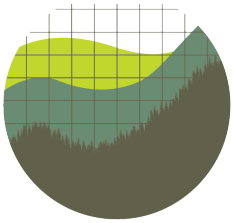

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

November 24, 2017

VIA ELECTRONIC SUBMISSION

Attn: Office of Postsecondary Education

Re: Docket ID No. ED-2017-OPE-0108; RIN 1840-AD25

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] submits the following comments on the Department of Education's ("the Department") Interim Final Rule ("the Second Delay")[2] delaying certain provisions of the "Borrower Defense Rule."[3]

Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. We write to make the following comments:

1. The Department's analysis of the costs and benefits of the Second Delay is inadequate.
2. The Second Delay is procedurally defective.

I. The Department's analysis of the costs and benefits of the Second Delay is inadequate

The Department's analysis of the Second Delay's cost and benefits is inadequate in at least two respects. First, the Department does not provide a reasoned explanation for ignoring its prior findings regarding the Borrower Defense Rule's benefits for borrowers and society, which will be forgone as a result of the Second Delay. Second, the Department does

[1] This document does not purport to present New York University School of Law's views, if any.
[2] 82 Fed. Reg. 49,114 (Oct. 24, 2017).
[3] 81 Fed. Reg. 75,926 (Nov. 1, 2016).

not provide a reasoned explanation for disregarding its prior finding that delaying implementation of the Borrower Defense Rule would not be cost-benefit justified.

A. The Department has not provided a reasoned explanation for disregarding its prior findings on the Borrower Defense Rule's benefits for borrowers and society

When amending, suspending, or repealing a rule, an agency must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[4] In the Second Delay, the Department acknowledges that its action will result in fewer students receiving loan discharges during the delay period.[5] But it makes no mention of its prior findings regarding the benefits that the Borrower Defense Rule would generate for borrowers and society at large, beyond the transferred value of the discharged loans themselves.

In the Borrower Defense Rule, the Department explained that borrowers whose loans are discharged can "become bigger participants in the economy, possibly buying a home, saving for retirement, or paying for other expenses."[6] The Rule also pointed to literature suggesting "that high levels of student debt may decrease the long-term probability of marriage, increase the probability of bankruptcy, reduce home ownership rates, and increase credit constraints."[7] The Department expected these "significant positive consequences for affected borrowers" to have "spillover economic benefits" for society as a whole.[8]

The Department also predicted that institutional disclosure requirements in the Rule would help students make more informed enrollment decisions.[9] Finally, the Department anticipated that the Rule would create "stronger incentives for schools to avoid committing acts or making omissions that could lead to a valid borrower defense claim," in turn reducing the negative impacts of institutional misconduct on borrowers.[10]

Although the Department claims it is "issuing [the Second Delay] only on a reasoned determination that its benefits justify its costs,"[11] the justification for the Second Delay

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[4] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).
[5] 82 Fed. Reg. at 49,120 (noting a "[r]eduction in transfers from the Federal Government to affected borrowers in the 2017 and 2018 cohorts").
[6] 81 Fed. Reg. at 76,051.
[7] *Id.*
[8] *Id.*
[9] *Id*.
[10] *Id.* at 76,050.
[11] 82 Fed. Reg. at 49,118.

includes no discussion of the aforementioned benefits to borrowers and society, which will necessarily be forgone during the delay period. If the Department now weighs these benefits differently than it did in the Borrower Defense Rule, it must explain why.

B. The Department has not provided a reasoned explanation for disregarding its prior finding that delaying the Borrower Defense Rule would not be cost-benefit justified

The Regulatory Impact Analysis for the Borrower Defense Rule indicated that the Department had weighed not just the costs and benefits of issuing the Rule, but also the costs and benefits of delaying action to gather more information regarding the type of institutional behavior that might give rise to borrower defense claims.[12] The Department concluded that "[d]elaying the regulations would delay the improved clarity and accountability from the regulations without developing additional data within a definite timeframe," and it did not "believe the benefits of such delay outweigh[ed] the costs."[13]

Although the Department now makes the conclusory assertion that the Second Delay's benefits outweigh its costs, the Department fails to acknowledge that it previously came to the exact opposite conclusion.[14] The Department is legally obligated to provide a reasoned explanation for disregarding this prior finding.[15]

II. The Second Delay is procedurally defective

The Department has declined to follow traditional notice and comment procedures in delaying the effective date of its Borrower Defense Rule from July 1, 2017, to July 1, 2018, claiming "good cause" because the procedure would be both unnecessary and impracticable. However, the Department's good cause claims do not resemble any of the narrow circumstances where agencies are permitted to act without posting notice and giving the public a fair chance to comment.

In addition, the Department has solicited postpromulgation comments via "interim final" rulemaking. Because the Department clearly does not possess an "open mind" on the question of whether to delay the Borrower Defense Rule, its consideration of postpromulgation comments cannot lawfully substitute for traditional notice and comment rulemaking.

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[12] 81 Fed. Reg. at 76,049.
[13] *Id.*
[14] 82 Fed. Reg. at 49,118.
[15] *Fox*, 556 U.S. at 516.

A. The Second Delay does not qualify for the good cause exception to notice and comment requirements

Section 553 of the APA provides a narrow exception for agencies to avoid notice and comment procedures when they have "good cause" to do so—i.e., when they are "impracticable, unnecessary, or contrary to the public interest."[16] The Department claims that notice and comment here would be both unnecessary and impracticable, offering two arguments in support.[17]

Courts have made clear, however, that the good cause exception "should be limited to emergency situations, so that the section does not become an all-purpose escape clause."[18] Neither of the Department's rationales meets this high bar for invoking the exception.

1. The Department's First Delay is not good cause

The Department's first justification for invoking the good cause exception is that is has *already* stayed the Borrower Defense Rule, pursuant to section 705 of the APA, pending the resolution of a legal challenge to the Rule ("First Delay").[19] Because the "master calendar" requirement of the Higher Education Act[20] requires that regulatory changes take effect only at the beginning of the following financial aid award year, the Department asserts that the earliest the Borrower Defense Rule could lawfully become effective following the First Delay is July 1, 2018, rendering notice and comment on the Second Delay, which lasts only until July 1, 2018, unnecessary.

But this reasoning—that the issuance of a section 705 stay provides good cause for issuing a second delay without notice and comment—would allow the Department to delay, without notice and comment, any rule that is subject to legal challenge, no matter how frivolous that challenge. At the first hint of litigation, the Department could issue a 705 stay, followed immediately by a second, overlapping delay through rulemaking. The second delay would not be subject to notice and comment requirements because the agency would claim good cause, citing the 705 stay. But the only scenario in which the second delay would have practical effect would be if the original 705 stay were found to be unlawful. (Notably, at the time of the Second Delay's issuance, the First Delay had already been

[16] 5 U.S.C. § 553(b)(3)(B).
[17] 82 Fed. Reg. at 49,117.
[18] *National Federation of Federal Emp. v. Devine*, 671 F.2d 607, 610 (D.C. Cir. 1982).
[19] 82 Fed. Reg. 27,621 (June 16, 2017).
[20] 20 U.S.C. § 1098(c)(1).

challenged in the U.S. District Court for the District of Columbia as an improper application of section 705.[21])

If the Department wants to delay a rule's implementation, it can either lawfully exercise its section 705 stay powers or it can change the rule's effective date through notice and comment rulemaking (assuming the change complies with all relevant statutory mandates). What the Department cannot do is *un*lawfully exercise its 705 powers and then use that unlawful action as an excuse to avoid notice and comment on an additional delay.

2. The Department was not compelled to issue the First Delay

The Department claims, as a second good cause justification, that notice and comment procedures would be impracticable because the litigation challenging the Borrower Defense Rule was initiated on May 24, 2017. The Department maintains that it would have had to conduct notice and comment rulemaking between then and July 1, 2017, at which point the master calendar requirement would require the department to delay the rule until July 1, 2018, anyway.

This second argument is also illogical. It is true that the master calendar requirement provides that regulatory changes to student financial aid programs promulgated between July 1 and November 1 may not take effect until July 1 of the following year. However, the Department was under no obligation to change the effective date of the Borrower Defense Rule merely because a plaintiff challenged it in court. The "impracticable" timeframe that the Department cites to invoke good cause is completely of its own making and therefore cannot constitute good cause.[22]

B. The Department's "interim final" rulemaking procedures cannot lawfully substitute for notice and comment

The Department has styled the Delay as an "interim final" rule, meaning that it now seeks public comments, postpromulgation. In some instances, an agency's sincere and careful consideration of postpromulgation comments can substitute for traditional notice and

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[21] *Bauer v. DeVos,* No. 17-cv-1330-RDM (D.D.C.); *Massachusetts v. Dep't of Educ.*, No. 17-cv-1331-RDM (D.D.C.).

[22] *Compare Envt'l Def. Fund, Inc. v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983) (a deadline's imminence does not give the agency "good cause" to suspend a rule without complying with the APA's notice and comment requirements) *with Nat'l Fed'n of Fed. Employees v. Devine,* 671 F.2d 607, 611 (D.C. Cir. 1982) ("The situation facing [the Office of Personnel Management] on November 6, 1981 was an 'emergency' within the scope of the 'good cause' exception. The agency's action was required by events and circumstances beyond its control, which were not foreseen in time to comply with notice and comment procedures.").

comment procedures.[23] When considering the validity of an agency action that relied on a postpromulgation comment period, the D.C. Circuit applies a "presumption of closed-mindedness" and places a burden on the agency to produce a "compelling showing" that it meaningfully considered public comments.[24]

Far from a "compelling showing" of an open mind, the Department has made it clear that it plans to replace the Borrower Defense Rule and will delay the Rule's effective date until that replacement process can be completed. The Department has already initiated a negotiated rulemaking process "to revise the regulations on borrower defenses to repayment of Federal student loans and other matters."[25] And in the Second Delay, the Department indicates that it will eventually issue a *third* delay of the Borrower Defense Rule to ensure that the Rule does not take effect before the new rulemaking process is complete.[26]

Given the Department's clear stance in favor of delaying—and eventually, repealing—the Borrower Defense Rule, it cannot overcome the judicial presumption of closed-mindedness. Therefore, none of the comments it receives in response to the Second Delay can cure the procedural deficiencies resulting from promulgating the delay without proper notice and comment procedures.

Conclusion

The Second Delay is arbitrary and capricious because the Department fails to acknowledge its prior findings on the critical benefits that the Borrower Defense Rule would have provided to borrowers and to society at large. In addition, the Department gives no explanation for departing from its original conclusion that delaying implementation of the Borrower Defense Rule would not be cost-benefit justified.

The Second Delay is also procedurally defective. The Department did not consider public comment before delaying the Borrower Defense Rule's effective date, and it failed to meet the APA's standard for a good cause exception to notice and comment. Further, the

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[23] *See generally,* Kristin Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 Cornell L. Rev. 261 (2016).
[24] *Air Transp. Ass'n of Am. v. Dep't of Transp*., 900 F.2d 369, 379-80 (D.C. Cir. 1990). Other circuits have employed other tests to determine whether substituting postpromulgation comments for traditional notice and comment can constitute "harmless error." *See* Hickman & Thomson, *Open Minds and Harmless Error*, 101 Cornell L. Rev. at 285-305.
[25] 82 Fed. Reg. 27,640 (June 16, 2017).
[26] 82 Fed. Reg. at 49,117.

solicitation of postpromulgation comments cannot cure this procedural deficiency, because the Department has made clear that it does not have an open mind on the question of whether to delay the Borrower Defense Rule.

Respectfully,

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