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January 13, 2020

Dear Senator Warren:

Under your new administrative student debt cancellation plan, you propose to direct the Secretary of the United States Department of Education (Secretary) to exercise his or her broad existing authority to compromise and modify existing student loans to cancel up to $50,000 in debt for 95% of student loan borrowers (about 42 million people).

In assessing your proposal, we have consulted the statutory and regulatory framework governing federal student loan programs administered by the Department of Education, as well as the framework and controlling interpretations of the budgetary structure of these programs. We conclude that your proposal calls for a lawful and permissible exercise of the Secretary's authority under existing law.

By way of background, the power to create debt is generally understood to include the power to cancel it. This power rests in the first instance with Congress. The Constitution gives to Congress the power to "dispose of" the property of the United States. U.S. Const. Art. IV, sec. 3, Cl. 2. This means that Congress alone is able to "release or otherwise dispose of the rights and property" of the federal government, and thus "[s]ubordinate officers of the United States are without that power, *save only as it has been conferred upon them by an Act of Congress* or is to be implied from other powers." *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294 (1941) (emphasis added).

Congress gave a general but restricted authority to administrative agencies of the executive branch to cancel debt owed to the federal government in the Federal Claims Collection Act of 1966 (FCCA), as amended by the Debt Collection Improvement Act (DCIA), 31 U.S.C. § 3701 *et seq.*[1] The Departments of Justice and the Treasury have promulgated standards by which this authority is to be exercised by agencies, known as the Federal Claims Collection Standards (FCCS), 31 C.F.R. Subt. B, Ch. IX.

However, as relevant to your proposal, Congress has granted the Secretary a more specific and unrestricted authority to create *and* to cancel or modify debt owed under federal student loan programs in the Higher Education Act (HEA) itself. That provision empowers the Secretary to execute the broad debt cancellation plan you have proposed.

[1] In general, the FCCA gives heads of agencies the power, in certain circumstances, to compromise (or, cancel) debts owed to the Government of up to $100,000 (exclusive of interest) without the involvement of the Attorney General. 31 U.S.C. § 3711(a)(2).

A. Statutory Authorization to Create Student Loan Debts and Guarantees

Under the Federal Family Education Loan Program (FFELP), Congress authorized the Department of Education to guarantee (and pay a portion of interest on) loans issued to students in eligible institutions as defined by the program. *See generally* 20 U.S.C. § 1071(a)(1); HEA, Title IV, Part B. Congress authorized appropriations for "such sums as may be necessary" under the program, which "shall remain available until expended," 20 U.S.C. § 1071(b).[2] Generally, funds are expended under FFELP when a guarantee agency makes a demand for payment following borrower default, at which point the loan may be assigned to the Department.[3] Congress has authorized the Secretary in certain circumstances to require a guaranty agency to assign to the Secretary any FFELP loan on which the Secretary has made a payment to the guaranty agency. 20 U.S.C. § 1078(c)(8).

Under the Direct Loan Program (DLP), HEA, Title IV, Part D, Congress made available to the Department of Education "such sums as may be necessary" to lend to "all eligible students (and the eligible parents of such students)" who are eligible under the program. 20 U.S.C. § 1087a(a); *see also* 20 U.S.C. § 1087b(a) ("The Secretary shall provide, on the basis of the need and the eligibility of students…funds for student and parent loans under this part….").

Both FFELP and DLP are mandatory programs that Congress has exempted from annual appropriations requirements,[4] the relevance of which to your proposal is discussed below.

Through the Federal Perkins Loan Program (FPLP), HEA, Title IV, Part E, Congress authorized the Secretary to "carry out a program assisting in the maintenance of funds at institutions of higher education" for making loans to undergraduate students. 20 U.S.C. § 1087aa(a). For each fiscal year, Congress appropriates funds for the FPLP, 20 U.S.C. § 1087aa(b), and directs the Secretary in how to allocate such funds to eligible institutions. 20 U.S.C. § 1087bb.

B. Statutory Authorization to Compromise and Modify Student Loan Debts and Guarantees

Congress enumerated general powers of the Secretary under Title IV, including the power to prescribe such regulations as are necessary to carry out the programs; to sue and be sued in federal court; and to include terms, conditions, and covenants relating to repayment, and to modify such terms. 20 U.S.C. § 1082(a). Although located in the portion of the HEA specific to

[2] Congressional authorization for the Department to make or insure new loans under FFELP terminated as of June 30, 2010. 20 U.S.C. § 1071(d).
[3] 20 U.S.C. § 1080.
[4] *See* OMB Circular No. A-11 (2016), Section 20, p. 6 ("Entitlement refers to a program in which the Federal Government is legally obligated to make payments or provide aid to any person who…meets the legal criteria for eligibility. Entitlements are generally provided by an authorizing statute, and can include loan and grant programs."). Congress separately provided for an appropriation of "such sums as may be necessary" for "administrative expenses necessary for carrying out [Title IV], including expenses for staff personnel, program reviews, and compliance activities." 20 U.S.C. § 1098b.

FFELP, the Secretary openly relies on these authorities in carrying out activities under other Title IV programs,[5] and Congress has acquiesced in this interpretation. Direct Loans are understood to have the same terms and conditions as FFELP loans, 20 U.S.C. § 1087a(b)(2).

i. Secretary's Compromise Authority under the HEA

Amongst the general powers conferred by Congress to the Secretary in the HEA is the power to "enforce, pay, *compromise*, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption." 20 U.S.C. § 1082(a)(6) (emphasis added).[6] This compromise authority was contained in the HEA from its initial enactment.[7] Any exercise of this compromise authority "shall be final and conclusive upon all accounting and other officers of the Government." 20 U.S.C. § 1082(b). The only statutory limitation on this authority is the requirement that the Secretary "may not enter into any settlement of any claim under [Title IV] that exceeds $1,000,000" without requesting "a review of the proposed settlement of such claim by the Attorney General," 20 U.S.C. § 1082(b).[8]

In 1988, the Secretary finalized a regulation, 34 C.F.R. § 30.70, which explains how the Secretary exercises discretion to compromise a debt.[9] This regulation was enacted as part of a package of regulations addressed to the Secretary's general authority to collect debt. As explained, those regulations "supplement the FCCS in those instances where the FCCS requires agency-specific rules or the nature of a particular debt collection activity administered by the Department calls for further clarification of the FCCS. In some cases, these regulations clarify the relationship between the laws administered by the Secretary and the requirements of the

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[5] For example, there is no other Congressional authorization for the Secretary to sue and be sued in the Higher Education Act, and the Secretary regularly initiates and defends lawsuits related to DLP activities. Likewise, the Secretary promulgates regulations under the DLP. Insofar as the general power conferred in §1082 relates to the ability to set terms and conditions of federal student loans, and to cancel or compromise those loans, Congressional intent to apply such powers to DLP loans is evident in the DLP "parity provision," 20 U.S.C. § 1087e(a)(1): "Unless otherwise specified in this part, loans made to borrowers under this part shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers [of FFELP loans]." Statutory discharges exemplify the functioning of the parity provision. Congress has authorized the Secretary to discharge (or, cancel) student loans under the FFELP in circumstances of death, disability, or false certification by an institution of the student's eligibility for the loan. 20 U.S.C. § 1087. The Secretary has promulgated regulations making these discharges available to borrowers under the DLP. *See* 34 C.F.R. §§ 685.212 (discharge of a DLP loan obligation when borrower dies); 685.213 (discharge of a DLP loan obligation when a borrower is disabled); 685.214 (discharge of a DLP loan obligation when a borrower's school closes); 685.215 (discharge of a DLP loan obligation when a borrower's eligibility is falsely certified by an institution).

[6] Subsection (a)(5) authorizes the Secretary to compromise "any claim on, or arising because of, any such insurance or any guaranty agreement" under FFELP.

[7] Pub. Law 89-329, Section 432(a)(6) (Nov. 8, 1965).

[8] Congress similarly granted authority to the Secretary under the FPLP "to enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption," 20 U.S.C. § 1087hh(2).

[9] 53 Fed. Reg. 33424-01 (Aug. 30, 1998).

FCCS."[10] The compromise-specific regulation at § 30.70 clearly preserves the Secretary's authority "to compromise a debt, or suspend or terminate collection of a debt, in any amount," without reference to FCCS or referral to DOJ, "if the debt arises under the Guaranteed Student Loan Program" under Title IV, Part B (FFELP), or Title IV, Part E (PLP). 34 C.F.R. 30.70(h) (eff. until June 30, 2017).[11] With respect to non-Title IV debt, the Secretary would apply the FCCA and FCCS standards only where the Secretary's regulations require that a debt be referred to DOJ for resolution.[12] This requirement is found only in relation to funds misspent by institutional recipients under specific grant programs or cooperative agreements.[13]

As part of the 2016 borrower defense regulations, the Secretary amended § 30.70.[14] The stated intent of the regulatory change was to "reflect a series of statutory changes that have expanded the Secretary's authority to compromise…debts,"[15] and to "[c]larify" that certain limits do "not apply to resolution of claims arising under the FFEL Program, or under the Direct Loan Program or Perkins Loan Program…."[16] The only statutory change to the Title IV compromise authority was the 2008 amendment to section 432 of the HEA to require the Department to provide DOJ an opportunity to review and comment on any proposed resolution of a claim arising under any Title IV program that exceeds $1 million.[17]

The amended §30.70 continues to differentiate the treatment of Title IV debts, addressing them in a new subsection (e). However, this new subsection includes a cross reference to the FCCS—"Subject to [the requirement to consult with DOJ on compromise of a claim over $1 million], *under the provisions of 31 CFR part 902 or 903*, the Secretary may compromise a debt in any amount, or suspend or terminate collection of a debt in any amount, if the debt arises under" FFELP, DLP, or PLP.[18]

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[10] 53 Fed. Reg. at 33424. Other Department regulations clarify that the Secretary may take "any action authorized by law"—not just the FCCA or FCCS—to collect (or compromise) a debt, 30 C.F.R. § 30.1(a), and that the Secretary "complies with the requirements of the FCCS…that are not inconsistent" with the Secretary's own regulations, 30 C.F.R. § 30.1(b).

[11] The pilot version of the DLP was signed into law in the 1992 Reauthorization of the HEA, after the promulgation of this regulation.

[12] 34 C.F.R. § 30.70(a)(1) (eff. until June 30, 2017).

[13] 34 C.F.R. § 30.70(b) (referring to section 452(f) of the General Education Provisions Act (20 U.S.C. § 1234a), which only applies to "recipients" of a "grant or cooperative agreement under an applicable program." With respect to Title IV programs, the Secretary is required to consult with—but not refer to—a proposed compromise of any single Title IV debt that is greater than $1 million, 20 U.S.C. § 1082(b).

[14] 81 Fed. Reg. 75926 (Nov. 1, 2016).

[15] Generally speaking, the FCCS were amended to allow for agencies to compromise debts at a higher dollar level--$100,000 rather than $20,000—without referring them to DOJ.

[16] 81 Fed. Reg. 39330, 39369 (June 16, 2016) (NPRM); *accord* Issue Paper 11, Negotiated Rulemaking Committee, https://www2.ed.gov/policy/highered/reg/hearulemaking/2016/bd3-i11-collection.pdf (proposing to amend § 30.70 to "[c]larify that the generally-applicable $100,000 limit does not apply to resolution of claims arising under" FFELP, DLP, or PLP; "and include the requirement that the Department seek DOJ review of any proposed resolution of a claim exceeding $1,000,000 under any of those loan programs").

[17] *See* Pub. L. 110-315.

[18] 34 C.F.R. 30.70 (e)(1) (eff. July 1, 2017) (emphasis added).

The best reading of the amended regulation is that the Secretary may compromise debts under Title IV programs without following the procedures outlined in the FCCS. *First*, cabining the Secretary's broad authority to compromise Title IV debts under the HEA to the considerations and procedures outlined in the FCCS would constitute a significant limiting of that authority. There is nothing in the regulatory history to suggest this was the intent of the Department. To the contrary, the regulation was revised so as to reflect expansions in the Secretary's authority. *Second*, the language of subsection (e) is not reconcilable with the FCCS. Subsection (e) states that the Secretary may compromise a debt *in any amount*, without prescribing any procedures or considerations for the exercise of that discretion, whereas the FCCS (found in 31 CFR part 902 or 903) apply restrictions on the dollar amounts and prescribe considerations and procedures that an agency must follow before compromising a debt.[19] Moreover, the FCCS, on their own terms, apply *only* when an agency is relying on the Congressional delegation of authority under the FCCA to compromise a debt.[20]

Alternately, it is not inconsistent with the amended regulation for the Secretary to compromise a Title IV debt *outside of*, rather than "under" the provisions of the FCCS. The regulation's language is precatory rather than mandatory, and the statutory authority of § 1082 is broad. The Secretary need not rely on a regulation in order to implement it. Prior to 1988, there was no regulation even addressing the compromise authority, and other powers granted by Congress in § 1082 do not have any implementing regulations, yet are regularly used.[21]

It is also possible that the Secretary could compromise a significant number of outstanding loans in conformity with the FCCS. Specifically, under those standards, agencies may compromise a debt when its collection is in doubt because the debtor is unable to pay the full amount in a

[19] For the same reason, subsection (e) is incongruous with subsection (a)'s language that "the Secretary uses the standards in the FCCS, 31 CFR part 902, to determine whether compromise of a debt is appropriate if the debt arises under a program administered by the Department…."

[20] *See* 31 C.F.R. § 902.1(a) ("The standards set forth in this part apply to the compromise of debts pursuant to 31 U.S.C. § 3711); 31 C.F.R. § 903.1(a) ("The standards set forth in this part apply to the suspension or termination of collection activity pursuant to 31 U.S.C. § 3711); *see also* 31 C.F.R. § 900.1(a) ("The regulations in this chapter prescribe standards for Federal agency use in the administrative collection, offset, compromise, and the suspension or termination of collection activity…, unless specific Federal agency statutes or regulations apply to such activities…."); §900.4 ("the laws and regulations that are specifically applicable to claims collection activities of a particular agency generally take precedence over [the FCCS]").

[21] For example, section 1082(a)(4) authorizes the Secretary to consent to modification of "any note or other instrument evidencing a loan" under Title IV. The Secretary does modify loans even in the absence of any implementing regulations—and the FCCS do not address modification at all. In fact, the Secretary has used the modification power to cancel out, or modify to zero, loan obligations under FFELP and DLP in certain circumstances. *See Carr et al. v. DeVos*, Case No. 19-cv-6597 (S.D.N.Y.), Dkt. No. 15-1 (Decl. of Cristin Bulman), 16 (Stipulation of Dismissal) (Secretary modified DLP and FFELP loans of Plaintiffs pursuant to 20 U.S.C. § 1082(a)(4) resulting in balances of $0.00).

"reasonable time,"[22] or if the cost of collecting a debt is greater than the amount likely recoverable in a single installment.[23]

ii. Secretary's Authority to Modify Loans under the HEA

The Secretary may carry out your plan to cancel existing student loan debt under a distinct statutory authority—the authority to modify existing loans found in 20 U.S.C. § 1082(a)(4). Like the compromise authority, the modification power is included in the FFELP section of the HEA, but is read to apply to the DLP, and has a corollary in the FPLP, *see* 20 U.S.C. § 1087hh(1).

Modification of existing loans under Title IV programs is outside of the FCCA and FCCS, which address compromise and settlement, but not modification. The Secretary has the authority to modify a loan to zero,[24] and exercises this authority even in the absence of any implementing regulations.

Such modification (and, likewise, any act to compromise existing student loans), is permissible under the budgetary standards that govern Title IV programs.

Under the Federal Credit Reform Act of 1990 (FCRA), direct loan obligations and guarantee commitments may only be incurred or made to the extent that their "costs" are annually appropriated by Congress. *See* 2 U.S.C. § 661c(b). However, the FCRA specifically exempts any "direct loan or loan guarantee program" that "constitutes an entitlement (such as the guaranteed student loan program…)" from this appropriations requirement. 2 U.S.C. § 661c(c) (exemption for mandatory programs). Likewise, subsection (c) exempts mandatory programs such as FFELP and DLP from the requirement that any outstanding direct loan or loan guarantee "shall not be modified in a manner that increases its cost" unless the cost increase is provided for in an appropriations Act, 2 U.S.C. § 661c(e). Congress also anticipated and provided "permanent indefinite authority" for agencies' "reestimate" of the cost for a group of direct loans or loan guarantees made in a single fiscal year. 2 U.S.C. § 661c(f).

For the foregoing reasons, we conclude that your proposal calls for a lawful and permissible use of the authority Congress has conferred on the Secretary of Education, which is anticipated and allowed for in the budgetary and accounting treatment of federal student loan programs.

[22] 31 C.F.R. § 902.2(a)(1).
[23] 31 C.F.R. § 902.2(e),(f).
[24] *See* fn 21, supra.

Sincerely,

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