Submitted via www.regulations.gov

May 22, 2018

Jean-Didier Gaina
U.S. Department of Education
Office of Postsecondary Education
400 Maryland Avenue, SW
Washington, DC 20202-6110

Re: Comments in response to "Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings" – Docket ID ED-2017-OPE-0085, 83 Fed. Reg. 7460 (Feb. 21, 2018)

Dear Ms. Gaina:

Better Markets[1] appreciates the opportunity to comment on the request for information captioned above (the "Request"), issued by the Department of Education (the "Department"). We commend the Department for issuing the Request and undertaking a re-evaluation of its approach to undue hardship claims when borrowers seek the discharge of student loan debt in bankruptcy.

The Department should use this opportunity to afford meaningful relief to the population of students and graduates struggling with the "undue hardship" of crushing debt as a consequence of the 2008 financial crisis and through no fault of their own. In light of those unique circumstances, and as a matter of law, policy, and fundamental fairness, those debtors merit a different treatment in bankruptcy court. In short, we urge the Department to take into full account the undue hardship created by the historic and extraordinary events of 2008, which robbed so many young adults of a realistic chance at the American Dream. That generation, deeply and adversely affected by the crisis, deserves no less. Accordingly, the Department should amend its guidance

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

to recognize that the student loan borrowers most directly and severely affected by the 2008 financial crisis deserve a general finding of "undue hardship," while others deserve at least a rebuttable presumption of undue hardship.

## INTRODUCTION AND SUMMARY

The grim reality is that college students and graduates since 2007 collectively face a mountain of student loan debt that is largely attributable to the economic devastation caused by the financial crash of 2008, which was the worst financial crash since 1929 and caused the worst economy since the Great Depression.[2] The effects of the student loan crisis extend beyond the serious and long-term financial hardships imposed directly on individual borrowers. The crisis is also limiting broader economic growth by forcing student loan borrowers to delay important economic decisions such as investing in a home, purchasing a car, or opening a small business. Some even fear that the growing mountain of student loan debt represents a potentially dangerous threat to the systemic stability of our markets in the form of an asset bubble that could trigger or exacerbate another crisis.

A solution to these problems is overdue. The Department now has the opportunity to afford a significant measure of relief by exercising its discretion and adopting a more forgiving approach to the undue hardship exemption in bankruptcy. This step will help many debtors by mitigating the indefensibly harsh treatment of student loans under the bankruptcy code—a law that has unfairly cast student loan debtors into essentially the same category occupied by felons and drunk drivers.

To afford this relief, the Department should recognize a blanket "undue hardship" exemption for the students most directly harmed by the financial crisis and a rebuttable presumption of undue hardship for all others, with the burden of overcoming the presumption falling on creditors. To implement this policy, the guidance should provide that holders of student loan debt should not oppose petitions for discharge on grounds of undue hardship in bankruptcy proceedings.

These steps are necessary and appropriate for numerous reasons:

(1) They fall within the Department's broad regulatory authority, as evidenced by the current guidance. For example, that guidance now provides for holders of student loan debt to consent to discharge even where there is no finding of undue hardship, provided that the cost of contesting discharge will exceed a percentage of the debtor's loan balance. If this approach falls within the Department's regulatory discretion, then surely the Department also has the authority to find undue hardship based on concrete data, discussed below, showing that student loan borrowers as a group are in deep financial distress as a result of factors beyond their control—the 2008 financial crisis.

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[2] Better Markets, The Cost of Crisis, $20 Trillion and Counting 8, 22 (July, 2015), *available at* https://www.bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf.

(2) Our proposal will help restore uniformity in the treatment of student loan debtors, who are now subject to different interpretations of "undue hardship" in different courts. It will also promote fairness by recognizing that student loan borrowers as a class are far less reckless and irresponsible than many other debtors who enjoy unconditional discharge in bankruptcy.

(3) Finally, recognizing a general undue hardship exemption for the student loan borrowers most affected by the financial crisis is consistent with the factors analysis currently in place under the Department's guidance. Those factors emphasize causes of financial distress that are beyond the debtor's control, as was the 2008 financial crash and the economic catastrophe it caused. Indeed, as we explore in some detail below, the financial crisis of 2008 served as one of the most powerful yet largely ignored contributors to the student loan crisis. That economic calamity dealt student loan borrowers a number of monumental blows, destroying the home equity that many families once relied upon to pay for college and decimating the job market into which graduates were cast after taking on large amounts of student loan debt. Although these consequences of the financial crash, like many others, have faded from the public's memory, they remain among the central reasons why student loan borrowers continue to lag behind their counterparts from past generations in the quest to realize their potential, contribute fully to society, and attain a decent standard of living—in short, to achieve the American Dream. At the most basic level, it has also prevented millions of them from finding decent jobs at adequate compensation to pay their bills, including their student loans. Through no fault of their own, as the guidance says, those borrowers are victims of historic factors that created unique "undue hardship."

In the balance of this comment letter, we briefly review the dimensions of the student loan crisis and its damaging effects; we urge the Department to adopt a new approach to undue hardship claims in bankruptcy court; and we highlight and detail the role of the financial crisis as the primary cause of the difficult, often overwhelming, financial challenges facing many student loan borrowers today—through no fault of their own.

## BACKGROUND – THE SCALE OF STUDENT LOAN DEBT AND ITS HARMFUL IMPACT

### 1. Magnitude – The problem has reached trillion-dollar proportions.

According to a variety of metrics, the amount of student loan debt has reached crisis levels. Here are some basic data points that illustrate the dimensions of the problem. While the current levels of debt and default are alarming enough, the trends are just as troubling and they show no signs of abating.

- DOLLAR AMOUNT: Total student loan debt has reached \$1.52 trillion,[3] second only to mortgage loans \$8.94 trillion.[4] And, it has increased nearly three-fold since 2007, when the total amount of student loan debt stood at \$544.99 billion.

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[3] *See Cons. Cred. Outst'g*, Fed. Res., https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html (last visited May 16, 2018).

[4] *See* Fed. Reserve Bank of New York, Quarterly Report on Household Debt and Credit 1 (Feb. 2018) ("Fed. Report on Debt"), *available at*

- AVERAGE LOAN AMOUNT: The average student loan amount has climbed to $37,172.[5]

- GROWTH IN DEBT: The growth rate of student loan debt is higher than the growth rates of auto, credit card, and all other non-housing debt combined.[6] Since the 2008 crash, it has ballooned from 5% of all household debt to 10.7%.[7]

- NUMBER OF BORROWERS: The total number of student loan borrowers has reached over 42.8 million.[8]

- BORROWERS IN DEFAULT: The total number of borrowers in default has climbed to approximately 4.6 million.[9]

- DEFAULT RATE: Student loan debt has the highest percentage of 90+ day delinquencies among all types of retail debt since 2012, when it surpassed credit card delinquencies. Ten percent of the total student loan debt balance is 90+ days delinquent.[10] The cohort default rate is now at 11.5%.[11] A recent study by the Brookings Institution suggests that the default rate will grow aggressively, and will reach 40% among borrowers who entered college in 2004.[12]

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https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2018Q1.pdf.

5 Zack Friedman, *Student Loan Debt In 2017: A $1.3 Trillion Crisis*, Forbes (Feb. 21, 2017), https://www.forbes.com/sites/zackfriedman/2017/02/21/student-loan-debt-statistics-2017/#61d0d66d5dab.

6 *See id.*

7 Fed. Report on Debt, *supra* note 3, at 1.

8 *See Federal Student Loan Portfolio Summary*, Fed. Student Aid, https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls (last visited May 16, 2018).

9 *See* Josh Mitchell, *Nearly 5 Million Americans in Default on Student Loans*, Wall St. J. (Dec. 13, 2017), https://www.wsj.com/articles/nearly-5-million-americans-in-default-on-student-loans-1513192375.

10 Fed. Report on Debt, *supra* note, 3 at 1.

11 *Official Cohort Default Rates for Schools*, Fed. Student Aid, https://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html (last visited May 16, 2018). "A cohort default rate is the percentage of a school's borrowers who enter repayment on certain Federal Family Education Loan (FFEL) Program or William D. Ford Federal Direct Loan (Direct Loan) Program loans during a particular federal fiscal year (FY), October 1 to September 30, and default or meet other specified conditions prior to the end of the second following fiscal year." *Id.* It should also be noted that student loan delinquency rates likely do not reflect the effective delinquency rate since roughly half of student loans are in deferment, grace periods, or forbearance and thus temporarily not in the repayment cycle. *Id.* This suggests that the delinquency rate for loans in the repayment cycle are roughly twice as high. *See* Fed. Report on Debt, *supra* note 3, at 1.

12 Judith Scott-Clayton, *The Looming Student Loan Default Crisis Is Worse Than We Thought*, Brookings, https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/ (Jan. 18, 2018).

**2. <u>Impact – Inescapable student loan debt is eroding quality of life, dampening broader economic participation and growth, and threatening to precipitate or fuel another market crisis.</u>**

Student loan debt is degrading the quality of life for many young adults. It is also hampering broader economic growth, as young adults suffer financial deprivations that limit their ability to purchase a broad range of goods and services, save for retirement, or start a small business. As one commenter observed, "Student loan debt is keeping the next generation from moving forward with milestones, including buying homes and starting families. And the impact to the economy from these delayed milestones could be huge down the road."[13]

The statistics paint a dark picture for young adults saddled with student loan debt, with a host of major life decisions being delayed in the post-crisis era.

- <u>Delay in buying homes</u>:
  - Heavy student loan debt means that graduates must forego or significantly delay the purchase of a home.[14] For example, in 1Q 2007, 41.7% of those under age 35 had purchased a home, whereas in 4Q 2017, that percentage dropped to 34.3%.[15]
  - Over 80% of people ages 22-35 who have not yet purchased a house blame their educational loans.[16] Approximately 85% of student loan borrowers say difficulty in saving has delayed their ability to buy a house.[17] According to another survey from the NAR, more than 70% of would-be first-time home buyers said student loan debt is delaying their home purchase.[18]

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13 Andrew Josuweit, *6 Ways Congress Can Help Ease The Student Loan Crisis*, Forbes (Nov. 5, 2017), https://www.forbes.com/sites/andrewjosuweit/2017/11/05/6-ways-congress-can-help-ease-the-student-loan-crisis/#7dd732ee6cf6; *see also* Adam Forrest, *Millennials Are Missing Out on Life Because They Have More Debt Than Savings*, Vice (Apr. 4, 2018), https://www.vice.com/en_us/article/wj7zen/millennials-are-missing-out-on-life-because-they-have-more-debt-than-savings-vgtrn; Rick Rieder, *The Economic Side Effects Of The Student Loan Crisis (In 3 Charts)*, BlackRock Blog (June 28, 2017), https://www.blackrockblog.com/2017/06/28/student-loan-crisis/ (the student loan crisis has "underappreciated side effects for the U.S. economy as a whole . . . It represents a headwind to U.S. economic growth").

14 *See* Annie Nova, *These Are The Ways Student Loans Stop People From Buying A House*, CNBC (Mar. 31, 2018), https://www.cnbc.com/2018/03/29/these-are-the-ways-student-loans-stop-people-from-buying-a-house.html.

15 *Homeowenership Rates for the US and Regions*, U.S. Census Bureau, https://www.census.gov/housing/hvs/data/histtab14.xlsx (last visited May 16, 2018).

16 *See* Nova, *supra* note 13.

17 *See id.*

18 National Association of Realtors Rresearch Department & American Student Assistance, Student Loan Debt And Housing Report 2017 (2017) ("Realtors Student Loan Debt Report"), *available at* https://www.nar.realtor/sites/default/files/documents/2017-student-loan-debt-and-housing-09-26-2017.pdf.

- Almost 20% of people with student debt who apply for a mortgage are denied because of their high debt-to-income ratios attributable to student debt.[19]
- The homeownership rate in the U.S. has fallen each year over the last six years, despite an otherwise strong economic recovery, because student loans "are making it harder for first-time home buyers to buy homes".[20]

- Increase in the number of students living at home:

    - In 2007, 28% of 18-34 year-olds lived at home.[21]
    - In 2017, that figure rose to 32%.[22]
    - The number of college grads returning to live back at home has increased as well.[23]

- Delay in buying cars:

    - 29% of the 18-34 age group are delaying buying cars due to debt. [24]

- Delay in saving for retirement:

    - 61% of students have not been able to contribute at all to retirement accounts due to student loan debt, while an additional 32% had to contribute at a reduced amount. [25]

- Suppression of wages for 25-34:

    - In 2006, the average hourly wage for this age group was $14.23.
    - In 2016, that rate had actually decreased to $14.00. [26]

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19 Annie Nova, *Why Buying A Home Can Be Almost Impossible With Massive Student Loan Debt*, CNBC (Apr. 19, 2018), https://www.cnbc.com/2018/04/19/student-loan-debt-can-make-buying-a-home-almost-impossible.html.

20 *See* Rieder, *supra* note 12.

21 *See* Richard Fry, *For First Time in Modern Era, Living With Parents Edges Out Other Living Arrangements for 18- to 34-Year-Olds*, Pew Research (May 24, 2018), http://assets.pewresearch.org/wp-content/uploads/sites/3/2016/05/2016-05-24_living-arrangemnet-final.pdf.

22 *See id.*

23 *See id.*

24 NBC News & GenForward, March 2018 Toplines (Mar. 2018), *available at* https://genforwardsurvey.com/assets/uploads/2018/04/NBC-GenForward-March-2018-Toplines.pdf.

25 *See* Realtors Student Loan Debt Report, *supra* note 17, at 15.

26 Weekly And Hourly Earnings Data From The Current Population Survey, Burau of Labor and Statistics, https://data.bls.gov (select "Weekly & Hourly Earnings One Screen Data Search" hyperlink, select "median hourly earnings- in constant (base current year) dollars" under "1 Earnings" and select "25 to 34 years" under "7 Age"; then follow the "Get Data" hyperlink) (last visited May 17, 2018).

Some even argue that rising student loan debt represents a growing asset bubble similar to the mortgage expansion and subsequent meltdown that triggered the 2008 financial crisis: Loose underwriting standards causing ample loan availability, without regard to ability to pay, creating a mass of debt that may experience a sudden crash, made much worse to the extent the debt is spread throughout the asset-backed securities market.[27]

**<u>THE UNDUE HARDSHIP EXEMPTION<br>IN SECTION 523 OF THE BANKRUPTCY CODE</u>**

Prior to 1977, student loans were fully dischargeable in bankruptcy. However, that began to change with legislative amendments that made their way into the bankruptcy code revisions of 1978, followed by a series of amendments in 1990, 1998, and 2005. Those amendments imposed progressively more narrow restrictions on the dischargeability of student loans, ultimately making the ban perpetual, not just for a finite period of years, and also expanding the types of loans subject to the ban.[28] Currently, the law provides broadly that no student loans are dischargeable in bankruptcy unless excepting the debt from discharge "would impose an undue hardship on the debtor and the debtor's dependents."[29]

This treatment of student loans was "harsh and dramatic," in effect "treat[ing] educational loans precisely as the law now treats loans incurred by fraud, felony, and alimony-dodging."[30] Moreover, it had no empirical basis. The principal rationale for this restriction was the notion that student loan borrowers were abusing the bankruptcy system, unfairly seeking discharge of their loans soon after graduation supposedly to wipe their debts clean on the threshold of lucrative careers as doctors and lawyers. Yet a GAO study conducted in 1977 as part of the legislative process revealed just the opposite: The discharge rate for federally insured student loans was less than 1%, actually below the average for other types of loans.[31] As one legislator bitterly protested, Congress was "fighting a 'scandal' which exists primarily in the imagination."[32] In fact, there is no cogent, credible rationale for the notion that student loan debtors deserved to be singled out and deprived of the fresh start available to most other creditors regardless of how reckless or irresponsible they may have been in amassing personal debt. As another critique of these bankruptcy reforms observed, "Unfortunately, public policy was developed in spite of studies, many of which came out at that time, discrediting the reports of abuse."[33]

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27 Preston Mueller, *The Non-Dischargeability of Private Student Loans: A Looming Financial Crisis?* 32 Emory Bankruptcy Developments J. 229, 233 (2015).

28 *See* John A. E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 Canadian Bus. L. J. 245, 248-50 (2007); Letter from U.S. Dept of Ed. on Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings, app. A (July 7, 2015) ("Guidance"), *available at* https://ifap.ed.gov/dpcletters/attachments/GEN1513.pdf.

29 11 U.S.C. § 523(a)(8) (2018).

30 Pottow, *supra* note 26, at 248.

31 *Id*. at 249.

32 *Id*. at 248.

33 Deanne Loonin, *No Way Out: Student Loans, Financial Distress, and the Need for Policy Reform*, Nat. Consumer L. Center 1 (June 2006), *available at* http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/nowayout.pdf.

Section 523 has also led to uncertainty and disparate treatment of student loan debtors. Because Congress never defined "undue hardship," it has been left to the courts to interpret and apply the phrase. As noted in the Request, at least two distinct and quite different tests have emerged in the federal circuit courts—the three-pronged *Brunner* test from the Second Circuit, *Brunner v. New York State Higher Educ. Serv. Corp.,* 831 F.2d 295 (2d Cir. 1987), and the supposedly more lenient "totality of the circumstances" test from the Eighth Circuit, set forth in *Long v. Educ. Credit Mgmt. Corp.*, 322 F. 3d 549 (8th Cir. 2003). As the court observed in *Long*, courts have "struggled" with the concept, resulting in a "divergent body of appellate authority." *Id.* at 554. Thus, how a particular student debtor fares under Section 523 depends largely on the fortuity of where he or she files for bankruptcy. The Department itself recognizes that "evaluations of undue hardship cases often are difficult and require the exercise of judgement by the holder."[34] The result is substantial uncertainty and inequity among borrowers.

In reality, very few student debtors seek discharge of their student loans and less than half of those who attempt it actually succeed. According to a study published by the University of Pennsylvania, "only 0.1 percent of student loan debtors who have filed for bankruptcy attempt to discharge their student loans."[35] Less than half of those who actually initiate the process succeed in proving undue hardship.[36] The result is a system that is perceived to require vast amounts of time and resources to achieve an almost impossible end result, which discourages 99.9% of student loan debtors from pursuing it.

## THE DEPARTMENT'S IMPLEMENTING REGULATIONS AND GUIDANCE

The Department has issued regulations and guidelines to implement the undue hardship test.[37] As explained in the Request, those provisions require holders of student loan debt, including the Department itself, to evaluate each undue hardship claim in light of several enumerated factors, to determine whether or not to oppose a borrower's petition to discharge student loan debt. For example, the Guidance sets forth eleven factors to be considered, including circumstances such as mental or physical disability, whether the debtor has made any payments on the debt, and notably, whether the debtor has filed for bankruptcy "due to factors beyond his or her control."[38]

The regulations and Guidance expressly allow a holder of student loan debt to **consent** to a petition for discharge if either (1) requiring repayment would constitute an undue hardship on the debtor, or (2) requiring repayment would not impose an undue hardship, but the litigation costs of opposing discharge would exceed one-third of the total amount owed on the loan.[39] The

34 Guidance, *supra* note 27, at 4.

35 Jason Iuliano *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard,* 86 American Bankruptcy Law Journal 495, 525 (2012).

36 *See id.*

37 *See* 34 C.F.R. §§ 674.49; 682.402; 685.212; Guidance, *supra* note 27, at 5.

38 Guidance, *supra* note 27, at 5.

39 *Id* at 3.

Department follows this same two-step process when defending against discharge claims in bankruptcy proceedings for Direct Loans.[40]

Thus, the Department has already exercised its discretion to determine that under certain facts and circumstances, some totally unrelated to "hardship," it is appropriate for holders of student loans not to oppose a student's petition to have his or her student loan discharged in bankruptcy.

## SPECIFIC COMMENTS IN RESPONSE TO THE REQUEST FOR INFORMATION

In the Release, the Department invites the public "to provide comment on, and offer information regarding," (1) the factors to be considered in evaluating undue hardship claims; (2) the weight to be given to those factors; (3) whether the two legal tests result in inequities among borrowers; (4) the circumstances under which loan holders should concede an undue hardship claim; and (5) whether and how the Guidance should be amended.[41]

With the scope of the student loan crisis steadily increasing, the legacy of the financial crisis still burdening many student loan borrowers, and so many other forces working against student efforts to manage their debt, relief is essential. Broadening the scope of the undue hardship exemption is necessary and appropriate, and the Department should take this important step by implementing the following changes in the Guidance:

1. For all student loans obtained during or and within ten years following the financial crisis (from 2008 through 2018), the Department should recognize **a general "undue hardship" exemption** and make clear that holders (including the Department itself) should not oppose discharge of those student loans in adversary proceedings.

2. For loans issued after 2018, the Department should establish **a rebuttable presumption that repayment of a student loan will cause undue hardship**, and place the burden on the holder (or the Department) to overcome that presumption. Furthermore, the Department should provide that overcoming the presumption will require a specific showing that the student debtor seeks to abuse discharge by eliminating student loan debt without any legitimate need for debt relief.

3. Finally, if the Department declines to adopt the foregoing changes, then it should, at a minimum, **adjust the factors** analysis to make clear that the primary focus of the undue hardship analysis should be on whether there is any evidence of intent to abuse the bankruptcy system. The revised Guidance should emphasize that the most important factors are whether the debtor has made a good faith attempt to adhere to the payment schedule.

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40 Request at 7461.
41 *Id.*

These amendments to the Guidance are well-warranted on legal and policy grounds. First, it is a step that the Department has the authority to take. As explained above, the Department has previously stipulated the conditions for a holder's opposition to discharge, without usurping the authority or role of Congress or the courts. For example, the Department has seen fit to allow discharge if the costs of litigation in opposing discharge exceed one-third the outstanding loan balance. This regulatory standard was deemed appropriate even though it was fashioned out of concern for protecting the federal treasury against the excessive cost of litigation relative to a loan balance and has nothing to do with whether or not the duty to repay a student loan in fact imposes an undue hardship under the statutory test. In other words, the Department has already determined that factors extrinsic to the debtor's financial situation, and unrelated to the statutory standard, may serve as a justification for affording discharge relief to a student loan debtor.

Accordingly, it is even more appropriate to establish a guideline centered directly on the issue of undue hardship and stipulating that students who have had to struggle with the "undue hardship" caused by the financial crisis should not be opposed in their quest for relief. In short, the Department can and should exercise its discretion to determine that any student loan taken out during the crisis or its aftermath is one that per se imposes an undue hardship and warrants discharge.

This approach also offers several additional benefits. It better serves the underlying purpose of the Bankruptcy Code, which is to give those overwhelmed by personal debt the chance at a fresh start. And it comports with the general and well-recognized rule that exceptions in the Code are to be interpreted narrowly.[42]

In addition, this approach would be vastly more fair and equitable than the current approach. It ensures fairer treatment of student loan debtors by establishing a clear and consistent legal standard that does not hinge on the vagaries inherent in the different definitions of "undue hardship" fashioned by the federal courts. It also would go far to remove from student loan borrowers the stigma of non-dischargeability that should be reserved for much more culpable actors, as reflected generally in the Bankruptcy Code.[43]

Affording this type of relief to student debtors is also consistent with the current "factors analysis" in the Guidance. The Guidance sets forth eleven factors to be considered when determining whether a petition to discharge student loans should be met with consent. Second among those factors is "whether a debtor has filed for bankruptcy due to factors beyond his or her control."[44] Examples include the "protracted and ongoing physical or mental illness of a borrower

[42] *See* Raymond L. Woodcock, *Burden of Proof, Undue Hardship, and Other Arguments for the Student Loan Debtor Under 11 U.S.C. § 523(A)(8)(B),* 24 J.C. & U. L. 377, 380 (1998).

[43] *See* 11 U.S.C. § 523 (generally prohibiting discharge of debts owed by fraudsters, tax dodgers, drunk drivers, and other culpable bankrupts).

[44] Guidance, *supra* note 27, at 5.

or a borrower's family member, or a divorce resulting in a diminution of family income."[45] Since the "protracted and ongoing" hardships brought on by the financial crisis—including the severe and widespread degradation of the job market—were clearly outside the control of student debtors, just as much as an illness or family breakup, it is appropriate to fashion Guidance that gives appropriate weight to those crisis-related hardships. Moreover, because it would be impracticable if not impossible to assess precisely how the widespread and systemic destruction wrought by the financial crisis impacted a specific borrower with any degree of certainty, it would be inappropriate to require such a showing as a condition of the per se undue hardship finding.

Finally, it bears emphasis that affording student loan borrowers this measure of relief does not upend the bankruptcy code or eliminate the existing safeguards against bankruptcy fraud or manipulation of the system.[46] In short, it does not blindly wipe out student loan debt or permit abuse of the process. Students who are overwhelmed with debt still must file for bankruptcy, adhere to the applicable requirements, refrain from committing any form of fraud, and obtain judicial relief. It simply means that if a student is otherwise entitled to discharge of their debt, the holders of student loan debt should not force them to undertake the extra—and for most debtors, unnecessary—step of showing "undue hardship" absent discharge, where that undue hardship is presumptively attributable to the 2008 financial crisis.

In the next and final section of this comment letter, we focus special attention on this aspect of the factors analysis, including the central role of the 2008 crisis in severely damaging the financial futures of an entire generation of students who were suddenly victimized by the reckless and often illegal conduct of Wall Street banks and other financial institutions. As this fate was entirely "beyond the control" of those young adults, it is entitled to dispositive weight for those who have felt its impact most severely over the last decade.

## THE CENTRAL ROLE OF THE 2008 FINANCIAL CRISIS IN CREATING UNDUE HARDSHIP FOR STUDENT LOAN BORROWERS

### 1. Causes – Rising tuition costs and ill-conceived changes in bankruptcy law helped incubate the student loan crisis, but the devastation brought on by the 2008 financial meltdown intensified it dramatically.

Decades ago, students typically funded college with a combination of their own savings, family support, scholarships, and student loans. Once out of school, they found good jobs; invested in families, homes, and retirements; and paid off their loans over a reasonable span of time, typically ten years. Following this path, they raised their standard of living and promoted economic growth overall.

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45 *Id.* at 5-6.

46 *See, e.g.*, 11 U.S.C. § 110 (2018) (imposing penalties for persons who negligently or fraudulently prepare bankruptcy petitions).

That began to change even before the financial crisis. In the lead-up to the crash, two principal factors contributed to the student loan crisis. First, the demand for a college education and the costs of tuition continued to rise sharply and far outpaced inflation and wage growth.[47] In this period, student loan debt was rising at "alarming rates."[48] Second, as discussed more fully above, the bankruptcy code was repeatedly amended from 1978 to 2005 to prevent the discharge in bankruptcy of student loan debt except in extremely rare circumstances of "undue hardship." This misguided policy incentivized lax underwriting standards and easy access to student loans without caps, while miring many borrowers in high levels of debt without a realistic hope of a fresh start.

The 2008 financial crisis added new and frightening dimensions to the problem, changing the landscape for students and recent college graduates dramatically. Unemployment skyrocketed, home equity plummeted, jobs dried up,[49] graduating students faced meager job prospects, and government support for education shrank.[50] The magnitude of the devastation is illustrated vividly in the following graphics.

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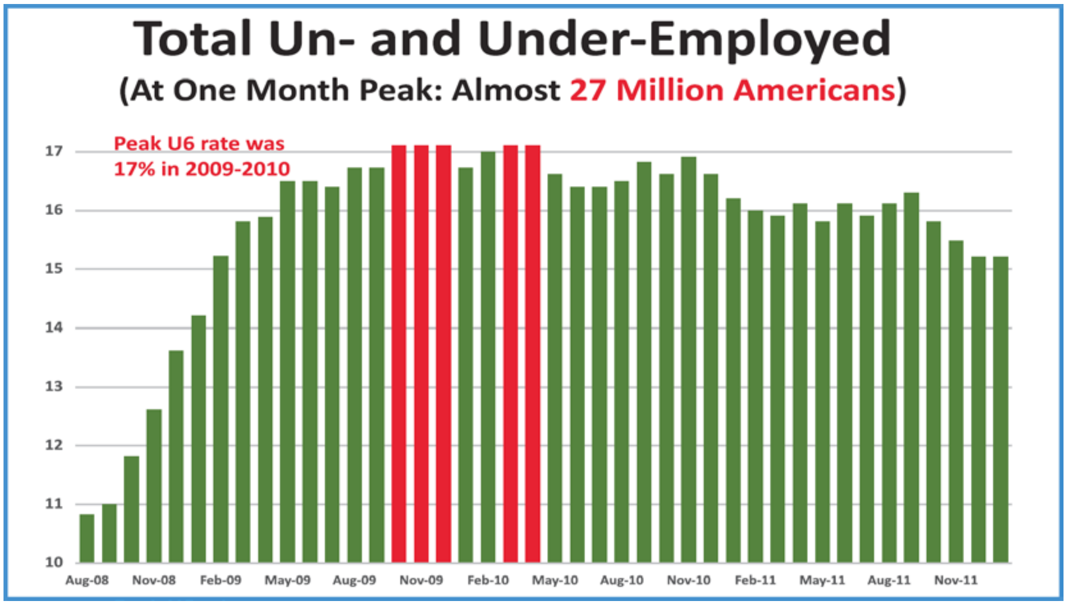
47 *See Tuition and Fees and Room and Board Over Time*, CollegeBoard, https://trends.collegeboard.org/college-pricing/figures-tables/tuition-fees-room-board-over-time (last visited May 16, 2018); Weekly And Hourly Earnings Data From The Current Population Survey, Burau of Labor and Statistics, https://data.bls.gov (select "Weekly & Hourly Earnings One Screen Data Search" hyperlink, select "median hourly earnings- in constant (base current year) dollars" under "1 Earnings" and select "25 to 35 years" under "7 Age;" then follow the "Get Data" hyperlink; adjust years to 2000-2007) (last visited May 17, 2018).

48 *See* Loonin, *supra* note 31, at 29.

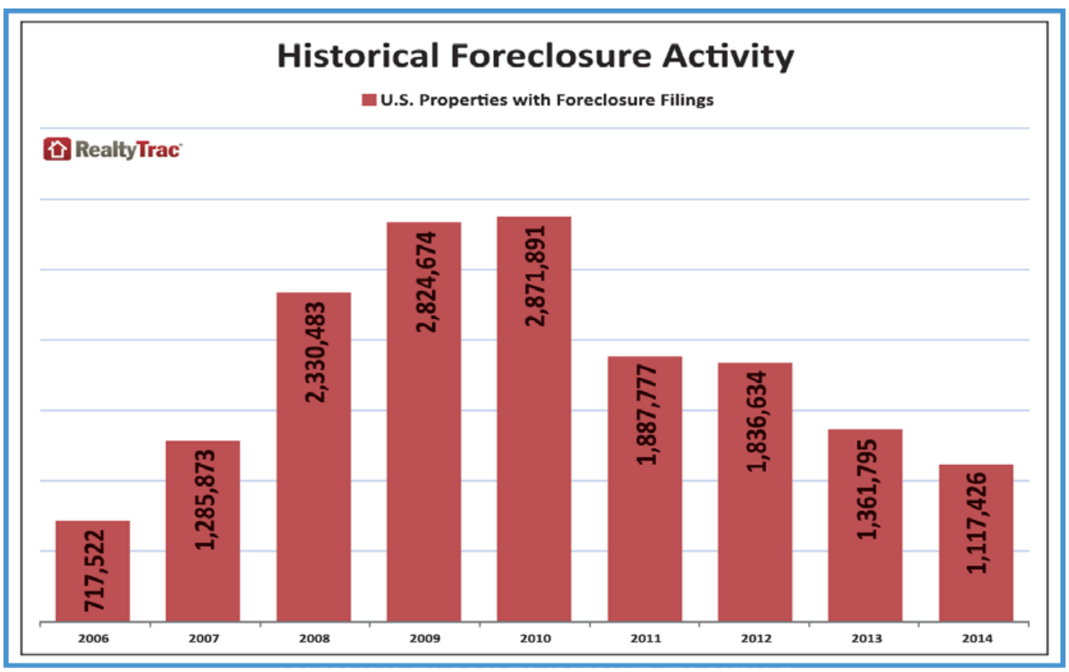
49 Better Markets, The Cost of Crisis, $20 Trillion and Counting 8, 22 (July, 2015), *available at* https://www.bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf.

50 *See* Danielle Douglas-Gabriel, *Graduating From College This Year? Employers Are Hiring … Well, Sort Of*, The Washington Post, (May 2, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/05/02/graduating-from-college-this-year-employers-are-hiring-well-sort-of/?utm_term=.eaa479c7ce8e; Andrew Fieldhouse, *Underemployment Isn't A 'Myth' For Recent College Grads*, Economic Policy Institute (May 4, 2012), https://www.epi.org/blog/underemployment-college-graduates/; Matt Nevisky, *The Career Effects of Graduating in a Recession*, National Bureau of Economics http://www.nber.org/digest/nov06/w12159.html (last visited May 22, 2018); Emily Zak, *Five Reasons Why Student Debt Is Skyrocketing*, TruthOut (June 4, 2016), http://www.truth-out.org/news/item/36275-five-reasons-why-student-debt-is-skyrocketing.

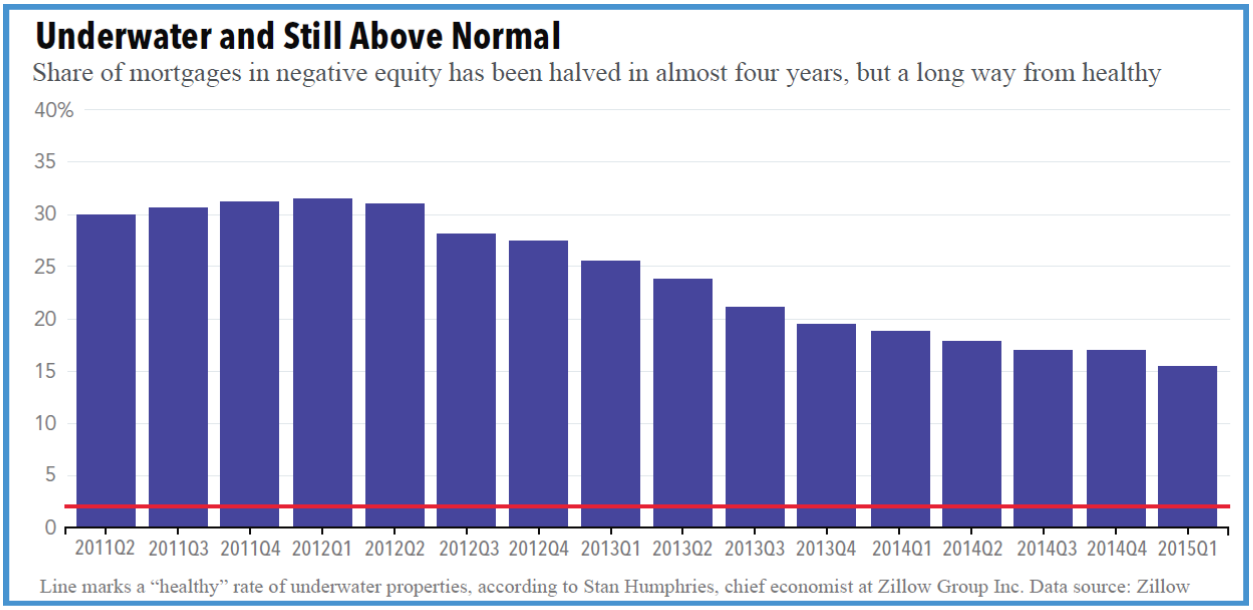
- The U-6 rate, which captures un- and under-employment, peaked at 17%, representing over 27 million Americans, crushing the job market for years to follow.




- Home equity plummeted and foreclosures shot up, gutting one of the principal resources historically used by families to fund college education:



- And, homes remained underwater for years following the crisis:




In fact, a recent study shows that a principal driver of student loan debt was the collapse of housing prices caused by the financial crisis and the corresponding drop in home equity, which traditionally funded a significant portion of college tuition costs.[51]

The crisis had a doubly powerful impact. It meant that students were less able to rely on family support or government subsidies to finance their studies and instead were forced to take out more loans. And, it also meant that graduates had a much harder time paying back loans.[52] Some even decided to prolong their educations for lack of better alternatives, thereby incurring additional student loan debt.[53] Student loan debt, on top of basic living costs, became unsustainable for many, increasing the default rate, degrading the quality of life, and hampering broader economic recovery. In short, the student loan default rate was a growing concern prior to 2008, but it accelerated after the crisis.[54] Since the crisis, more and more people with student loan debt have

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51 Gene Amromin *et. al.*, The Housing Crisis and the Rise in Student Loans, Society for Economic Dynamics (Nov. 23, 2016), https://economicdynamics.org/meetpapers/2017/paper_369.pdf.

52 *See* Noah Smith, *The Financial Crisis Isn't Over for Students*, Bloomberg (Mar. 27, 2018), https://www.bloomberg.com/view/articles/2018-03-27/financial-crisis-is-over-for-housing-but-not-for-student-loans; *When Baby Boomers Delay Retirement, Do Younger Workers Suffer?*, The Pew Charitable Trust (Sept. 2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/economic_mobility/empretirementdelaypdf.pdf.

53 *See* Ben Casselman, *Half Of People Who Went To College In The Recession Haven't Graduated*, FiveThirtyEight (Nov. 17, 2015), https://fivethirtyeight.com/features/half-of-people-who-went-to-college-in-the-recession-havent-graduated/.

54 Dan Kopf & Amy Wang, *America's Daunting Student Debt Crisis Is About To Get Even Worse*, Quartz (Jan. 19, 2018), https://qz.com/1183280/the-us-student-debt-crisis-is-even-worse-than-we-think/.

been forced to declare bankruptcy and the amount of student loan debt at issue in bankruptcy proceedings has also grown.[55]

All of this destruction befell an entire generation of young adults who played no role in the crisis. They were victims. The Department must weigh this history—this "factor" that was well beyond the control of student loan debtors—as it amends its Guidance.

**2. <u>Obstacles – There is little relief in sight, as recent or threatened measures promise to intensify the problem.</u>**

A number of forces are aggravating the student loan crisis or fending off and forestalling meaningful solutions to the problem in the aftermath of the crisis. They highlight the need for changes in the Guidance as the only foreseeable measure that can mitigate the impact of the financial crisis on student loan borrowers.

<u>The rise of for-profit colleges.</u> Since the financial crisis, for-profit colleges have been become more prominent, attracting an increasing number of students. In fact, the crisis drove many students into for-profit institutions on the promise of lower tuition and valuable skills. In reality, those schools have earned a reputation for charging high tuition, delivering degrees of little value, and saddling students with a relatively high percentage of student debt. For example, in 2000, only 1 of the top 25 schools whose students owed the most federal debt was a for-profit institution, whereas in 2014, 13 were.[56] Borrowers from those 13 schools owed $109 billion, which was almost 10 percent of all federal student loans[57] The default rate among those who have borrowed money to attend these schools is markedly higher than it is for the overall student borrower population.[58] And for-profit schools have been linked to misleading claims of low tuition and high job placement rates.[59]

<u>Fewer regulatory protections at the federal level.</u> The CFPB has been a powerful advocate for students. It has brought numerous suits against student loan companies alleging more than $25 million in damages.[60] However, under the agency's new leadership, the rulemaking and

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55 Daniel Austin, *Student Loan Debt in Bankruptcy: An Empirical Assessment*, 48 Suffolk U. L. Rev. 577, 577 (2015).

56 *See* Adam Looney & Constantine Yannelis, *A Crisis in Student Loans*, Brookings 27 (2015), https://www.brookings.edu/bpea-articles/a-crisis-in-student-loans-how-changes-in-the-characteristics-of-borrowers-and-in-the-institutions-they-attended-contributed-to-rising-loan-defaults/.

57 *See id.* at 28-29.

58 *See id.*

59 *See* Margaret Mattes, *8 Facts That Will Make You Think Twice Before Enrolling at a For-Profit College*, The Century Foundation (May 30, 2017), https://tcf.org/content/facts/8-facts-will-make-think-twice-enrolling-profit-college/; James Surowiecki, *The Rise and Fall of For-Profit Schools*, The New Yorker (Nov. 2, 2015), https://www.newyorker.com/magazine/2015/11/02/the-rise-and-fall-of-for-profit-schools.

60 *See* Press Release, Consumer Fin. Protection Bureau, CFPB Sues Nation's Largest Student Loan Company Navient For Failing Borrowers at Ever Stage of Repayment, (Jan. 18, 2017), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/; Press Release, Consumer Fin. Protection Bureau, CFPB Takes Action Against National Collegiate Student Loan Trusts, Transworld Systems for Illegal Student Loan

enforcement efforts of the CFPB have been scaled back dramatically, including in the student loan area. Recently, in fact, the CFPB has decided to abandon efforts to develop new rules to curb abuses by student loan servicers.[61] In addition, it has announced that it will dismantle its stand-alone student loan office (the Office of Students and Younger Consumers) and fold it into another unit.[62] The Department itself has reversed course on a number of initiatives that would have afforded protections and some of measure of relief to student loan debtors.[63]

Limits on the states' oversight role. The current administration is seeking to limit state consumer protections aimed at students saddled with debt. Specifically, the Trump administration is working to prevent states from protecting their student borrowers by arguing that federal loan servicers can only be regulated by the Federal Government and that state law is preempted in this area.[64]

Federal legislative proposals. Finally, a number of legislative steps could help ameliorate the student loan crisis but they are unlikely to gain any traction in the current Congress. Among these steps are increasing the deduction for student loan interest,[65] increasing opportunities to refinance interest rates, and preserving and expanding "public service loan forgiveness" and "income driven repayment" plans.[66] In some cases, Congress may make matters worse with legislation that withdraws existing programs that help those saddled with student loan debt.[67] Threatening to intensify the crisis further, the federal government recently announced that interest

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Debt Collection Lawsuits (Sept. 18, 2017), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-national-collegiate-student-loan-trusts-transworld-systems-illegal-student-loan-debt-collection-lawsuits/; Press Release, Consumer Fin. Protection Bureau, CFPB Takes Action Against Citibank For Student Loan Servicing Failures That Harmed Borrowers (Nov. 21, 2017), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-citibank-student-loan-servicing-failures-harmed-borrowers.

61 *See* Glenn Thrush & Stacy Cowley, *Mulvaney Downgrades Student Loan Unit in Consumer Bureau Reshuffle*, N.Y. Times (May 9, 2018), https://www.nytimes.com/2018/05/09/us/student-loans-consumer-financial-protection-bureau-cfpb.html.

62 *See* Kate Berry, *Mulvaney Guts CFPB's Student Lending Office*, American Banker (May 9, 2018), https://www.americanbanker.com/news/mulvaney-guts-cfpbs-student-lending-office.

63 *See* Michael Stratford, *DeVos Will Delay and Rewrite Key Obama-era Higher Education Policies*, Politico (June 22, 2017) (reporting that the Department is delaying student loan debt relief rules, as well as rules aimed at colleges that saddle students with high debt relative to income, including a ban on mandatory arbitration clauses), https://www.politico.com/story/2017/06/22/devos-will-delay-and-rewrite-key-obama-era-higher-education-policies-239852.

64 *See* Michael Stratford, *Trump Administration Fights States' Crackdown On Student Loan Collectors,* Politico (Feb 26, 2018), https://www.politico.com/story/2018/02/26/education-department-student-loans-state-regulators-366033.

65 *See* Susan Shain, *Trump's New Tax Plan Axes the Student Loan Interest Deduction*, Student Loan Hero (Nov. 8, 2017), https://studentloanhero.com/student-loans/news/tax-reform-trump-axes-student-loan-interest-deduction/.

66 *See* Josuweit, *supra* note 12.

67 *See, e.g.*, Zack Friedman, *Trump May End Student Loan Forgiveness Program*, Forbes (Feb. 14, 2018), https://www.forbes.com/sites/zackfriedman/2018/02/14/trump-student-loan-forgiveness/#47d4431a768d.

rates on new loans will increase for the second year in a row.[68] And government subsidies for education are decreasing, so paying for a college education means greater reliance on student loans.[69]

Given these trends, it is critically important for the Department to provide relief through the use of its regulatory authority over the disposition of undue hardship claims in bankruptcy proceedings.

## CONCLUSION

We hope you find these comments helpful.

Sincerely,

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68 Danielle Douglas-Gabriel, *Interest Rates On Federal Student Loans Set To Rise For The Second Year In A Row*, Washington Post (May 10, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/05/10/interest-rates-on-federal-student-loans-set-to-rise-for-the-second-year-in-a-row/.

69 Steven Palmer, *The History of Student Loans and Bankruptcy Discharge*, Linkedin (Oct. 1, 2015), https://www.linkedin.com/pulse/history-student-loans-bankruptcy-discharge-steven-palmer.