



4000-01-U

DEPARTMENT OF EDUCATION

[Docket ID ED-2017-OPE-0085]

**Request for Information on Evaluating Undue Hardship Claims
in Adversary Actions Seeking Student Loan Discharge in
Bankruptcy Proceedings**

AGENCY: Office of Postsecondary Education, U.S. Department of Education.

ACTION: Request for information.

SUMMARY: The U.S. Department of Education (Department) seeks to ensure that the congressional mandate to except student loans from bankruptcy discharge except in cases of undue hardship is appropriately implemented while also ensuring that borrowers for whom repayment of their student loans would be an undue hardship are not inadvertently discouraged from filing an adversary proceeding in their bankruptcy case. Accordingly, the Department is requesting public comment on factors to be considered in evaluating undue hardship claims asserted by student loan borrowers in adversary proceedings filed in bankruptcy cases, the weight to be given to such factors, whether the existence of two tests for evaluation of undue hardship claims results in

inequities among borrowers seeking undue hardship discharge, and how all of these, and potentially additional, considerations should weigh into whether an undue hardship claim should be conceded by the loan holder.

DATES: Responses must be received by [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via U.S. mail, commercial delivery, or hand delivery. We will not accept comments by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID and the term "Evaluating Undue Hardship Claims in Bankruptcy" at the top of your comments.

- Federal eRulemaking Portal: Go to www.regulations.gov to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under the "Help" tab.

U.S. Mail, Commercial Delivery, or Hand Delivery: If you mail or deliver your comments, address them to Jean-Didier

Gaina, U.S. Department of Education, Office of Postsecondary Education, 400 Maryland Avenue, SW., Washington D.C. 20202-6110. Though this Request for Information (RFI) is not regulatory in nature, the Department has elected to use the Federal eRulemaking Portal for submissions to ensure the process is transparent to all interested parties.

Privacy Note: The Department's policy for comments received from members of the public (including comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available on the internet.

Note: This RFI is issued solely for information and planning purposes and is not a request for proposal (RFP), a notice inviting applications (NIA), or a promise to issue an RFP or NIA. This RFI does not commit the Department to provide a response to any of the comments or take any action proposed in any comment. The Department will not pay for any information or administrative costs that you

may incur in responding to this RFI. The documents and information submitted in response to this RFI become the property of the U.S. Government and will not be returned.

FOR FURTHER INFORMATION CONTACT: Jean-Didier Gaina, U.S. Department of Education, Office of Postsecondary Education, 400 Maryland Avenue, SW., Washington D.C. 20202-6110. Telephone: 202-453-7551.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Background:

A. Statutory Authority

The U.S. Bankruptcy Code, 11 U.S.C. 523(a)(8), currently provides that student loans can be discharged in bankruptcy only if excepting the debt from discharge would impose an "undue hardship" on the borrower and the borrower's dependents:

Section 523 Exceptions to Discharge

(a) A discharge under ... this title does not discharge an individual debtor from any debt--
(8) *unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for--*

(A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.

11 U.S.C. 523(a)(8).

Congress has amended the student loan bankruptcy discharge provision several times, tightening the restrictions on discharge with each amendment.

B. "Undue Hardship" Case Law

Congress has never defined the term "undue hardship" in the Bankruptcy Code and has not delegated to the Department the authority to do so. Federal courts have established the legal standard for a student loan debtor to prove "undue hardship" as authorized by Congress. In general, the courts have used one of two tests to analyze whether undue hardship is proven: the *Brunner* test (named after the case in which that test was first articulated, *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395 (2d Cir. 1987)) or the Totality of the

Circumstances test (*Long v. Educ. Credit Mgmt. Corp.*, 322 F.3d 549 (8th Cir. 2003)).

Under the *Brunner* test, the debtor must show that:

(1) he or she cannot maintain, based on current income and expenses, a minimal standard of living for himself or

herself and any dependents if forced to repay the loans;

(2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and

(3) he or she has made good faith efforts to repay the

loans. Under the Totality of the Circumstances test, the

court examines: (1) the debtor's past, present, and likely future financial resources; (2) his or her reasonably

necessary living expenses; and (3) any other relevant facts

and circumstances. Regardless of which test is used, the

burden of proof is on the debtor to meet the standard and

prove undue hardship.

C. Regulatory Requirements: Direct 34 CFR 685.212(c), FFELP 34 CFR 682.402(i)(1) & Perkins 34 CFR 674.49(c)

Department regulations currently require holders to evaluate each undue hardship claim to determine whether

requiring repayment would constitute an undue hardship. If

a holder determines that requiring repayment would impose an undue hardship, the holder must concede an undue hardship claim by the borrower in an adversary proceeding. The Department's current guidance to guarantors and educational institutions in defending bankruptcy proceedings is summarized in a July 7, 2015, Dear Colleague Letter (GEN-15-13 <https://ifap.ed.gov/dpcletters/GEN1513.html>) and provides for a two-step analysis when evaluating whether or not to object to a borrower's claim of undue hardship. The Department follows the same two-step analysis when defending bankruptcy proceedings for Direct loans. After receiving input from this notice, we will consider whether that analysis is still appropriate.

Context for Responses and Information Requested:

The undue hardship standard established under either test requires a variety of factors to be evaluated when determining whether repaying a debt will cause a debtor and his or her dependents an undue hardship, such as, but not limited to, the debtor's: medical, work, or family history; history of mental illness; level of educational attainment; future employment prospects; payment history,

including a borrower's willingness to avail himself or herself of all available repayment plans, including income-driven repayment plans; and necessary expenses in excess of ordinary unique to the debtor.

The Assistant Secretary for Postsecondary Education invites the public, including individuals, advocacy groups, and professional organizations, as well as other State or Federal agencies or components, to provide comment on, and offer information regarding: (1) factors to be considered in evaluating undue hardship claims; (2) weight to be given to any such factors; (3) whether the use of two tests results in inequities among borrowers; (4) circumstances under which loan holders should concede an undue hardship claim by the borrower; and (5) whether and how the 2015 Dear Colleague Letter should be amended. The Department will review the data collected to determine whether there is any need to modify how undue hardship claims by student loan borrowers in bankruptcy are evaluated.

You may provide comments in any convenient format (i.e., bullet points, charts, graphs, paragraphs, etc.) and may also provide relevant information that is not

responsive to a particular question but may nevertheless be helpful.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) upon request to the person listed under FOR FURTHER INFORMATION CONTACT.

Electronic Access to This Document: The official version of this document is the document published in the *Federal Register*. Free internet access to the official edition of the *Federal Register* and the Code of Federal Regulations is available via the Federal Digital System at: www.gpo.gov/fdsys. At this site you can view this document, as well as all other documents of this Department published in the *Federal Register*, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the *Federal Register* by using the article search feature at: www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

PROGRAM AUTHORITY: 20 U.S.C. 1082(a)

Dated: February 15, 2018.

Frank T. Brogan,
Principal Deputy Assistant Secretary and
Delegated the duties of the Assistant
Secretary, Office of Planning, Evaluation
and Policy Development, Delegated the duties
of the Assistant Secretary, Office of
Postsecondary Education.

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