to retain this benefit."²¹² Once a servicemember requests the SCRA interest rate cap, the servicer should apply the benefit for the duration of the active duty status.²¹³ Although a servicemember has the initial responsibility to provide proof of eligibility, "a servicer cannot impose additional requirements."²¹⁴ The CFPB has also heard from servicemembers who report that

²⁰⁶ *See id.* ("In some cases, this may be due to variation in policies and procedures between companies. In other cases, servicemembers' success or failure may be determined by servicers' differing interpretations of statutory requirements.").

²⁰⁷ *See id.* at 9.

²⁰⁸ *See* PETRAEUS & CHOPRA, *supra* note 1 at 5.

²⁰⁹ PETRAEUS & CHOPRA, *supra* note 1, at 5.

²¹⁰ *See* PETRAEUS & CHOPRA, *supra* note 1, at 7 (explaining that in order to qualify for protection, the servicemember must have entered into the financial obligation prior to service, must have sent a written request to the servicer along with his or her active duty orders, and "[a]fter receiving a valid request, the servicer must refund any interest charges in excess of the six-percent rate cap, dated from the servicemember's receipt of orders calling her onto active duty").

²¹¹ *See* PETRAEUS & CHOPRA, *supra* note 1, at 7.

²¹² *See* PETRAEUS & CHOPRA, *supra* note 1, at 7.

²¹³ *See* PETRAEUS & CHOPRA, *supra* note 1, at 7 ("[T]he SCRA requires the servicer to continue to provide this benefit for the duration of the servicemember's time on active duty, as reflected in the servicemember's orders.").

²¹⁴ *See* PETRAEUS & CHOPRA, *supra* note 1, at 7 n.11 (stating that the servicemember must initially provide "a copy of the military orders calling the servicemember to military service and any orders further extending military service").

they were asked to provide orders that included an end date for their active duty service. As one servicemember told the CFPB:

I received a letter from [my lender] stating they needed verification of my beginning and end dates of active service. . . . Shortly thereafter, I sent them a letter stating that because I was a commissioned officer I did not have an end date, and I provided with them a copy of the DOD Manpower printout stating I was still on active duty. At the end of last month I received a letter stating that was not good enough, and that I needed to provide new orders or a letter from my commanding officer.²¹⁵

This sort of practice places an "unnecessary burden on active duty servicemembers—particularly on officers whose orders do not typically contain an active-duty end date."²¹⁶ Servicemembers have access to an online database provided by the Department of Defense that provides an avenue for the servicer to verify whether or not a servicemember is on active duty.²¹⁷ This avenue should be used to ensure a servicemember's status in order to remove any burden on the servicemember who may be deployed or otherwise occupied with military affairs.²¹⁸

Further, loan discharge policies may create problems for service-disabled veterans and military families. The Department of Veterans Affairs can discharge federal student loans if a servicemember is permanently disabled.²¹⁹ However, discharge for death or permanent disability of a servicemember is not required for private student loan lenders.²²⁰ Some private lenders do provide grant loan forgiveness on a case-by-case basis "and, in some cases, this may be required under the terms of private student loan contracts."²²¹ However, the forgiveness is not required by law.²²²

Lastly, standards for awarding benefits are inconsistent and thus may frequently be misapplied by servicers.²²³ As has been seen in the overview of the different resources available to servicemembers in Section I of this paper, there are various requirements for each individual option provided to servicemembers.²²⁴ The varying

²¹⁵ PETRAEUS & CHOPRA, *supra* note 1, at 8.

²¹⁶ PETRAEUS & CHOPRA, *supra* note 1, at 8.

²¹⁷ PETRAEUS & CHOPRA, *supra* note 1, at 8 (explaining that servicers can use a borrower's name and Social Security number to verify a borrower's current active-duty status).

²¹⁸ See PETRAEUS & CHOPRA, *supra* note 1, at 8 (arguing that the burden of verification should not be on the borrower).

²¹⁹ See 34 C.F.R. § 685.213(b)(7)(ii)–(iii), (c)(1) (2016).

²²⁰ See PETRAEUS & FROTMAN, *supra* note 205, at 9.

²²¹ See PETRAEUS & FROTMAN, *supra* note 205, at 9.

²²² See PETRAEUS & FROTMAN, *supra* note 205, at 9 (explaining that while federal law requires federal student loans be discharged upon the borrower's death, private student lenders are not required by law to offer military borrowers a disability discharge).

²²³ See PETRAEUS & FROTMAN, *supra* note 205, at 19 (contrasting the protections available for student loan borrowers against the protections available for borrowers with mortgages).

²²⁴ See PETRAEUS & CHOPRA, *supra* note 1, at 9.

requirements can make the application of the various benefits available to servicemembers difficult. Further, the fact that these benefits are scattered in various statutes across the United States Code and Code of Federal Regulations make them difficult to find, let alone apply, to each individual servicemember with student loans. Finally, because each specific benefit is found in a "patchwork of different federal statutes and lender-specific policies, there are different eligibility requirements for receiving each benefit, and each benefit may not be available for every type of loan."²²⁵

To combat the difficulties facing servicemembers, the CFPB and the DOE are working on a number of fronts to help servicemembers and their families.²²⁶ The two federal agencies have worked towards a goal of making the avenues available to servicemembers more transparent, thus providing a more complete understanding of the servicemembers' options.

The first of these projects was the development of a "Know Before You Owe" project to solicit input on a "financial aid shopping sheet."²²⁷ The goal of the initiative was to "help students understand the debt implications of their college choice."²²⁸ The result of the project was to ensure that "all schools participating in the Department of Defense Tuition Assistance program will be required to use a 'shopping sheet' modeled after this project."²²⁹ Another of these projects is the CFPB's web-based Student Debt Repayment Assistant.²³⁰ This website was launched in an effort to "help servicemembers better understand their student loan repayment options and make sense of the costs and risks that accompany each choice."²³¹ The CFPB went further by beginning to accept "private student loan complaints to help ensure that private student lenders and servicers are responsive to potential mistakes and problems that borrowers encounter."²³² The CFPB has also partnered with the military Judge Advocate Generals to "provide up-to-date training on the various benefits available to servicemembers."²³³ The efforts made by the CFPB and the DOE are a step in the right direction. However, they are not enough to ensure that the servicemembers who sacrifice so much to protect our country are protected from ballooning interest rates and a confusing list of benefits offered to them. Information alone will not solve the problem facing the servicemembers of this country. A confusing statutory code serves only the attorneys hired to enforce its provisions instead of benefitting the individuals for whom it was intended. In order to do what is right by our country's servicemembers, this confusing statutory code must be streamlined and amended to ensure that it applies to both federal and private student loans.

²²⁵ PETRAEUS & CHOPRA, *supra* note 1, at 9.

²²⁶ See PETRAEUS & CHOPRA, *supra* note 1, at 10.

²²⁷ PETRAEUS & CHOPRA, *supra* note 1, at 10.

²²⁸ PETRAEUS & CHOPRA, *supra* note 1, at 10.

²²⁹ PETRAEUS & CHOPRA, *supra* note 1, at 10.

²³⁰ CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/paying-for-college/repay-student-debt/#Question-1> (last visited Sept. 21, 2017).

²³¹ PETRAEUS & CHOPRA, *supra* note 1, at 10.

²³² PETRAEUS & CHOPRA, *supra* note 1, at 10–11.

²³³ PETRAEUS & CHOPRA, *supra* note 1, at 11.

III. PROPOSAL

In order to protect servicemembers, the statutory code must be amended in a number of ways. First and most important, a new bill needs to be passed which will address the issues facing servicemembers with student loans in a comprehensive fashion. The first change that needs to occur is an extensive overhaul of the regulations that pertain to a servicemembers' student loan benefits.

Section I of this paper covered nine different benefits available to servicemembers.²³⁴ These nine different benefits are located in nine different locations across the Code of Federal Regulations and the United States Code. The maze of regulations that needs to be sifted through in order to fully understand all of the benefits available to a servicemember is complicated enough. Further, these regulations do not cover any individual regulation provided by the loan servicers and agreed to by the servicemember.

In order to simplify this, all of these regulations need to be brought under the umbrella of one statute. The most likely location for this consolidated bill would be within the SCRA after the Six Percent Rule. This will likely be a long and complicated amendment to an already complicated bill but the benefits of having a one stop shop to locate all of the benefits available to a servicemember will be helpful to military Judge Advocates and any other attorney charged with interpreting the benefits of servicemembers with student loans.

The second change that should take place is an effort to bring all loans, whether private or federal, under each regulatory provision noted in Section I of this paper.²³⁵ As of November 20, 2012, approximately forty-one percent of servicemembers carried student loan debt.²³⁶ This number has surely increased in the last five years since student loans continue to grow every year.²³⁷ Although private student loans only make up 7.6% of the \$1.31 trillion student loan market (roughly \$99.7 billion), our servicemembers deserve the same protection for these loans as any other loans they receive from the federal government. As the law currently stands, a servicemember who has decided to, or who lacked any other choice but to take out a private loan, has only the option to limit the interest rate to six percent under the SCRA²³⁸ unless there is an agreement stating that the servicemember has other rights similar to those described in Section I.²³⁹

²³⁴ See discussion *supra* Section I.

²³⁵ See discussion *supra* Section I.

²³⁶ Press Release, Sen. Ben Cardin, Senators Call for End to Obstacles Facing Service Members with Student Loan Debt (Nov. 20, 2012), available at <https://www.cardin.senate.gov/newsroom/press/release/cardin-joins-other-senators-in-calling-for-end-to-obstacles-facing-troops-burdened-with-student-loan-debt>.

²³⁷ Jeffrey Sparshott, *Congratulations, Class of 2015. You're the Most Indebted Ever (For Now)*, WALL STREET J.: REAL TIME ECONOMICS, May 8, 2015, <http://blogs.wsj.com/economics/2015/05/08/congratulations-class-of-2015-youre-the-most-indebted-ever-for-now/>.

²³⁸ See H.R. 4137, *supra* note 34 and accompanying text.

²³⁹ See discussion *supra* Section I.

The extension of the protections allowed under federal loans will only apply to the small proportion of the private student loan market being affected. The only revenue lost to the private loan servicers will be the revenue generated from the small number of loans that have been granted to servicemembers who also qualify for one of the exceptions defined in Section I above.²⁴⁰ Although the servicemembers did enter into these loan agreements willingly, the government should make it a point to protect these men and women and ensure that the benefits they receive for their service will be the same whether the student loan is private or federal.

Third, certain protections should be expanded to more than just what is allowed under the current state of the law. First, the SCRA Six Percent Rule should be given annual review to ensure that the interest rate cap is still advantageous and a draw for individuals deciding between the military and other more lucrative career opportunities. As an example, the interest rates for federal student loans dispersed between July 1, 2015 and July 1, 2016 are at 4.29% for subsidized and unsubsidized loans for undergraduates (down from 4.66% last academic year) and 5.84% (down from 6.21% last academic year).²⁴¹ These interest rates are below the Six Percent Rule and ultimately render the Six Percent Rule useless for individuals taking out federal student loans who enter the armed services. Without a periodic reevaluation of the interest rate cap, the Six Percent Rule will be useless as it relates to student loans.

Another area that should be expanded is the zero percent interest rate cap that currently only applies to servicemembers serving in hostile areas.²⁴² As the military moves away from boots on the ground combat to combat involving unmanned vehicles, the interest rate cap will apply to fewer and fewer individuals. Expansion of the zero percent interest rate cap to other individuals will protect servicemembers who choose to postpone federal student loan repayment under the Military Service Deferment from ballooning student loan debt as a result of continued interest rates accrual.

Finally, the HEROES Act Waiver should be expanded and amended to a uniform application to be administered through the DOE and applied to all loan servicers. In order to streamline the system and ensure that a servicemember is given every benefit he or she is entitled to under the law, the servicemember should be able to file one application for the benefits available to him or her with the DOE. Then, the DOE should inform the loan servicers that a servicemember has applied for the various benefits available under this new statute. The loan servicer should also be required to use the online database provided by the Department of Defense²⁴³ to examine the application and ensure that the servicemember qualifies for the benefit. If the servicemember does not qualify for any of the benefits, the loan servicer should be

²⁴⁰ See discussion *supra* Section I.

²⁴¹ Troy Onink, *College Student Loan Rates Drop For 2015-2016 Academic Year*, FORBES, May 31, 2015, <http://www.forbes.com/sites/troyonink/2015/05/31/college-student-loan-rates-drop-for-2015-2016-academic-year/>.

²⁴² See U.S. DEP'T OF EDUC., *supra* note 38.

²⁴³ See PETRAEUS & CHOPRA, *supra* note 1, at 8.

required to inform the servicemember of every benefit for which they are unqualified, provide details about why he or she does not qualify, and provide instructions on how to qualify.

By making these changes to the current state of the law, Congress will take active steps to simplify the process to guarantee that servicemembers are given adequate protection regarding any student loans they have accumulated.

CONCLUSION

This paper is an effort to provide an overview of the various benefits to servicemembers with student loan debt and to provide innovative solutions to the shortcomings of the current system. By evaluating all of the offered benefits and examining the ways they can be improved, this paper is meant to be a resource to servicemembers, legislators, professors, and loan servicers to clarify some of the confusion regarding the rights servicemembers have when it comes to student loans. By pointing out some of the flaws in the current system, this paper seeks to provide assistance to anyone attempting to reevaluate or amend the current system.