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Defending Liberty
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Ms. Nikki Harris
U.S. Department of Education
1990 K Street, NW, Room 8033
Washington, DC 20006-8502

Re: Proposed Rulemaking; Public Interest Loan Forgiveness, et al. (RIN 1840-AC94)

Dear Ms. Harris:

On behalf of the American Bar Association (ABA), I am pleased to provide these comments in response to the Department of Education proposed rulemaking concerning amendments to the Federal Perkins Loan Program; the Federal Family Education Loan Program and the William D. Ford Federal Direct Loan Program pursuant to P.L. 110-84, the College Cost Reduction and Access Act of 2007.

These changes provide, among other things, repayment options for student borrowers, including lower-income borrowers, and provide specific relief to public sector employers and employees. We believe that these changes provide vital tools necessary to bridge a gap between growing demands on the public sector in the delivery of critical services and the increasing insurmountable inability of higher education graduates with substantial student loan debt loads to be able to afford to take these usually lower-paying positions.

Preliminarily, we wish to commend the Department and non-federal negotiators who participated in advanced discussions that produced these proposals. For the most part, the proposed regulations balance countervailing interests while preserving what we understand to be the purpose of the legislation.

Clarity of the Regulations

The Proposed Rulemaking solicits comments on the clarity of the regulations pursuant to Executive Order 12866. While we do not take issue with language generally, we believe that the final regulations should be perfectly clear not just as to their terms, but also their operation. As we address below, repayment options and benefits under the income-contingent and income-

based repayment programs, as well as the public interest loan forgiveness program, involve potentially long-term commitments with significant financial consequences for even a technical misunderstanding. Consistent with growing federal interest in promoting increased consumer literacy and understanding in other areas of consumer lending, we urge you to include with the final regulations illustrations, such as hypothetical scenarios that demonstrate successful compliance as well as technical noncompliance and the appropriate administrative mechanism for redress.

Definitions §§ 682.215(a) and 685.221(a)(4); Married Borrowers

Shortly following the enactment of P.L. 110-84, and with it the Income-Based Repayment option (IBR), Congress approved technical amendments under P.L. 110-153 to, among other things, provide married borrowers relief from a disadvantage under IBR. Under P.L. 110-84, for the purposes of computing income-based repayment, the incomes of both spouses were to be combined, attributing access to the full income of each spouse to the single borrower. Obviously, this could lead to considerable penalty since, for example, if both spouses were in repayment under IBR, it could attribute the combined income of both spouses to each.

P.L. 110-153, however, amended 20 U.S.C. 1098e to provide that married borrowers could avoid this by filing separate income tax returns and thereby exclude their spouse's income from their own when computing IBR. We are concerned that this proposed solution may have unintended consequences for married couples who are forced to choose between avoiding the IBR "penalty" and forgoing tax benefits intended for married couples for which they must file jointly. We do not think it is unreasonable to take account of a spouse's income in appropriate circumstances, but we believe that such consideration should more fairly ascribe half of their combined income than their sum, and perhaps also contemplate student debt repayment status of both spouses. Accordingly, consistent with efforts in P.L. 110-153, we urge you to consider further regulation in this area to ensure that borrowers are not treated unfairly in seeking their due benefits by virtue of being married.

Eligibility Documentation §§ 682.215(e)(i)(B) and 685.221(e)(i)(B)

As a point of clarification, we note that in these two sections a loan holder has the opportunity to produce alternative documentation to demonstrate a borrower's adjusted gross income (AGI) when AGI is otherwise not available or the loan holder suspects the income is not accurately reported. We encourage the Department to clarify whether a similar ability to demonstrate AGI through alternative documentation in these circumstances should also be extended to the borrower.

Public Service Loan Forgiveness § 682.219; Need for Certification of Compliance

Our greatest concern under these proposed regulations is the silence concerning a borrower's ability to certify on an ongoing basis that he or she is in compliance with the terms of the loan

forgiveness program. Under the proposed regulations, it seems that a borrower would have to wait until the end of the requisite 120 monthly payments to know whether monthly payments made while in a particular job or assignment were disqualified from accrual towards the loan forgiveness benefit. Also, while it is reasonable to expect that a person would assume responsibilities in order to enjoy a federal benefit, we question the reasonability of requiring persons to maintain a complete and detailed employment history of at least 10 years duration without an interim means of assurance from the Department that the employment is compliant and documentation appropriate for Department purposes.

Further, while there are some definitions provided for qualifying employers, certain positions are less clear or could become unclear, yet there is no proposed mechanism for an employee or employer to seek certification or assurances from the Department that a given position qualifies appropriate payments towards the loan forgiveness benefit. With every change in employment laudably motivated public servants acting in good faith should be equipped to make such moves with confidence regarding whether they are in compliance with the loan forgiveness program.

Given that the College Cost Reduction and Access Act represented an investment in the public service workforce, employers, too, should have a mechanism by which they can certify to their current and new employees that they are an approved workplace for those who may seek loan forgiveness.

Given the lengthy service required, the consequences of even technical non-compliance and for the reasons cited above, we urge you to adopt a mechanism by which employees and employers are able to seek ongoing assurance from the Department of Education that a particular position satisfies the public service loan forgiveness program requirements.

Public Service Loan Forgiveness § 682.219(b); Public Interest Law Services

The College Cost Reduction and Access Act did not attempt to fully describe the range of public interest law services to be covered under the loan forgiveness program but provided a parenthetical that included by way of example prosecutors and public defenders, as well as those who provide advocacy in low-income communities at nonprofits. There was no requirement that this advocacy or related services be in support of a government funded program, as the proposed regulations would require. The original focus of the public interest law provision was on the population served and the services provided. It is true that in limiting the scope to those supported by government programs it captures a core population meant to be included. However, in the effort to streamline and reorder definitions to base them on where one works, many committed and deserving public servants contemplated by the new law will be excluded.

Many law service programs that serve the poor, vulnerable, and others in need, are not part of a 501(c)(3) nor receive government funding. Some work for other forms of nonprofits and in addition to pro bono coordination services some state and local bar associations will employ a full-time lawyer to provide critical services to the poor on a very limited budget. These and related programs are growing to meet the overwhelming and exploding legal needs of our

military veterans and their families, those enduring the mortgage foreclosure issues or natural disasters, are survivors of domestic violence, or face other crises.

We support efforts to ensure that the loan forgiveness program only applies to those most deserving and in need and would welcome the opportunity to work with you to craft a modified definition of "public interest law services," or one that allows the Secretary the ability to review applications for forgiveness in certain public interest law service settings. In the alternative we would suggest as one possibility that "public interest law services" would refer to legal services provided to low income individuals at no or very low cost to the individual.

Public Service Loan Forgiveness § 682.219(b)(2); Full Time Employment

We note that the proposed rulemaking establishes several qualifications on what may constitute "full-time employment" – something that has generally been left to the states and employers to define for accessing state and federal benefits. We applaud the work of the federal and non-federal negotiators in striking a balance in developing an inclusive definition of what may constitute "full-time" for the purposes of this loan forgiveness program, a definition that includes contemplation of an employer's own definition provided it requires a greater number of hours of service than the other listed options.

We take particular note, however, of the express exclusion of "vacation" from the computation of hours of full time employment. Vacation is an important tool for employers to ensure the quality of the services they provide through improved morale and the prevention of burnout – a significant concern of public service employers. However, we note, for example, that if the portion of a employee's 35-work week that represents hours of leave accrued is excluded, it can bring the total hours below 30, potentially disqualifying the employment. It is possible that under 685.219(b)(1)(A) an employee can demonstrate actual hours worked when in excess of those contracted, but there is no guidance as to how this would be demonstrated.

We recommend that you consider, and provide greater clarification as to the intent here, and its consistency with the purpose of the underlying law.

Again, we thank you for this opportunity to provide these comments and look forward to the final regulations implementing these invaluable new programs.

Respectfully submitted,

Thomas M. Susman