AMERICAN BANKRUPTCY INSTITUTE

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Consumer Track

Student Loans

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Student Loans: The New DOJ Guidelines Regarding Discharge of Student Loans

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OVERVIEW OF STUDENT LOANS

I. GENERAL OVERVIEW OF STUDENT LOANS

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

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

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

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

C. Types of Federal Loans:

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

2. Health and Human Services Loans: The United States Department of Health and Human Services ("HHS") also administered a student loan program, Health Education Access Loan program, ("HEAL"), for borrowers engaged in health-related studies. This program is no longer active. Like FFEL Program loans, HEAL loans are also presumptively nondischargeable. Courts have construed the dischargeability standard of "unconscionability" for HEAL loans as being a "higher standard" than that of FFEL Program/Direct Loan Program loans, which require a showing of "undue hardship." On July 1, 2014, loan administration under the HEAL Program was transferred from HHS to ED. This has enabled HEAL loans to be eligible for consolidation along with FFEL Program loans in the Direct Loan program.

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

II. ADMINISTRATIVE DISCHARGE AND FORGIVENESS REMEDIES

There are numerous administrative remedies for student loan borrowers to consider in lieu of seeking discharge through bankruptcy. Unlike relief under 11 U.S.C § 523(a)(8), borrowers may be entitled to administrative relief irrespective of whether they've filed bankruptcy.[1]

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

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

1. Eligibility Criteria: A person meets TPD eligibility if that individual (1) is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that (i) can be expected to result in death, (ii) has lasted for a continuous period of not less than 60 months, or (iii) can be expected to last for a continuous period of not less than 60 months; or (2) has been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability. 34 C.F.R. § 682.200(b); *see also* 34 C.F.R. 682.402.

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

a. Certification of Service-Related Disability: A veteran may provide documentation from the U.S. Department of Veterans Affairs that indicates that the veteran-borrower is unemployable due to a service-related disability.

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

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

c. Certification with a Social Security award letter: Borrowers who receive Social Security Disability Income or Supplemental Security Income benefits may use their Social Security award ("SSA") letter in lieu of obtaining a separate certification from a physician on the TPD discharge application. The SSA award letter must state that the borrower's next scheduled disability review will be five or more years from the date of the borrower's most recent SSA disability determination.

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

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

d. ED Notification and Application System: Recognizing that Social Security designation is a good indicator of eligibility for a TPD discharge, ED has developed a process under which ED notifies borrowers who are potentially eligible for TPD discharges about the benefit and guide them through steps needed to discharge their loans. ED had been working with the Social Security Administration to create a data match to identify federal student loan borrowers who also receive disability payments and have the specific designation of "Medical Improvement Not Expected". Beginning in April, 2017, borrowers who were positively identified in the match began receiving a customized letter explaining that they are eligible for loan forgiveness and the steps needed to receive a discharge. Unlike other borrowers, those identified through the data match will not be required to submit documentation of their eligibility. Instead, they are eligible for a streamlined process under which they simply sign and return the completed application.

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

If the TPD request is approved, the account is immediately discharged by ED. There is still a three-year post-discharge monitoring period. During this three-year period, borrowers cannot earn more than 100 percent of the federal poverty guidelines for a family of two (in 2019 = $16,910) and cannot have obtained any new federal student loans. Borrowers must notify Nelnet of any address change during the three-year period. Typically, Nelnet will contact the borrower when the three-year mark is approaching to update the disability status and financial status to ensure that the borrower's discharge criteria have not changed. Borrowers who fail to respond with updated information will have their TPD request cancelled and their loans reinstated until they comply with the request for updated information so their account can be finally reviewed.

Borrowers receive an IRS form 1099-C for the cancellation of debt income when the TPD request is approved and the debt is discharged by ED, not at the end of the three-year monitoring period.[2]

B. Closed School Discharge: Borrowers whose school closed (1) on or after January 1, 1986 and (2) before they could complete the program of study may be eligible for discharge. Borrowers must show they were enrolled at the time of closure or that they withdrew from the school not more than 120 days prior to the date the school closed and that they were unable to complete the program of study through a teach-out at another school or by transferring academic credits or hours earned at the closed school to another school. *See* 34 C.F.R. § 682.402.

C. False Certification Discharge: A borrower's student loans can be discharged if a school (1) falsely certified the borrower's (a) eligibility for a federal student loan on the basis of ability to benefit from the education, (b) eligibility generally, but because of a physical or mental condition, age, criminal record, or other reason, the borrower would not meet state requirements for employment in the occupation in which the borrower was being trained; (2) signed the borrower's name without authorization by the borrower on the loan application or promissory note; or (3) because of identity theft, another person obtained a federal student loan using the borrower's identity. *See id.*

D. Death Discharge: If an individual borrower dies or the student for whom a parent received a PLUS loan dies, the obligation of the borrower and any endorser to make any further payments on the loan is automatically discharged. *See id.* If a borrower who entered into a spousal consolidation loan dies, the surviving spouse or former spouse may receive a discharge of the amount of the consolidation loan attributable to the deceased borrower. *Id.*

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

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

[2] Under the Internal Revenue Code, student loan debt forgiven or discharged by TPD may constitute a taxable event, but the taxpayer will typically qualify for an insolvency exclusion from such event. *See* 11 U.S.C. § 108(a)(1)(B).

G. Unpaid Refund Discharge: Borrowers who withdraw from school after receiving a loan may be eligible for partial discharge if the school did not return the portion of the borrower's loan that it was required to return under applicable laws and regulations. If approved, the amount of any unpaid refund will be discharged.

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

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

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

A. Loan Rehabilitation: Federal regulations allow borrowers who default on repayment of their loans a one-time opportunity to bring their loans out of a default status. Payment amounts are set at a reasonable rate as set forth by regulation and borrowers must make nine on-time payments over a 10-month period. The standard payment amount is 15 percent of the amount by which the borrower's adjusted gross income ("AGI") exceeds 150 percent of the federal poverty level for the borrower's family size,[3] with a minimum monthly payment of $5. 34 C.F.R. §§ 682.405(b) (FFEL), 685.211(f)(1) (Direct Loan). For FFELs, after the borrower makes the required timely monthly payments under the new plan and requests rehabilitation, the guarantor must sell the loan to an eligible lender if practicable. 20 U.S.C. § 1078-6(a)(1)(A)(ii); 34 C.F.R. § 682.405(a)(1), (2)(ii). When loans are rehabilitated, collection fees of up to 16 percent of the unpaid principal and accrued interest at the time of sale may be added to the new loan, if the fees are not waived or paid by ED on Direct Loans. 20 U.S.C. § 1078-6(a)(1)(D)(i)(II); 34 C.F.R. § 682.405(b)(1).

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

B. Consolidation: Consolidation benefits a borrower by spreading the payments over a term of up to 30 years, depending on the total loan balance and type of consolidation plan chosen.[4] Since July 1, 2010, new consolidation loans are available only through the Direct Loan

[3] If the borrower objects to the payment amount based on the regulation, then the borrower must complete a Financial Disclosure form and the agency will determine the new rehabilitation payment. Borrowers who reject both payment options or fail to timely provide any required documentation will not be eligible to rehabilitate their loans.

[4] *See* 34 C.F.R. § 685.208(j).

Loan Balance	Maximum Loan Term

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

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

1. Income Based Repayment:

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

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

Less than $7,500	10 years
$7,500 to $9,999	12 years
$10,000 to $19,999	15 years
$20,000 to $39,999	20 years
$40,000 to $59,999	25 years
$60,000 or more	30 years

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

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

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

e. IBR Calculation and Terms: The IBR payment is calculated using the borrower's AGI, from the most recent federal tax return or alternative documentation of income, and family size. The required monthly loan payment under the IBR is capped at 15 percent of annual household earnings above 150 percent of the applicable poverty level, divided by 12. The IBR payment is recalculated annually and updated to reflect in changes in household AGI and family size. Borrowers who earn less than 150 percent of the poverty level for their family size will have a $0 IBR payment but will still be considered "in repayment" and in good-standing.

Borrowers may contact their lender/servicer at any time if they experience a change in financial circumstances that could impact their required IBR payment. The IBR repayment term for most loan balances is 25 years. At the conclusion of the 25-year repayment period, any remaining balance is forgiven.[5] *But see* above in II.F (discussing 10-year repayment term for the Public Service Loan Forgiveness Program).

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

[5] Under the Internal Revenue Code, student loan debt forgiven at the end of the IBR (and ICR, unless it is forgiven under the Public Service Loan Forgiveness Program, discussed below) term may constitute a taxable event. However, any forgiven debt is taxable only to the extent the borrower is solvent *prior* to the loan forgiveness. Thus, it is unlikely that borrowers with large student loan debts will have assets that exceed the debt forgiven 25 years into the future.

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

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

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

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

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

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

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

3. Pay As You Earn: The Pay As You Earn repayment plan is available to eligible borrowers - [6] only Direct Loans are eligible for repayment under PAYE. Under the PAYE plan, eligible borrowers can elect to pay 10 percent of their discretionary income and be eligible for debt forgiveness after 20 years.

4. Revised Pay as You Earn: Revised Pay As You Earn: The Revised Pay As You Earn (REPAYE) plan is also available to qualified borrowers. Only Direct Loans are

[6] Eligible borrowers are new borrowers in 2008 or after and received a disbursement of a loan in 2012 or after. New borrowers include borrowers who had never received a federal loan prior to October 1, 2007, as well as borrowers who did not have an outstanding balance on a federal loan as of the date the borrower received a loan after October 1, 2007. 34 C.F.R. § 685.209(a)(1)(iii).

eligible for repayment under REPAYE. Like the PAYE plan, borrowers repaying their loans can elect to pay 10% of their discretionary income, but there are no disbursement date restrictions to access this plan. However, REPAYE differs from PAYE and the other income-driven plans in two major ways. First, there are two repayment term "tracks:" borrowers repaying only undergraduate loans under REPAYE are eligible for loan forgiveness after 20 years, but borrowers repaying graduate loans under REPAYE are eligible for forgiveness after 25 years. Second, while monthly payments under ICR, IBR, and PAYE take into account the joint income of married spouses only if they file taxes jointly, under REPAYE the monthly payment will be based on the joint marital income of borrowers regardless of marital tax filing status.

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

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

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

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

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

D. Suspension of Payments: In addition to the different types of repayment plans, borrowers may seek deferment or forbearance. Deferment or forbearance may be granted for specific bases stated in federal regulations which include, but are not limited to, poor health, economic hardship, federal student loan payments equal to or greater than 20 percent of monthly gross income, full time student status, or other reasons acceptable to ED.

During a deferment period, the government pays the interest accruing on subsidized loans. The borrower is responsible for interest that accrues on unsubsidized loans during a deferment.

The borrower may pay the accruing interest on any unsubsidized loans or have it added to the principal when the deferment expires.

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

IV. PRACTICE TIPS

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

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

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

THE NEW STUDENT LOAN ATTESTATION FORM AND THE PROPOSED NEW PROCESS

As discussed *supra*, student loan debts are not dischargeable in bankruptcy unless a Debtor can show "undue hardship" under 11 USC §523(a)(8). "Undue hardship" has been defined by the Courts using the test established in *Brunner vs. New York Higher Education Services Corp (In re Brunner)* 49 B.R. (Bankr. S.D.N.Y. 1985), affirmed 831 F.2d 395 (2nd Cir. 1987).

The *Brunner* test has been roundly criticized as a test that only serves to strip student loan debtors "of the refuge of bankruptcy in all but the most extreme circumstances." *Id* at 756. The

Brunner test is a three-factor test that must be proved by a Debtor seeking to discharge student loans in an adversary proceeding. These factors are:

1. The Debtor cannot maintain a minimal standard of living for the debtor and dependents if forced to pay the student loans;
2. Additional circumstances exist which indicate that this state of affairs is likely to persist for a significant portion of the repayment period for the loan; and
3. The Debtor has made good faith attempts to pay off the student loan.

The *Brunner* test has been adopted in the majority of the circuits. As a result, many Debtors have opted not to file an Adversary Proceeding to seek discharge of their student loans as under *Brunner*, "undue hardship" is hard to prove and requires extensive documentation, expensive discovery and uncomfortable testimony.

In light of this, the Department of Justice has established a new Guidance (See **Exhibit A**) with the goal of making the AP process for discharge easier, cheaper, more transparent and consistent. While this new Guidance may effectuate more discharges by providing an easier and cheaper path to discharge for those Debtors, the reality is that the Debtors who qualify for discharge under the guidance would probably already meet the *Brunner* test. The following must be kept in mind with respect to the Guidance:

1. The DOJ recommendation for discharge is not binding on the Court. The court may elect to follow *Brunner* and disregard the recommendation.
2. The DOJ recommendation will follow current case law and will not overturn or alter the *Brunner* test.
3. Administrative programs via the Department of Education may offer a better result than a bankruptcy AP.

To request a discharge of student loans, a Debtor in Bankruptcy will file an Adversary Proceeding seeking discharge of student loans (See a **Sample Complaint attached as Exhibit B**) and then the AP proceeds in an informal manner to a settled resolution between the Debtor and the Department of Education according to the Guidance.

This new procedure will only apply to loans that are guaranteed by the Department of Education and apply only to cases pending or filed after November 17, 2022. It will not apply to a reopened case that was closed before November 17, 2022. The procedure will apply in both Chapters 7 and 13. Currently, private loans are not eligible, but loan payments made on private student loans may be used as an expense on the Attestation.

Once the complaints are served, the debtor will get a letter from the Department of Justice regarding the new Attestation form that is used by the DOJ to review the Debtor's eligibility for discharge with the Department of Education. (See **Attestation Exhibit C**). Generally, this letter will also request a stipulation to extend the time to respond to the Complaint for 90 days pending the attestation process. The Attestation must be provided to the DOJ within 20 days of receipt.

Bear in mind, the Attestation is not filed with the Court and is only used as an informal tool to exchange information. This attestation looks at 3 factors (which are very similar to the *Brunner* factors) in determining if the Debtor is eligible for a discharge of student loans. These three factors are:

i. Debtor's present ability to pay:

Debtor's present ability to pay is Debtor's total gross household income less IRS, local and other actual expenses applicable to your district. Income must be fully disclosed and verified with attachments. The DOJ will use National and Local standards along with actual expenses to determine if Debtor's expenses exceed income. The standards used are posted on IRS.gov and are updated periodically by the IRS.

Actual expenses in other categories will also be considered such as child care, alimony, health insurance not paid by an employer, as well as any other verified expenses not included in the standards above. Note that a Debtor also may exceed a standard; however, the Debtor must be able to attest to the reason for the excess and additional verification regarding that excess will be required.

If a Debtor's income is less than expenses, this element is met. If the Debtor's income is more than expenses, the DOJ looks at the Debtor's ability to pay either all or a part of the student loans. A partial payment determination should be persuasive in seeking a partial discharge, pending the results of the other two factors.

ii. Debtor's Future Ability to Pay

After looking at the Debtor's Income vs. Expenses, the DOJ turns to the Debtor's future ability to pay the student loans. The new Guidance sets up rebuttable presumptions that the Debtor will not be able to pay the Debts in the future. These are:

1. Debtor is over 65;
2. Debtor is disabled or chronically ill or injured impacting the ability to earn income;
3. Debtor has been unemployed for at least 5 of the last 10 years;
4. The Student Loan has been in payment status for at least 10 years; and
5. The Debtor did not get the degree paid for.

The Debtor can also show other factors that may indicate an inability to pay in the future as well. These include Debtor's failure to obtain employment, any familial obligations that impact employment (like caring for elderly parents, or a child with a chronic condition) and Debtor's attempts to maximize income and minimize expenses and still not be able to make the student loan payments. These factors are not rebuttable presumptions, but, if significant, could prove a future inability to repay the student loans. Again, all attestations must be verified and supported by documentation. Finally, the Debtor must disclose all assets, exempt and non-exempt. If the asset could be liquidated easily, the DOJ may consider that asset as part of the Debtor's future ability to pay.

iii. Debtor's Past Payment Attempts

Finally, the Debtor's past attempts to pay student loans are examined. The DOJ is looking for good faith efforts to pay as well as evidence that the Debtor did not abuse the system or willfully contrive the hardship. Evidence of good faith includes payments made, deferment/forbearance or consolidation attempts, IDR (Income Driven Repayment) Plans attempted, Debtor working with Education to make payment arrangements, or otherwise get relief, or Debtor working with 3rd party Debt relief agency to try to resolve student loan issues. No single factor is dispositive, but the Debtor's actions as a whole will be reviewed to determine if the Debtor made good faith attempts at trying to pay off his student loans.

After DOJ reviews the Attestation, the AUSA assigned to the case will consult with the Department of Education and will make a recommendation to the Bankruptcy Court as to dischargeability. The recommendations will be one of the following: to discharge the total debt, to discharge none of the debt or to grant a partial discharge. The DOJ may recommend a total discharge where the Debtor meets all three elements. In instances where the Debtor's present ability to pay reflects that the Debtor may be able to pay part of the student loans back, the DOJ may recommend a partial discharge. Bear in mind, however, that the stipulation for a partial discharge includes a repayment plan that fits within the Debtor's budget at the time of the stipulation and cannot be altered in the future for any reason. So, if the Debtor's circumstances change in the future, the Debtor will be bound to that agreement and the Debtor's subsequent default may wipe out the partial discharge.

Closing Observations

The new Guidance gives the Debtor an easier, less expensive means to obtain a recommendation for discharge. However, will this mean that more Debtors will qualify for discharge than under *Bunner*? This remains to be seen. As stated in the Guidance itself, all recommendations will be made in accordance with current case law, and undue hardship will still need to be proven. (See Guidance, page 1). What the new guidance does is streamline the information gathering process and provide for a less expensive means to recommend a discharge of student loans. It also provides a more consistent approach to settlement across districts. Nevertheless, the caselaw remains the same, the test used by the DOJ is nearly identical to *Brunner* and the Courts can still disregard the recommendation and rule according to the case law.

THE CURRENT STATUS OF BIDEN FORGIVENESS PROGRAM

How the Forgiveness Plan Works

The Biden forgiveness plan was intended to cancel $10,000 in federal student loan debt for non-Pell grant recipients with loans held by the Department of Education, and $20,000 in debt cancellation for Pell Grant recipients. Borrowers were (are?) eligible for relief if their individual income is less than $125,000 ($250,000 for married couples). The program also contains options to help reduce payments for undergraduate loans, and to ease the process for individuals working for nonprofit employers to receive credit towards loan forgiveness.

The plan made approximately 43 million borrowers eligible for some debt forgiveness, with as many as 20 million individuals who could have had debt erased entirely (per the Biden administration). As of March of 2023, the White House reports that approximately 26 million people applied for debt relief, and that 16 million people have had the relief already approved. The Congressional Budget Office reports that the program will cost approximately $400 billion over the next 30 years.

The relief program primarily relied on the Higher Education Relief Opportunities for Students Act (the "HEROES" Act). This was a program originally enacted following 9/11, and was intended to provide financial relief to service members. The Act allows the Secretary of Education to waive or modify terms of federal student loans as necessary when in connection with a national emergency, laying the grounds for the basis of the relief program.

The Supreme Court

In February of 2023, the United States Supreme Court heard two challenges to the Biden relief plan. The first involved six Republican led states (Arkansas, Iowa, Kansas, Missouri, Nebraska, and South Carolina) that sued to prevent implementation of the program, and the second involved a lawsuit filed by two students.

The State-led suit was initially dismissed in the lower courts based on a standing argument that states were not eligible to challenge the relief program because they were not harmed. On appeal, the 8th Circuit stayed the relief program pending appeal. The student-led case involved a student who was not eligible for the relief because the loans were commercially held, and a second student who was eligible only for $10K of relief rather than $20K because he did not receive a Pell grant. A Texas District Court sided with the students and blocked the relief program. The District Court held there was no clear authorization from Congress to implement the program. The Appeals Court left the District Court ruling in place, and the Supreme Court granted cert.

The first question in both matters was standing. Much of the Supreme Court argument focused on the loan servicer known as MOHELA (Missouri Higher Education Loan Authority). The challengers argued that the losses, or potential losses, were enough to confer standing because it was essentially an arm of the State of Missouri.

The second primary question was whether the administration had acted without sufficiently explicit congressional authorization to undertake one of the most ambitious and expensive executive actions in history, and whether that violated separation of powers principles.

Observers have noted that oral argument presented strong challenges to the administration's position. The Court appeared to invoke the "major questions" doctrine, which requires that government initiatives with major political and economic consequences be clearly authorized by Congress. Although the administration argued that the relief program did fit within the statutory language of the HEROES Act, which in turn provided appropriate authority to the Secretary of Education, it is of note that the Supreme Court has already invoked the "major questions" doctrine to curtail the EPA's power to address climate change without clear congressional authorization, and similarly ruled that administrative agencies were not authorized to impose moratoriums on evictions or force large employers to vaccinate employees in the face of the Covid-19 pandemic.

The administration has announced that the student loan pause is extended until 60 days after the Supreme Court issues its ruling, or until 60 days from June 30, 2023, if a decision has not been issued by that date.

Practical Considerations

The reality is that for a large number of consumer bankruptcy filings, the outcome of the Supreme Court decision may not be of great impact. The primary setting it could arise is in Chapter 13. In most chapter 13 cases, student loans are receiving limited distributions during the chapter13 case or are possibly treated as direct pay. However, a decision in favor of the relief plan would affect chapter 13 cases in some limited circumstances (100% plan, large base plan, if student loans are large majority of unsecured class, etc.). If the Supreme Court were to uphold the relief plan, these cases would require amendment and may be able to quickly complete. A majority of minimal base cases would not be largely affected, but it would be essential to review each pending case for potential impact to determine if an advantage may be obtained for your client.

Continue to advise clients and look for the following loans associated with education expenses that are dischargeable:

- Loans where the principal amount was higher than the cost of attendance (such as tuition, books, room, and board), which can occur when a loan is paid directly to a consumer.
- Loans to pay for education at places that are not eligible for Title IV funding such as unaccredited colleges, a school in a foreign country, or unaccredited training and trade certificate programs.
- Loans made to cover fees and living expenses incurred while studying for the bar exam or other professional exams.
- Loans made to cover fees, living expenses, and moving costs associated with medical or dental residency.
- Loans to a student attending school less than half-time.

In sum, there appears to be some positive movement toward assisting student debtors. Time will reveal whether this movement will materialize or whether the courts and student debtors will be left with the *Brunner* test and its rigid application.

November 17, 2022

GUIDANCE FOR DEPARTMENT ATTORNEYS REGARDING STUDENT LOAN BANKRUPTCY LITIGATION

I. Introduction

This memorandum provides guidance (Guidance) to Department of Justice (Department) attorneys regarding requests to discharge student loans in bankruptcy cases. Developed in coordination with the Department of Education (Education), this Guidance will enhance consistency and equity in the handling of these cases. In accordance with existing case law and Education policy, the Guidance advises Department attorneys to stipulate to the facts demonstrating that a debt would impose an undue hardship and recommend to the court that a debtor's student loan be discharged if three conditions are satisfied: (1) the debtor presently lacks an ability to repay the loan; (2) the debtor's inability to pay the loan is likely to persist in the future; and (3) the debtor has acted in good faith in the past in attempting to repay the loan.

To assist the Department attorney in evaluating each of these factors, a debtor will typically be asked to provide relevant information to the government by completing an attestation form (Attestation). The Attestation requests information about the debtor's income and expenses to enable the Department attorney to evaluate the debtor's present ability to pay. The Attestation also seeks information that will help the Department attorney evaluate the other two factors. In the following sections, this Guidance provides more detail about the Attestation that a debtor will be asked to complete, and how the information provided in the Attestation will be considered by the Department attorney. In Appendix A, this Guidance provides a sample attestation form. In addition, in Appendix B, this Guidance provides a concrete example of how a debtor's request for discharge of a student loan will be evaluated.

II. Objectives of the Guidance and Education's Role in Supporting Discharge Cases

In cases where a debtor seeks the discharge of a student loan in bankruptcy, the Department shares with Education the responsibility to represent the interests of the United States in accord with existing law and in the interests of justice. This responsibility includes recommending that a bankruptcy court grant full or partial discharge of student loan debts in appropriate cases. To fulfill that responsibility, Department attorneys should stipulate to facts necessary to demonstrate undue hardship and recommend discharge where the debtor provides information in the Attestation (or otherwise during the adversary proceeding) that satisfies the elements of the analysis below. Some debtors have been deterred from seeking discharge of student loans in bankruptcy due to the historically low probability of success and due to the mistaken belief that student loans are ineligible for discharge. Other student loan borrowers have been dissuaded from seeking relief due to the cost and intrusiveness entailed in pursuing an

adversary proceeding. This Guidance is intended to redress these concerns so that discharges are sought and received when warranted by the facts and law. In addition, Department attorneys are expected to consult proactively with Education to evaluate the specific circumstances of each case.

In collaborating in the preparation of this Guidance, the Department and Education have sought to promote three goals in particular:

1. To set clear, transparent, and consistent expectations for discharge that debtors understand regardless of representation;
2. To reduce debtors' burdens in pursuing an adversary proceeding by simplifying the fact-gathering process. This includes use of an Attestation, and where feasible, information provided through prior submissions to the bankruptcy court and available student loan servicing records;
3. Where the facts support it, to increase the number of cases where the government stipulates to the facts demonstrating a debt would impose an undue hardship and recommends to the court that a debtor's student loans be discharged.

Education is committed to supporting Department attorneys handling these cases. Department attorneys should expect that, for each adversary proceeding, Education will provide to the Department attorney a record of the debtor's account history, loan details, and—where available—educational history, which the Department attorney will share with the debtor. This information will be provided with the Education litigation report.

The Department attorney is expected to consult with Education in each case; consultation includes sharing the completed Attestation and conferring on an appropriate course of action. In its initial litigation report, Education will advise on matters including whether it has data relating to the presumptions in this Guidance regarding assessment of future circumstances and whether it considers the debtor made good faith efforts to repay their student loans. This process will ensure the final decision is informed by Education's experience administering student loans and its role as creditor. Once the Department attorney reaches a recommendation in accordance with this Guidance, the Department attorney shall submit their recommendation or approval, as appropriate, along with Education's recommendation, under the standard procedures applicable in that attorney's component.

III. Applicable Law

Under Section 523(a)(8) of the Bankruptcy Code, certain student loans may not be discharged in bankruptcy unless the bankruptcy court determines that payment of the loan "would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 278 (2010) ("the bankruptcy court must make an independent determination of undue hardship . . . even if the creditor fails to object or appear in the adversary proceeding.").[1] This inquiry is undertaken through a formal adversary proceeding in the bankruptcy court. *United Student Aid Funds*, 559 U.S. at 263-64; Fed. R. Bankr. P. 7001(6). The parties in that proceeding may stipulate to the existence of certain facts and recommend that the bankruptcy court find, based on such facts, that repayment of the student loan would cause the debtor an undue hardship.

The most common framework for assessing undue hardship is the so-called *Brunner* test, emanating from *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987). To discharge a student loan under the *Brunner* test, a bankruptcy court must find that the debtor has established that (1) the debtor cannot presently maintain a minimal standard of living if required to repay the student loan, (2) circumstances exist that indicate the debtor's financial situation is likely to persist into the future for a significant portion of the loan repayment period, and (3) the debtor has made good faith efforts in the past to repay the student loan. *Id.* at 396.

Other courts have employed a "totality of circumstances" test (Totality Test) to determine whether repayment of student loan debt would cause an undue hardship. *See, e.g.*, *In re Long*, 322 F.3d 549, 553 (8th Cir. 2003). The Totality Test looks to: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and their dependents' reasonably necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. *Id.*

This Guidance applies in both *Brunner* and Totality Test jurisdictions. Courts have recognized the *Brunner* and Totality Tests "consider similar information—the debtor's current and prospective financial situation in relation to the educational debt and the debtor's efforts at repayment." *In re Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); *see also In re Jesperson*, 571

[1] Section 523(a)(8) requires the debtor to demonstrate an undue hardship to discharge nearly all federal student loans, excluding Health Education Assistance Loans, as well as private education loans that meet the definition of qualified education loans under the Internal Revenue Code. *See* 26 U.S.C. § 221(d)(1).

F.3d 775, 779 (8th Cir. 2009).[2] Both tests require assessment of the debtor's income and reasonable expenses to determine whether the debtor has the present and future ability to maintain a "minimal standard of living" while making student loan payments. *See, e.g.*, *In re Hurst*, 553 B.R. 133, 137 (B.A.P. 8th Cir. 2017) ("[I]f the debtor's reasonable financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged.") (citing *In re Jesperson*, 571 F.3d at 779). Finally, both tests direct the court to review the debtor's past efforts at repayment. *In re Polleys*, 356 F.3d at 1309; *see also In re Bronsdon,* 435 B.R. 791, 797 (B.A.P. 1st Cir. 2010).

IV. Discussion of the Applicable Factors

As explained above, consideration of student loan debt discharge requires an evaluation of a debtor's present, future, and past financial circumstances. This Guidance offers a framework for Department attorneys to apply each of these factors.

With respect to the first factor, the Guidance relies upon the Internal Revenue Service Collection Financial Standards (the IRS Standards) to assess whether a debtor can presently maintain a "minimal standard of living" if required to repay student loan debt. In particular, the Department attorney is advised to use the IRS Standards to evaluate a debtor's expenses, and then to compare those expenses to the debtor's income, to determine whether the debtor has a present ability to pay the loan.

With respect to the second factor, the Guidance uses presumptions for determining whether inability to repay is likely to persist in the future. The Guidance recognizes, however, that even in the absence of such presumptions a debtor may be able to establish that their inability to pay will continue in the future.

With respect to the third factor, the Guidance identifies certain objective criteria that evidence a borrower's good faith. In addition, the Guidance discusses how to evaluate a debtor's

[2] The Eighth Circuit has described the Totality Test as "less restrictive" than the *Brunner* framework, *In re Long*, 322 F.3d at 554, but it has also recognized that the distinction between the standards "may not be that significant." *Jesperson*, 571 F.3d at 779 n.1, 782. *See, e.g.*, *In re Long,* 322 F.3d at 554-55 ("Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged. Certainly, this determination will require a special consideration of the debtor's present employment and financial situation—including assets, expenses, and earnings—along with the prospect of future changes—positive or adverse—in the debtor's financial position"); *see also Jesperson*, 571 F.3d at 782 (the totality approach also requires consideration of "evidence of a less than good faith effort to repay . . . student loan debts"). The Guidance does not supersede applicable case law in the circuits. Department attorneys should advance the principles and goals described in this Guidance consistent with that case law.

payment history and decision to participate in an income-driven repayment plan, and clarifies that neither of these factors are dispositive evidence where other evidence of good faith exists.

Finally, the Guidance also provides direction to Department attorneys regarding the treatment of a debtor's assets and the availability of partial discharge.

The Attestation provided with this Guidance will assist in the assembly of the information needed to assess these factors.[3] Department attorneys are expected to review completed Attestations in consultation with Education.

A. Assessment of Present Circumstances

The first factor relevant to whether a student loan debtor can meet the statutory undue hardship standard requires the debtor to prove an inability to presently maintain "a minimal standard of living" while making student loan payments. To address this factor, the Department attorney should complete two steps. First, the Department attorney should use the IRS Standards to determine the debtor's "allowable" expenses. Second, the attorney should compare those allowable expenses to the debtor's income to determine whether the debtor has income after expenses with which to make student loan payments. If the debtor's allowable expenses exceed their gross income, this element of the analysis is satisfied. If the debtor's financial circumstances changed since filing the initial bankruptcy petition, the Department attorney can look to the debtor's actual financial circumstances when making an undue hardship determination. *Cf. In re Walker* 650 F.3d 1227, 1232 (8th Cir. 2011).

1. Assessment of the Debtor's Expenses

The Attestation solicits expense information from debtors in categories corresponding to the IRS Standards, particularly the portions of the IRS Standards described as "National and Local Standards" and "Other Necessary Expenses."[4] The IRS Standards are a useful guide to assess a debtor's expenses for purposes of the "minimal standard of living" inquiry. Use of these standards will ensure more consistent and equitable treatment of debtors seeking discharge. The IRS has established and updated the IRS Standards to determine appropriate collection actions where taxpayers have outstanding unpaid tax obligations. The IRS Standards evaluate what

[3] As discussed in more detail below, the Attestation requires a debtor to present information relevant to the Department attorney's analysis in an efficient, organized manner. If the debtor's satisfaction of the requirements for discharge are clearly demonstrated by the complaint or other facts available outside the Attestation, then upon verification of those facts, a Department attorney may recommend discharge without requiring that the debtor complete the Attestation.

[4] Links to the IRS Standards are found at https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards.

expenses are "necessary to provide for a taxpayer's health and welfare[,]"[5] or, as described in the IRS Collection Manual, "the *minimum* a taxpayer and family needs to live."[6] Courts have recognized the IRS Standards as useful objective criteria in assessing "undue hardship" under Section 523(a)(8). *See, e.g.*, *In re O'Hearn*, 339 F.3d 559, 565 (7th Cir. 2003); *In re Cota*, 298 B.R. 408, 415 (Bankr. D. Ariz. 2003). The IRS Standards list certain expenses (the National and Local Standards) for which they provide a recommended maximum allowance, but also recognize other potential expenses (Other Necessary Expenses) that are potentially necessary for an individual's health and welfare.

Allowance of Expenses in National Standard Categories: The IRS National Standards consist of tables of allowable expense amounts in the following categories: food; housekeeping supplies; apparel and services; personal care products and services; and miscellaneous. Where the debtor's expenses are below the amount allowed under the IRS National Standards, no further inquiry into the debtor's actual expense amount is needed and the debtor is allowed the full National Standards amount. If a debtor's reported expenses exceed the IRS National Standard amount, a debtor's reasonable explanation for why particular actual expenses exceed the standard should be considered carefully by the Department attorney, in consultation with Education, and may be accepted if allowing the additional expenses is warranted by the debtor's circumstances and would comport with a "minimal standard of living."[7]

Allowance of Expenses in Local Standards Categories: The Local Standards provide expense standards for the categories of housing, utilities, and transportation. Unlike the expenses in the National Standards category, for the Local Standards categories, the Department attorney should limit the debtor to their *actual* expenses. To the extent such expenses do not exceed the amount prescribed in the Local Standards for the debtor's location and household size, Department attorneys should consider the debtor's actual expenses in these categories to be consistent with a minimal standard of living and treat such amount as allowed. If the debtor's actual expense exceeds the Local Standards amount, Department attorneys should generally limit the debtor's allowable expense to the standard amount. However, as with those expenses categorized as National Standards expenses, the Department attorney should, in consultation

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[5] IRS, *Collection Financial Standards*, https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards.

[6] IRS, Internal Revenue Manual: Part 5.15.1.8 (July 24, 2019), https://www.irs.gov/irm/part5/irm_05-015-001#idm139862108264304 (emphasis added).

[7] The decision whether to allow expenses in excess of the National and Local Standards will necessarily be fact-intensive, but allowable excess expenses could, for example, include specific health-related costs, costs for special dietary needs, unique commuting requirements, or other needs of the debtor or dependents.

with Education, carefully consider and accept a debtor's reasonable explanation for the need for the additional expenses.

Allowance of Other Necessary Expenses: The IRS Standards recognize "Other Necessary Expenses" in addition to the National and Local Standards expenses. The Attestation requests that debtors list expenses in these "Other Necessary Expense" categories. For example, the IRS Standards allow expenses for alimony and child support payments if they are court-ordered and actually being paid, as well as for baby-sitting, day care, nursery and preschool costs where reasonable and necessary. These Other Necessary Expenses are consistent with a "minimal standard of living," so long as they are necessary and reasonable in amount.[8]

Allowance for Reasonable Expenses Not Incurred: In addition to the comparison of expenses and income described above, Department attorneys should also recognize there may be circumstances in which a debtor's actual expenditures fall below the expenses required to maintain a minimal standard of living and to meet basic needs. For example, a debtor may be living in housing that the debtor is not paying for (e.g., the debtor is staying with a family member) or living in substandard or overcrowded housing but should not be required to remain there indefinitely. Likewise, a debtor may be forgoing spending on childcare, dependent care, technology, or healthcare that would otherwise be expenses one would reasonably expect to maintain a minimal living standard. A simple comparison of present expenses and income could unduly assess the debtor's financial situation against a standard that is below a minimal standard of living. In such circumstances, it would be inappropriate to conclude a debtor possesses income with which to make student loan payments and ignore the debtor's actual living standard. To address these situations, the Attestation provides an opportunity for a debtor to identify and explain expenses the debtor would incur if able to address needs that are unmet or insufficiently provided for. The Department attorney should use those projected expenses in assessing the debtor's present and future financial circumstances. Unless the amount of the projected expenses exceeds the Local Standards, it is not necessary to probe the debtor's calculation.

Appendix B includes specific examples of the recommended analysis of expenses.[9]

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[8] The Department attorney may consult the IRS Standards themselves to assist in determining whether these expenses are necessary to a debtor's minimal standard of living.

[9] The Attestation process is intended to be distinct from the bankruptcy "means test," which is used to determine a debtor's eligibility for Chapter 7 relief. Although the means test also uses the IRS Standards as part of its calculation of a debtor's household disposable income for the purpose of establishing bankruptcy eligibility, courts have recognized that the means test is not a test of a "minimal standard of living." *See In re Miller*, 409 B.R. 299, 319–320 (Bankr. E.D. Pa. 2009) (means test not appropriate to determine whether the "undue hardship" standard is met) (citing *In re Savage*, 311 B.R. 835, 840 n.7 (1st Cir. B.A.P. 2004). Moreover, the means test calculation differs from the Attestation in specific ways, including that (1) the means test (unlike

2. *Comparison of Expenses with the Debtor's Gross Income*

After determining the debtor's allowable household expenses using the National and Local Standards and Other Necessary Expenses, the Department attorney should compare the debtor's expenses to the debtor's household gross income. Gross income includes income from employment of the debtor and other household members, as well as unemployment benefits, Social Security benefits and other income sources. Debtors normally provide this information in the Schedule I filing. Where debtors filed this form less than 18 months prior to the adversary proceeding, the debtor may use the information on Schedule I to complete the Attestation. Where Schedule I was filed more than 18 months prior to the adversary proceeding or the debtor's circumstances have changed, the Attestation directs the debtor to provide the new income information.

Using the expense and income information provided in the Attestation, the Department attorney should determine whether the debtor possesses income with which to make student loan payments. If the debtor's allowable expenses exceed the debtor's income, the minimal standard of living requirement is satisfied and the debtor may be eligible for a student loan discharge, subject to consideration of the additional factors below. If, however, after considering the analysis described above, the debtor has sufficient discretionary income to make full student loan payments as required under their loan agreement, the debtor has not satisfied the test for undue hardship.[10] Where a debtor's income allows for payment toward the student loan debt but in an amount insufficient to cover the required monthly student loan payment, the Department attorney

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the Attestation) is required only for "consumer" debtors whose income exceeds a state "median," and (2) in practice, the means test often allows expenses regardless of their necessity to the debtor's basic or minimal standard of living, such as payments on multiple vehicles or for real property other than the debtor's residence.

[10] Department attorneys are expected to consult with Education to determine the monthly repayment amount. Generally, where permitted in a given jurisdiction, the Department attorney should use the monthly payment amount due under a "standard" repayment plan for the student loan in question when determining whether the debtor has the ability to make payments. The standard repayment amount is the payment amount required to pay the student loan within the remaining term of the loan, as determined by Education. *See* 34 C.F.R. § 685.208. Where the account includes unpaid interest, Department attorneys should take care to ensure that the monthly payment amount would be sufficient to pay the loan obligation in full. Except as required by controlling law, the Department attorney should not use the monthly payment amount available through income-driven repayment plan options as the comparator. Finally, where a student loan has been accelerated, whether based on a debtor's payment default or otherwise, the Department attorney should, following consultation with Education, determine the standard repayment amount either prior to default or as calculated if the loan were removed from default status.

should consider the potential for a partial discharge (discussed more fully in Section IV.E. below).

B. Assessment of Future Circumstances

The second factor for discharge is whether the debtor's current inability to repay the debt while maintaining a minimal standard of living will likely persist for a significant portion of the repayment period. This showing is required in both *Brunner* Test and Totality Test jurisdictions. *See In re Thomas,* 931 F.3d 449, 452 (5th Cir. 2019); *In re Long*, 322 F.3d at 554.

A presumption that a debtor's inability to repay debt will persist is to be applied in certain circumstances, including: (1) the debtor is age 65 or older; (2) the debtor has a disability or chronic injury impacting their income potential;[11] (3) the debtor has been unemployed for at least five of the last ten years; (4) the debtor has failed to obtain the degree for which the loan was procured; and (5) the loan has been in payment status other than 'in-school' for at least ten years.[12] The Attestation is designed to identify any such circumstances, and it advises the debtor to disclose all of the circumstances applicable to their situation and not rely exclusively on a single presumptive basis for claiming a continuing inability to repay.

The presumptions identified in this Guidance are rebuttable. Although circumstances supporting rebuttal of a presumption will likely be uncommon, the Department attorney need not apply a particular presumption if the debtor's attestation nonetheless indicates a likely future ability to pay. Such a rebuttal must be based on concrete factual circumstances. Mere conjecture about the borrower's future ability is not enough. For example, the presumption in favor of a

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[11] The debtor may, but is not required to, submit information from a treating physician indicating that the debtor suffers from a disability or chronic injury impacting their income potential, and when provided, that information should be considered carefully. The presumption may be applied even in the absence of a formal medical opinion.

Education offers Total and Permanent Disability (TPD) discharge for qualifying borrowers with certain severe disabilities. Because TPD discharge has its own requirements, the existence of that potential administrative relief generally should not foreclose the debtor from showing a future inability to pay. If, in the view of the Department attorney, the debtor may qualify for TPD discharge, the attorney can provide information to the debtor about the program. Finally, Education's denial of a TPD discharge request is not dispositive of the future circumstances analysis: a prior denial for TPD discharge only implies that Education determined the borrower is likely to have some ability to earn income at the time of the application based on the information provided and evaluation criteria in place, but does not otherwise suggest that the debtor's income is sufficient to service student loan debt or that future circumstances are likely to change.

[12] In the case of consolidation loans, the length of time the debtor has been in repayment includes periods in repayment on the original underlying loans.

debtor who failed to obtain a degree may be rebutted by evidence that the debtor has received employment offers with salaries significantly higher than their current income. In sum, a presumption may be rebutted by evidence that a debtor's future financial circumstances render them able to pay their outstanding debt.

The presumptions identified above are not the sole bases upon which a future inability to pay may be found. A debtor may attest to any facts the debtor believes are relevant to future inability to pay, and the Department attorney should review the Attestation to determine whether the facts presented by the debtor satisfy the standards for proof of likely persistence of inability to pay. A Department attorney may find, for example, that a debtor's financial circumstances are unlikely to improve in the future where the debtor has a significant history of unemployment, even if the debtor's unemployment does not meet the criteria for a presumption. A stipulation may also be appropriate, even absent a particular presumption, where the institution that granted the debtor's degree has closed, and that closure has inhibited a debtor's future earning capacity.[13] Education has indicated that closure of a school after completion of the debtor's degree may affect a debtor's future ability to pay where the debtor incurs reputational harm from such closure or where the debtor's lack of access to records hampers employment efforts.[14]

C. Assessment of Good Faith

Whether a debtor has demonstrated good faith with regard to repayment of student loan debt depends upon the debtor's actions relative to their loan obligation.[15] Good faith may be demonstrated in numerous ways and the good faith inquiry "should not be used as a means for courts" or Department attorneys "to impose their own values on a debtor's life choices." *Polleys*, 356 F.3d at 1310. A debt should not be discharged if the debtor has "willfully contrive[d] a hardship in order to discharge student loans," *id.*, abused the student loan system, *In re Coco*, 335 Fed. App'x 224, 228-29 (3rd Cir. 2009), for example, by committing fraud in connection with obtaining the loans, or otherwise demonstrated a lack of interest in repaying the debt, *id*.

[13] Education offers a loan discharge for students attending a school that closed while the borrower was in attendance or shortly after withdrawal. As with a TPD discharge, the availability of this administrative relief should have limited influence on the analysis discussed in this Guidance. Debtors may not receive the "closed-school" discharge for a range of reasons that do not implicate their financial status.

[14] The presumptions discussed in this Guidance are intended to direct a Department attorney's assessment of the debtor's situation and do not shift any burden of proof in undue hardship litigation. Before the court in the adversary proceeding, the debtor retains the burden of proof on all elements of the undue hardship claim.

[15] In discussing good faith, this Guidance intends to encompass satisfaction of both Prong Three of the *Brunner* test and good faith as considered under the Totality Test in evaluating the debtor's past efforts at repayment.

Where the debtor has taken at least one of the following steps and in the absence of countervailing circumstances as discussed below, the steps demonstrate good faith. We would normally expect the Department attorney to be able to determine the presence of any countervailing circumstances based on the information contained in the Attestation and provided by Education or that is publicly available.

Evidence of good faith: The following steps evidence good faith:

- making a payment;
- applying for a deferment or forbearance (other than in-school or grace period deferments);
- applying for an IDRP plan;
- applying for a federal consolidation loan;
- responding to outreach from a servicer or collector;
- engaging meaningfully with Education or their loan servicer, regarding payment options, forbearance and deferment options, or loan consolidation; or
- engaging meaningfully with a third party they believed would assist them in managing their student loan debt.

The good faith standard also assesses criteria such as "the debtor's efforts to obtain employment, maximize income and minimize expenses." *In re Mosko*, 515 F.3d 319, 324 (4th Cir. 2008) (citing *In re O'Hearn*, 339 F.3d at 564); *see, e.g.*, *In re Jesperson,* 571 F.3d at 780. A debtor's handling of finances in a manner that suggests responsible management of their debts, including student loan debts, also suggests good faith. A debtor has minimized expenses if their expenses fall within the IRS Standards as discussed in this Guidance.[16] Good faith can be satisfied where debtors' personal or family obligations significantly reduce their employment opportunities or increase their expenses." Issues concerning employment, income, and expenses are case-specific and may be highly dependent on a debtor's family, community, and individual circumstances. Debtors may provide an explanation of those circumstances, and the Department attorney should weigh the explanation in consultation with Education.

Actual payment history and IDRP enrollment: Department attorneys should consider the following two issues that frequently arise and deserve additional attention: a debtor's actual payment history and a debtor's enrollment or non-enrollment in an IDRP. Department of Education studies have shown that the servicing of student loan debt has been plagued at times

[16] By contrast, a debtor whose expenses exceed the IRS Standards should not be foreclosed from showing they have minimized expenses, and the Department attorney and Education should carefully assess any explanations debtors may provide for exceeding the standard expenses.

by administrative errors and dissemination of confusing and inaccurate information, and that these issues may have affected debtors' responses to their loan obligations. In addition, the Consumer Financial Protection Bureau has found that debtors have been wrongfully denied IDRP enrollment and that monthly payments have been inaccurately calculated. *See* Consumer Financial Protection Bureau, *Supervisory Highlights* Fall 2022, Summer 2021, and Fall. The Bureau has also found that servicers falsely but affirmatively represented to borrowers that loans were never dischargeable in bankruptcy. *See* Consumer Financial Protection Bureau, *Supervisory Highlights*, Fall 2014 & Fall 2015. These problems have also given rise to a lack of trust by debtors in the repayment process. As a result, the good faith inquiry should not disqualify debtors who may not have meaningfully engaged with the repayment process due to possible misinformation, wrongful IDRP determinations, or a lack of adequate information or guidance. When considering a debtor's attempts to engage with their student loan, attorneys should look at the entire life of the loan rather than merely considering the recent history.

Department attorneys should consider payment history within the broader context of the debtor's financial means and personal circumstances. Where other evidence of good faith exists, including evidence that the debtor lacked financial means to pay or that the debtor made meaningful contact with Education or the servicer to explore repayment options, the failure to repay (or inconsistent or limited repayment) does not indicate a lack of good faith. In some circumstances, the Department of Education may not have records or have incomplete records about a debtor. The absence of ED data should not reduce the weight of the borrower's evidence.[17]

Department attorneys should also exercise caution in assessing IDRP enrollment. IDRPs are intended to provide a means through which debtors may respond to difficult financial circumstances, and the model Attestation asks a debtor to identify if they enrolled in an IDRP and to offer an explanation if they did not. Where a debtor participated in an IDRP, this factor is evidence of good faith.[18]

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[17] Between March 2020 and December 2022, borrowers were placed into an automatic COVID-related forbearance. The vast majority of borrowers remained in that forbearance for the duration of the period because it included a zero percent interest rate and eligibility toward IDRP and PSLF forgiveness. Due to this extended period, many debtors may not have taken any action toward their loans. This period of inactivity is not evidence of bad faith and actions taken prior to March 2020 should not be discounted because they are not recent.

[18] *See, e.g.*, *In re Tingling*, 990 F.3d 304, 309 (2d Cir 2021); *In re Krieger*, 713 F.3d 882, 884 (7th Cir. 2013); *In re Coco*, 2009 WL 1426757, at *228–229; *In re Mosko*, 515 F.3d at 323; *In re Barrett*, 487 F.3d 353, 363-64 (6th Cir. 2007); *In re Mosley*, 494 F.3d 1320, 1327 (11th Cir. 2007); *In re Jesperson*, 571 F.3d at 782-83; *In re Nys*, 446 F.3d 938, 947 (9th Cir. 2007); *In re Alderete*, 412 F.3d 1200, 1206 (10th Cir. 2005); *In re Bronsdon*, 435 B.R. at 802.

However, where a debtor has not enrolled in an IDRP, the Department attorney should give significant weight to the fact that, as noted, Education has found widespread problems with IDRP servicing. In particular, Education has advised that IDRPs have not always been administered in ways that have been effective for, or accessible to, student loan debtors. In some cases, borrowers may not have been aware of their IDRP options. At times, servicers failed to inform borrowers about these options in favor of other repayment plans or nonpayment options like forbearance. Likewise, many schools have failed to advise prospective borrowers about IDRPs, despite being legally obligated to do so. *See* 20 U.S.C. § 1092(d). Thus, non-enrollment alone does not show a lack of good faith.

Where a debtor did not enroll in an IDRP, the Department attorney is expected to look first to the debtor's Attestation response and to accept any reasonable explanation or evidence supporting the debtor's non-enrollment in an IDRP. Acceptable explanations or evidence could include, for example:

- that the debtor was denied access to, or diverted or discouraged from using, an IDRP, and instead relied on an option like forbearance or deferment;
- that the debtor was provided inaccurate, incomprehensible, or incomplete information about the merits of an IDRP;
- that the debtor had a plausible belief that an IDRP would not have meaningfully improved their financial situation;
- that the debtor was unaware, after reasonable engagement, of the option of an IDRP and its benefits; or
- where permitted under controlling case law, that the debtor was concerned with the potential tax consequences of loan forgiveness at the conclusion of an IDRP.

Where these explanations are based in part on contact or attempted contact with Education, servicers, or trusted third parties, they evidence good faith.

If a debtor provides an explanation that lacks sufficient detail or is not otherwise acceptable (or fails to provide any explanation), the debtor may still demonstrate good faith through other actions such as making payments, responding to outreach from a servicer or collector, enrolling in deferment or forbearance, making contact with Education or their servicer about their loan, or otherwise taking professional or financial steps that indicate a good-faith attempt to meet their loan obligations. In sum, we would expect Department attorneys not to oppose discharge for lack of good faith where there is a basis to conclude that the debtor's IDRP non-enrollment was not a willful attempt to avoid repayment.

D. Consideration of a Debtor's Assets

A debtor's assets must also be considered in the undue hardship analysis. Department attorneys, however, should not give dispositive weight to the existence of assets that are not easily converted to cash or are otherwise critical to the debtor's well-being, and should be cautious in concluding that the existence of real property or other financial assets demonstrates a lack of undue hardship.[19]

The Attestation facilitates this inquiry by seeking information regarding the debtor's assets. It may be appropriate to suggest that a debtor consider liquidating an asset where the asset is unnecessary to the debtor's and dependents' support and welfare. Residential real property and funds in retirement accounts are often exempt from collection under federal or state exemption laws. Although the exempt status of property may not be dispositive of whether that property is necessary for a minimal standard of living, the Department attorney should be careful in considering such property in the undue hardship analysis. *In re Marcotte*, 455 B.R. 460, 471 (Bankr. D.S.C. 2011).[20] The Department recognizes that liquidating a primary residence or retirement account is an extreme measure and therefore requests to liquidate those assets should be exceptionally rare.

E. Partial Discharge.

Where appropriate and permissible under governing case law, Department attorneys may recognize the availability of partial discharge. Partial discharge occurs where the bankruptcy

[19] The debtors' assets may be liquidated by a bankruptcy trustee to fund payments to creditors of the estate. Such property, if liquidated by the trustee, would not be available for the payment of student loan debt and thus should not be considered.

[20] The question of how exempt property should be considered under the "undue hardship" analysis has generated disagreement among courts. Generally, courts find that "the exempt character of an asset does not necessarily preempt its relevance to a hardship evaluation." *In re Armesto*, 298 B.R. 45, 48 (Bankr. W.D.N.Y. 2003); *see also In re Nys*, 446 F.3d at 947 (recognizing courts must consider availability of assets "whether or not exempt, which could be used to pay the loan"); *In re Gleason*, 2017 Bankr. LEXIS 3455, at *14 (Bankr. N.D.N.Y. Oct. 6, 2017) (allowing consideration of IRA or 401K account, regardless of exemption status). Other courts, however, have noted the necessity to weigh the policies underlying certain exemptions, for example, the homestead exemption in the debtor's residence, before considering such assets in assessing undue hardship. *Schatz v. Access Grp., Inc. (In re Schatz)*, 602 B.R. 411, 427-28 (1st Cir. B.A.P. 2019) (reversing bankruptcy court's treatment of exempt equity in homestead as dispositive of a lack of undue hardship). Notably, the *Schatz* opinion states that the bankruptcy court failed to make any finding whether the equity in the debtor's home could be liquidated without imposing an undue hardship on the debtor. *Id.* at 428.

court discharges a portion of the outstanding student loan debt while requiring payment of the remainder.[21]

Department attorneys may consider recommending partial discharge based upon a determination that the debtor has the ability to make some payments on the loan while maintaining a minimal standard of living, but an inability to make the full standard monthly repayment due. A partial discharge should not result in a remaining (undischarged) balance larger than what a debtor's discretionary income (as determined under the Prong One analysis) permits them to pay off in monthly payments over the remaining loan term. In practice, a full discharge is appropriate for debtors whose expenses are equal to or greater than their income where they meet the other elements of the analysis. Partial discharge may also be available to a debtor who is able to liquidate assets to pay a portion of the debt but remains unable to pay the remainder while maintaining a minimal standard of living. *See In re Stevenson*, 463 B.R. 586, 598-99 (Bankr. D. Mass. 2011); *In re Clavell*, 611 B.R. 504, 531-32 (Bankr. S.D.N.Y. 2020).

V. Procedures

Although the process for soliciting and reviewing the Attestation may vary from case to case, Department attorneys should generally observe the following procedures in soliciting Attestations.

A. Submission of the Attestation

Upon a debtor's commencement of an adversary proceeding seeking discharge pursuant to 11 U.S.C. § 523(a)(8), the Department attorney should provide a debtor the opportunity to complete and submit the Attestation. The Department attorney is encouraged to contact the debtor or debtor's counsel as soon as practicable after service of process in an adversary

[21] Section 523(a)(8) is silent with respect to whether bankruptcy courts may discharge part of a student loan based on undue hardship. The concept, however, has been recognized by several courts of appeals. *See generally In re Miller*, 377 F.3d 616, 622 (6th Cir 2004); *In re Saxman*, 325 F.3d 1168, 1173-1174 (9th Cir. 2003); *In re Alderete*, 412 F.3d at 1207; *In re Cox*, 338 F.3d 1238, 1243 (11th Cir. 2003). In most jurisdictions where no circuit level authority exists, lower courts have permitted partial discharges. *See, e.g.*, *In re Rumer*, 469 B.R. 553, 564 n.12 (Bankr. M.D. Pa. 2012) (recognizing majority rule is to allow partial discharges); *In re Gill*, 326 B.R. 611, 644 (Bankr. E.D. Va. 2005) (recognizing lower courts have generally allowed partial discharges); *but see, e.g.*, *In re Conway*, 495 B.R. 416, 423 (B.A.P. 8th Cir. 2013) (explaining that the general rule prevents discharging parts of individual loans). Prior to any partial discharge, a debtor must have established all elements necessary for an undue hardship determination. *See In re Saxman*, 325 F.3d at 1175; *Hemar Ins. Co. of Am. v. Cox (In re Cox)*, 338 F.3d 1238, 1243 (11th Cir. 2003).

proceeding, advising the debtor of the opportunity to submit the Attestation for review by the United States. Any Attestation should be submitted by a debtor under oath by signing under penalty of perjury pursuant to 28 U.S.C.§ 1746. The Attestation requests that a debtor provide documents corroborating the debtor's stated income (tax returns, or where appropriate, paystubs or other documents proving income). The Department attorney may seek additional evidence where necessary to support representations in the Attestation.

Education will provide debtors' account history and loan details to the Department and that information will be provided to the debtor with the Attestation form.

B. Time for Attestation

Ideally, the Department attorney would solicit the Attestation from the debtor at the outset of the case to permit early consideration whether to stipulate to facts relevant to undue hardship. The Department attorney is not required to impose any strict time limit for the Attestation.

C. Bankruptcy Court Authority

The Department attorney should advise debtors that although the United States may stipulate to facts relevant to undue hardship and recommend to the bankruptcy court that a finding of undue hardship is appropriate, the United States' position is not binding on the bankruptcy court, which will render its own determination whether a debtor has met the standard for an undue hardship discharge. Department attorneys and debtors should cooperate to file appropriate documents to enable the court to consider whether to issue an order to discharge student loan debt based upon undue hardship.

VI. Conclusion

The goal of this Guidance is to provide Department attorneys with a consistent and practical approach for handling student loan discharge litigation. Because of the fact-specific nature of such litigation, questions may arise about how the Guidance should be applied in particular cases. For assistance in interpreting and implementing the Guidance, Department attorneys are invited to contact the Commercial Litigation Branch, Corporate/Financial Litigation Section of the Civil Division.[22]

[22] This memorandum applies only to future bankruptcy proceedings, as well as (wherever practical) matters pending as of the date of this Guidance. This Guidance is an internal Department of Justice policy directed at Department components and employees. Accordingly, it is not intended to and does not create any rights, substantive or procedural, enforceable at law by any party in any matter.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

In re:

Case No.
Chapter 13
Honorable: Daniel S. Opperman

Debtor(s)

Plaintiff

AP Case No:
Hon. Daniel S. Opperman

vs.

Defendant
_____/

COMPLAINT TO DETERMINE DISCHARGEABILITY
OF STUDENT LOANS UNDER 11 U.S.C. §523(a)(8)

JURISDICTION

1. The United States District Court for the Eastern District of Michigan has jurisdiction of this action pursuant to 28 U.S.C. §1334 because plaintiff's dischargeability complaint arises under Title 11.
2. The United States Bankruptcy Court for the Eastern District of Michigan has jurisdiction of this action pursuant to 28 U.S.C. §157 and Rule 7001 of the Federal Rules of Bankruptcy Procedure, in that it arises under the plaintiff's bankruptcy case number _____filed under Chapter _____ of Title 11 in this United States Bankruptcy Court for the Eastern District of Michigan (_____ Division).

3. Plaintiff's dischargeability complaint is a core proceeding under 28 U.S.C. §157(b)(2), and plaintiff consents to entry of final orders and judgment by the bankruptcy judge in this adversary proceeding.

4. Venue is proper in this district because plaintiff resides in _____ in this district and filed her bankruptcy in the Eastern District of Michigan.

5. The relief requested in this Complaint is predicated upon section 523(a)(8) of the Bankruptcy Code, 11 U.S.C. §523(a)(8), and Rule 7001 of the Federal Rules of Bankruptcy Procedure.

PARTIES

6. _____("Plaintiff") is an individual living in _____. Plaintiff's educational debts to defendants are collectively referred to as "student loans" in this complaint.

7. Defendant United States Department of Education ("DOE") is the owner of all of the plaintiff's outstanding student loans.

FACTS

8. Plaintiff attended _____ hereinafter "_____") from _____ through _____ and received (didn't receive) a degree in _____.

9. Plaintiff attended _____ hereinafter "_____") from _____ through _____ and received (didn't receive) a degree in _____.

10. To finance the education, the plaintiff borrowed a total of $_____ in federal student loans, with interest rates ranging from _____ to _____. No payments were due on these loans while the plaintiff was a full-time student.
11. The current cumulative balance on these loans is $_____.
12. Under the original terms of the student loans, plaintiff was required to resume payments six months after graduation (around _____), and the monthly payment required to pay off all loans during the standard loan repayment period would have ranged between $_____ and $_____ for a period of _____ years, or until _____.
13. Plaintiff was unable to find a job immediately after graduation. Plaintiff applied and interviewed for many jobs but was unable to get a job because_____.
14. Plaintiff eventually found a job as an _____. Plaintiff's starting wages were $_____ per hour and currently, Plaintiff's wages are $_____ per hour.
15. Plaintiff could not afford to start making payments of $_____ per month in as required. On _____ she applied for and was accepted into DOE's income-based repayment ("IBR") program, with her required payment being $_____ per month.
16. Plaintiff has made a good faith attempt to repay the student loans. Once Plaintiff was accepted in the IBR program, plaintiff made the following payments:

17. Plaintiff became unable to make further payments because

    _____.

18. Special circumstances exist that indicate plaintiff's inability to repay the student loans will continue through the loan repayment period. These circumstances are

    _____

    _____

    _____

    _____.

19. Due these circumstances, Plaintiff has been

    _____. Plaintiff receives limited public benefits of Medicaid medical insurance and SNAP (food stamps) of $_____ per month.

20. Plaintiff has unable to work since _____. Plaintiff does not know if or when Plaintiff will ever be able to return to work in any capacity

21. Plaintiff cannot maintain a minimal standard of living if required to repay the student loans to defendants.

22. Even if plaintiff were able to return to work, it would be impossible for Plaintiff to pay off the loan balance within the repayment term of the loan.

23. Plaintiff has made all reasonable efforts to maximize income after graduating from school. Plaintiff's current situation prevents her from being able to have any gainful employment now or in the foreseeable future.

CAUSE OF ACTION

24. Plaintiff incorporates the above allegations by reference.

25. Plaintiff has established that requiring Plaintiff to repay the student loans would impose an undue hardship on plaintiff:

- Plaintiff cannot maintain a minimal standard of living for herself if forced to repay Plaintiff's student loans;
- Due to _____, plaintiff's current financial situation is likely to continue during the repayment period;
- Plaintiff has made a good-faith effort to repay the student loans.

WHEREFORE, plaintiff requests:

1. An order determining plaintiff's debts to defendants as alleged above are discharged pursuant to 11 U.S.C. §523(a)(8) because excepting plaintiff's debts to defendants from discharge would impose an undue hardship on plaintiff under the three-prong Brunner test;
2. For other equitable relief this Court may determine is fair and just.

[Updated January 2023]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF _____

In re:	)	
	)	
	)	Case No. _____
	)	Chapter [7]
Debtors.	)	
	)	
_____	)	
	)	
	)	
	)	
Plaintiff,	)	Adversary Pro. _____
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF EDUCATION, [et al.],	)	
	)	
Defendant[s].	)	
_____	)	

ATTESTATION OF [_____] IN SUPPORT
OF REQUEST FOR STIPULATION CONCEDING
DISCHARGEABILITY OF STUDENT LOANS

PLEASE NOTE: This Attestation should be submitted to the Assistant United States Attorney handling the case. It should not be filed with the court unless such a filing is directed by the court or an attorney.

I, [_____], make this Attestation in support of my claim that excepting the student loans described herein from discharge would cause an "undue hardship" to myself and my dependents within the meaning of 11 U.S.C. §523(a)(8). In support of this Attestation, I state the following under penalty of perjury:

I. PERSONAL INFORMATION

1. I am over the age of eighteen and am competent to make this Attestation.

[Updated January 2023]

2. I reside at _____ [address], in _____ County, _____[state].

3. My household includes the following persons (including myself):

_____ [full name] _____[age] _____[self]

_____ [full name] _____[age] _____[relationship]

_____ [full name] _____[age] _____[relationship]

_____ [full name] _____[age] _____[relationship]

_____ [full name] _____[age] _____[relationship]

_____ [full name] _____[age] _____[relationship]

Questions four through eight request information related to your outstanding student loan debt and your educational history. The Department of Education will furnish this information to the Assistant United States Attorney ("AUSA") handling your case, and it should be provided to you. If you agree that the information provided to you regarding your student loan debt and educational history is accurate, you may simply confirm that you agree, and these questions do not need to be completed. If you have not received the information from Education or the AUSA at the time you are completing this form, or if the information is not accurate, you may answer these questions based upon your own knowledge. If you have more than <u>one</u> student loan which you are seeking to discharge in this adversary proceeding, please confirm that the AUSA has complete and accurate information for each loan, or provide that information for each loan.

4. I confirm that the student loan information and educational history provided to me and attached to this Attestation is correct and complete: YES ☐ NO ☐ No Information Provided ☐

[If you answered anything other than "YES," you must answer questions five through eight].

5. The outstanding balance of the student loan[s] I am seeking to discharge in this adversary proceeding is $_____.

[Updated January 2023]

6. The current monthly payment on such loan[s] is _____. The loan[s] are scheduled to be repaid in _____ [month and year] **[OR]** ☐ My student loan[s] went into default in _____ [month and year].

7. I incurred the student loan[s] I am seeking to discharge while attending _____, where I was pursuing a _____ degree with a specialization in _____.

8. In _____ [month and year], I completed my course of study and received a _____ degree. **[OR]** In _____ [month and year], I left my course of study and did not receive a degree.

9. I am currently employed as a _____. My employer's name and address is _____ **[OR]** ☐ I am not currently employed.

II. CURRENT INCOME AND EXPENSES

10. I do not have the ability to make payments on my student loans while maintaining a minimal standard of living for myself and my household. I submit the following information to demonstrate this:

A. Household Gross Income

11. My current monthly household ***gross*** income from all sources is $_____.[1] This amount includes the following monthly amounts:

[1] "Gross income" means your income before any payroll deductions (for taxes, Social Security, health insurance, etc.) or deductions from other sources of income. You may have included information about your gross income on documents previously filed in your bankruptcy case , including Form B 106I, Schedule I - Your Income (Schedule I). If you filed your Schedule I within the past 18 months and the income information on those documents has not changed, you may refer to that document for the income information provided here. If you filed Schedule I more than 18 months prior to this Attestation, or your income has changed, you should provide your new income information.

[Updated January 2023]

$_____ my ***gross*** income from employment (if any)
$_____ my unemployment benefits
$_____ my Social Security Benefits
$_____ my _____
$_____ my _____
$_____ my _____
$_____ ***gross*** income from employment of other members of household
$_____ unemployment benefits received by other members of household
$_____ Social Security benefits received by other members of household
$_____ other income from any source received by other members of household

12. The current monthly household gross income stated above (select which applies):

☐ Includes a monthly average of the gross income shown on the most recent tax return[s] filed for myself and other members of my household, which are attached, and the amounts stated on such tax returns have not changed materially since the tax year of such returns; OR

☐ Represents an average amount calculated from the most recent two months of gross income stated on four (4) consecutive paystubs from my current employment, which are attached; OR

☐ My current monthly household gross income is not accurately reflected on either recent tax returns or paystubs from current employment, and I have submitted instead the following documents verifying current gross household income from employment of household members:

_____

13. In addition, I have submitted _____ verifying the sources of income other than income from employment, as such income is not shown on [most recent tax return[s] or paystubs].

[Updated January 2023]

B. Monthly Expenses

14. My current monthly household expenses do/do not exceed the amounts listed below based on the number of people in my household for the following categories:

(a) Living Expenses[2]

i. My expenses for food — do exceed ☐ do not exceed ☐
$431 (one person)
$779 (two persons)
$903 (three persons)
$1028 (four persons)

ii. My expenses for housekeeping supplies — do exceed ☐ do not exceed ☐
$40 (one person)
$82 (two persons)
$74 (three persons)
$85 (four persons)

iii. My expenses for apparel & services — do exceed ☐ do not exceed ☐
$99 (one person)
$161(two persons)
$206 (three persons)
$279 (four persons)

iv. My expenses for (non-medical) personal care products and services — do exceed ☐ do not exceed ☐
$45 (one person)
$82 (two persons)
$78 (three persons)
$96 (four persons)

v. My miscellaneous expenses (not included elsewhere on this Attestation) — do exceed ☐ do not exceed ☐
$170 (one person)
$306 (two persons)
$349 (three persons)
$412 (four persons)

vi. My total expenses in these categories — do exceed ☐ do not exceed ☐
$785 (one person)

[2] The living expenses listed in Question 14 and 15 have been adopted from the Internal Revenue Service Collection Financial Standards "National Standards" and "Local Standards" for the year in which this form is issued. This form is updated annually to reflect changes to these expenses.

[Updated January 2023]

$1410 (two persons)
$1610 (three persons)
$1900 (four persons in household)
Add $344 per each additional member if more than four in household.

If you answered that your total expenses for any of the categories (i) through (v) exceed the applicable amount listed in those categories, and you would like the AUSA to consider your additional expenses for any such categories as necessary, you may list the total expenses for any such categories and explain the need for such expenses here. (You do not need to provide any additional information if you answered that your total expenses did not exceed the applicable amount listed in subsection (vi)).

(b) Uninsured medical costs:

My uninsured, out of pocket medical costs do exceed ☐ do not exceed ☐

$75 (per household member under 65)
$153 (per household member 65 or older)

If you answered that your uninsured, out of pocket medical costs exceed the listed amounts for any household member, and you would like the AUSA to consider such additional expenses as necessary, you may list the household member's total expenses and explain the need for such expenses here.

[If you filed a Form 122A-2 Chapter 7 Means Test or 122C-2 Calculation of Disposable Income in your bankruptcy case, you may refer to lines 6 and 7 of those forms for information.][3]

[3] Forms 122A-2 and 122C-2 are referred to collectively here as the "Means Test." If you filed a Means Test in your bankruptcy case, you may refer to it for information requested here and in

[Updated January 2023]

15. My current monthly household expenses in the following categories are as follows:

(a) Payroll Deductions

i. Taxes, Medicare and Social Security $_____
[You may refer to line 16 of the Means Test or Schedule I, line 5]

ii. Contributions to retirement accounts $_____
[You may refer to line 17 of the Means Test or Schedule I, line 5]

Are these contributions required as a condition of your employment? YES☐ / NO☐

iii. Union dues $_____
[You may refer to line 17 of the Means Test or Schedule I, line 5]

iv. Life insurance $_____
[You may refer to line 18 of the Means Test or Schedule I, line 5]

Are the payments for a term policy covering your life? YES☐ / NO☐

v. Court-ordered alimony and child support $_____
[You may refer to line 19 of the Means Test or Schedule I, line 5]

vi. Health insurance $_____
[You may refer to line 25 of the Means Test or Schedule I, line 5]

Does the policy cover any persons other than yourself and your family members? YES☐ / NO☐

vii. Other payroll deductions

_____ $_____
_____ $_____
_____ $_____

other expense categories below. If you did not file a Means Test, you may refer to your Schedule I and Form 106J – Your Expenses (Schedule J) in the bankruptcy case, which may also list information relevant to these categories. You should only use information from these documents if your expenses have not changed since you filed them.

[Updated January 2023]

(b) Housing Costs[4]

i.	Mortgage or rent payments	$_____
ii.	Property taxes (if paid separately)	$_____
iii.	Homeowners or renters insurance (if paid separately)	$_____
iv.	Home maintenance and repair (average last 12 months' amounts)	$_____
v.	Utilities (include monthly gas, electric water, heating oil, garbage collection, residential telephone service, cell phone service, cable television, and internet service)	$_____

(c) Transportation Costs

i.	Vehicle payments (itemize per vehicle)	$_____
ii.	Monthly average costs of operating vehicles (including gas, routine maintenance, monthly insurance cost)	$_____
iii.	Public transportation costs	$_____

(d) Other Necessary Expenses

i. Court-ordered alimony and child support payments (if not deducted from pay) $_____
[You may refer to line 19 of Form 122A-2 or 122C-2 or Schedule J, line 18]

ii. Babysitting, day care, nursery and preschool costs $_____
[You may refer to line 21 of Form 122A-2 or 122C-2 or Schedule J, line 8][5]

Explain the circumstances making it necessary for you to expend this amount:

[4] You should list the expenses you actually pay in Housing Costs and Transportation Costs categories. If these expenses have not changed since you filed your Schedule J, you may refer to the expenses listed there, including housing expenses (generally on lines 4 through 6 of Schedule J) and transportation expenses (generally on lines 12, 15c and 17).

[5] Line 8 of Schedule J allows listing of expenses for "childcare and children's education costs." You should not list any educational expenses for your children here, aside from necessary nursery or preschool costs.

[Updated January 2023]

iii. Health insurance $_____
(if not deducted from pay)
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Does the policy cover any persons other than yourself and your family members? YES☐ / NO☐

iv. Life insurance $_____
(if not deducted from pay)
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Are the payments for a term policy covering your life? YES☐ / NO☐

v. Dependent care (for elderly or disabled family members) $_____
[You may refer to line 26 of the Means Test or Schedule J, line 19]

Explain the circumstances making it necessary for you to expend this amount:

vi. Payments on delinquent federal, state or local tax debt $_____
[You may refer to line 35 of the Means Test or Schedule J, line 17]

Are these payments being made pursuant to an agreement with the taxing authority? YES☐ / NO☐

vii. Payments on other student loans I am not seeking to discharge $_____

viii. Other expenses I believe necessary for a minimal standard of living. $_____

Explain the circumstances making it necessary for you to expend this amount:

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16. After deducting the foregoing monthly expenses from my household gross income, I have _____ [no, or amount] remaining income.

17. In addition to the foregoing expenses, I anticipate I will incur additional monthly expenses in the future for my, and my dependents', basic needs that are currently not met.[6] These include the following:

III. FUTURE INABILITY TO REPAY STUDENT LOANS

18. For the following reasons, it should be presumed that my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

☐ I am age 65 or older.

☐ The student loans I am seeking to discharge have been in repayment status for at least 10 years (excluding any period during which I was enrolled as a student).

☐ I did not complete the degree for which I incurred the student loan[s].

Describe how not completing your degree has inhibited your future earning capacity:

☐ I have a disability or chronic injury impacting my income potential.

[6] If you have forgone expenses for any basic needs and anticipate that you will incur such expenses in the future, you may list them here and explain the circumstances making it necessary for you to incur such expenses.

[Updated January 2023]

Describe the disability or injury and its effects on your ability to work, and indicate whether you receive any governmental benefits attributable to this disability or injury:

☐ I have been unemployed for at least five of the past ten years.

Please explain your efforts to obtain employment.

19. For the following additional reasons, my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

☐ I incurred the student loans I am seeking to discharge in pursuit of a degree from an institution that is now closed.

Describe how the school closure inhibited your future earnings capacity:

☐ I am not currently employed.

☐ I am currently employed, but I am unable to obtain employment in the field for which I am educated or have received specialized training.

Describe reasons for inability to obtain such employment, and indicate if you have ever been able to obtain such employment:

[Updated January 2023]

☐ I am currently employed, but my income is insufficient to pay my loans and unlikely to increase to an amount necessary to make substantial payments on the student loans I am seeking to discharge.

Please explain why you believe this is so:

☐ Other circumstances exist making it unlikely I will be able to make payments for a significant part of the repayment period.

Explain these circumstances:

IV. PRIOR EFFORTS TO REPAY LOANS

20. I have made good faith efforts to repay the student loans at issue in this proceeding, including the following efforts:

21. Since receiving the student loans at issue, I have made a total of $_____ in payments on the loans, including the following:

___ regular monthly payments of $_____ each.

___ additional payments, including $_____, $_____, and $_____.

22. I have applied for ____ forbearances or deferments. I spent a period totaling ___ months in forbearance or deferment.

23. I have attempted to contact the company that services or collects on my student loans or the Department of Education regarding payment options, forbearance and deferment options, or loan consolidation at least _____ times.

[Updated January 2023]

24. I have sought to enroll in one or more "Income Driven Repayment Programs" or similar repayment programs offered by the Department of Education, including the following:

Description of efforts:

25. [If you did not enroll in such a program]. I have not enrolled in an "Income Driven Repayment Program" or similar repayment program offered by the Department of Education for the following reasons:

26. Describe any other facts indicating you have acted in good faith in the past in attempting to repay the student loan(s) you are seeking to discharge. These may include efforts to obtain employment, maximize your income, or minimize your expenses. They also may include any efforts you made to apply for a federal loan consolidation, respond to outreach from a loan servicer or collector, or engage meaningfully with a third party you believed would assist you in managing your student loan debt.

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V. CURRENT ASSETS

27. I own the following parcels of real estate:

Address: _____

_____

_____

Owners:[7] _____

_____

Fair market value: _____

Total balance of mortgages and other liens. _____

28. I own the following motor vehicles:

Make and model: _____

Fair market value: _____

Total balance of Vehicle loans And other liens _____

29. I hold a total of _____ in retirement assets, held in 401k, IRA and similar retirement accounts.

30. I own the following interests in a corporation, limited liability company, partnership, or other entity:

[7] List by name all owners of record (self and spouse, for example)

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Name of entity	State incorporated[8]	Type[9] and %age Interest
_____	_____	_____
_____	_____	_____
_____	_____	_____

31. I currently am anticipating receiving a tax refund totaling $_____.

VI. ADDITIONAL CIRCUMSTANCES

32. I submit the following circumstances as additional support for my effort to discharge my student loans as an "undue hardship" under 11 U.S.C. §523(a)(8):

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

_____
Signature:

_____
Name:

_____
Date:

[8] The state, if any, in which the entity is incorporated. Partnerships, joint ventures and some other business entities might not be incorporated.

[9] For example, shares, membership interest, partnership interest.

Faculty

Hon. Beth E. Hanan is a U.S. Bankruptcy Judge for the Eastern District of Wisconsin in Milwaukee and Green Bay, appointed in May 2015. Previously, she was an appellate lawyer and litigator in Wisconsin, and served several terms as managing member of a trial practice boutique, Gass Weber Mullins. Judge Hanan was chair of the Wisconsin Judicial Council and president of the Milwaukee Bar Association, and she remains a Fellow in the American Academy of Appellate Lawyers. Since joining the bench, she has been the judicial co-chair of ABI's annual Wedoff Consumer Conference (in 2020 renamed the Consumer Practice Extravaganza) and has served as the bankruptcy representative to the Seventh Circuit Judicial Council (2019-21). She also chaired the Public Outreach committee of the National Conference of Bankruptcy Judges (NCBJ) from 2020-22 and is a member of NCBJ's Ethics and International Judicial Relations committees. Judge Hanan received her undergraduate degree from Marquette University and her J.D. in 1996 from the University of Wisconsin Law School.

Nicholas S. Laue is a partner at Keller & Almassian, PLC in Grand Rapids, Mich., where his practice includes representing creditors, lenders, debtors and asset-buyers in both the consumer and corporate bankruptcy arena. He regularly represents clients in state and federal commercial litigation matters. He also has considerable experience prosecuting and defending adversary proceedings in the U.S. Bankruptcy Courts for the Western and Eastern Districts of Michigan. Before joining Keller & Almassian, PLC, Mr. Laue was an attorney for the Michigan Court of Appeals, Research Division. He graduated *magna cum laude* from the University of Toledo College and is a member of the University of Toledo College of Law Chapter of the Order of the Coif.

Tricia S. Terry is a founding partner of Marrs & Terry, PLLC in Ann Arbor, Mich., established 1999. She has focused primarily on chapter 13 practice in both the Eastern and Western Districts of Michigan since 2001. The firm's practice involves a heavy mix of bankruptcy, family law, probate and estate-planning issues and the interactions they have with each other. Ms. Terry is a member of the Washtenaw County Bar Association, the National Association of Chapter Thirteen Trustees, ABI and the National Association of Consumer Bankruptcy Attorneys. She received her B.S. in criminal justice with honors from Eastern Michigan University and her J.D. *cum laude* in 1998 from the Thomas M. Cooley Law School.