

# United States Senate

WASHINGTON, DC 20510

May 23, 2024

Tara Twomey  
Director, Executive Office for United States Trustees  
U.S. Department of Justice  
441 G Street, NW, Suite 6150  
Washington, D.C. 20530

Dear Director Twomey:

We write to seek information about the implementation of the Department of Justice (DOJ) and Department of Education (ED) guidance regarding requests to discharge student loans in bankruptcy. Since the November 2022 enactment of a new process for handling these requests, DOJ and ED have worked together to help more student loan borrowers obtain relief from crushing debt after filing for bankruptcy. Data released by DOJ and ED at the one-year mark of the process's implementation shows encouraging progress. We urge you, as the government's bankruptcy watchdog, to continue to educate borrowers, attorneys, and courts about the new guidance so that every qualified borrower can obtain relief.

Bankruptcy is supposed to be a tool for Americans struggling with debt to obtain a fresh start. However, for the last few decades, this relief has been out of reach for borrowers struggling with student loan debt. The Bankruptcy Code as it exists today, after multiple amendments by Congress, requires borrowers to prove that repaying their student loans would constitute an "undue hardship."<sup>1</sup> This standard is not consistent with Congress's original treatment of student loans in the Bankruptcy Code of 1978. When Congress passed the 1978 law, borrowers had two options to discharge their federal student loans: either demonstrate that repayment would impose an undue hardship on the borrower, or prove that the loan first became due at least five years before the borrower filed for bankruptcy.<sup>2</sup> In this way, Congress sought to prevent a situation in which borrowers struggled with student loan debt for decades. However, subsequent amendments made it harder and harder for struggling borrowers to discharge their loans alongside other debts in bankruptcy.<sup>3</sup> In 2005, Congress expanded the treatment of federal student loans to private student loans, "thus making any student loan, federal or not, essentially non-dischargeable in bankruptcy."<sup>4</sup>

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<sup>1</sup> 11 USC 523(a)(8).

<sup>2</sup> Public Law 95-598, Section 523(a)(8), 92 Stat. 2549 (1978).

<sup>3</sup> Public Law 96-56, 93 Stat. 387 (1979); Bankruptcy Amendments and Federal Judgeship Act of 1984, Public Law 98-353, Section 454(a), 98 Stat. 333 (1984); Omnibus Budget Reconciliation Act of 1990, P.L. 101-508, Section 3007, 104 Stat. 1388 (1990); Crime Control Act of 1990, Public Law 101-647, Section 3621(1)-(2), 104 Stat. 4789 (1990); Higher Education Amendments of 1998, Public Law 105-244, Section 971(a), 112 Stat. 1581 (1998); Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Public Law 109-8, Section 220, 119 Stat. 23 (2005).

<sup>4</sup> Georgia State University Law Review, "The Income-Based Repayment Plans and For-Profit Education: How Does This Combination Affect the Question to Include Student Loans in Bankruptcy?," Kevin J. Smith, Volume 32, Issue 3, Spring 2016, p. 642, <https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2838&context=gsulr>.

The “undue hardship” standard is difficult to meet and is not applicable to other types of consumer debt, which can typically be discharged in bankruptcy. As we have previously highlighted, demonstrating “undue hardship” involves a tedious and costly process that requires borrowers to prove that their inability to repay the loan will persist into the future, that they will be unable to maintain a “minimal” standard of living if forced to repay the loan, and that they have made good faith efforts to repay the loans.<sup>5</sup> Further, some bankruptcy courts’ application of the “undue hardship” test has been “random, arbitrary and unfair.”<sup>6</sup> As a result, borrowers struggling under the weight of student loans have historically found no relief, even if they make the decision to upend their finances by filing for bankruptcy: From 2011 to 2019, more than 99.8% of borrowers who filed for bankruptcy did not get their student loans discharged.<sup>7</sup>

On November 17, 2022, DOJ and ED announced a new process to make it fairer and easier for student loan borrowers to discharge their student loans in bankruptcy, consistent with President Biden’s commitment to fixing our broken student loan system.<sup>8</sup> The process “provides Justice Department attorneys with clear standards for recommending discharge to the judge without unnecessarily burdensome and time-consuming investigations.”<sup>9</sup> While the “undue hardship” standard remains in place for now, the Biden administration’s actions streamline the information required of the borrower by having the borrower complete a simplified attestation form rather than undergo a costly and intrusive process.<sup>10</sup> That information assists DOJ and ED in making a fair, efficient, and transparent recommendation to the bankruptcy judge, pursuant to new and clearer standards, in support of discharging some or all of the borrower’s debt.<sup>11</sup>

In the time since the guidance was implemented, DOJ and ED have collected data on the process and its use by U.S. Attorneys’ Offices, and have also collected comments from groups like the National Association of Consumer Bankruptcy Attorneys.<sup>12</sup> We are encouraged to see that the data is promising and shows that “[t]he vast majority of borrowers seeking discharge have received full

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<sup>5</sup> Letter from Senator Warren to Attorney General Merrick Garland, July 26, 2023, <https://www.warren.senate.gov/imo/media/doc/2023.07.26%20Letter%20to%20DOJ%20re%20Student%20Loan%20Bankruptcy%20Guidance.pdf>.

<sup>6</sup> National Consumer Law Center, “New Process to Discharge Student Loans in Bankruptcy,” John Rao, December 12, 2022, p. 3, <https://www.nclc.org/wp-content/uploads/2022/12/NCLC-ED-DOJ-Undue-Hardship-Guidance-article-3.7.23.pdf>.

<sup>7</sup> Duke Law Journal, “The Student Loan Bankruptcy Gap,” Jason Iuliano, Volume 70, Number 3, December 2020, pp. 525-526, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4046&context=dlj>.

<sup>8</sup> U.S. Department of Justice, “Justice Department and Department of Education Announce a Fairer and More Accessible Bankruptcy Discharge Process for Student Loan Borrowers,” press release, November 17, 2022, <https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-fairer-and-more-accessible-bankruptcy>.

<sup>9</sup> *Id.*

<sup>10</sup> U.S. Department of Justice, “Guidance for Department Attorneys Regarding Student Loan Bankruptcy Litigation,” November 17, 2022, pp. 1-2, [https://www.justice.gov/d9/pages/attachments/2022/11/17/student\\_loan\\_discharge\\_guidance\\_-\\_guidance\\_text\\_0.pdf](https://www.justice.gov/d9/pages/attachments/2022/11/17/student_loan_discharge_guidance_-_guidance_text_0.pdf).

<sup>11</sup> U.S. Department of Justice, “Justice Department and Department of Education Announce a Fairer and More Accessible Bankruptcy Discharge Process for Student Loan Borrowers,” press release, November 17, 2022, <https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-fairer-and-more-accessible-bankruptcy>.

<sup>12</sup> U.S. Department of Justice, “Justice Department and Department of Education Announce Successful First Year of New Student-Loan Bankruptcy Discharge Process,” press release, November 16, 2023, <https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-successful-first-year-new-student-loan>.

or partial discharges.”<sup>13</sup> Further, at least two bankruptcy courts have, in response to the new guidance, adopted procedures to streamline requirements for borrowers, reducing the time that borrowers spend in limbo after submitting applications.<sup>14</sup> Finally, we were glad to see that 97% of borrowers seeking discharges of their student loans are voluntarily using the new process.<sup>15</sup> All of these results point to a well-designed system.

Nevertheless, there is significant room for improvement. DOJ and ED reported that in the first ten months of the process, borrowers filed 632 cases seeking to discharge their student loans.<sup>16</sup> In the five years before the pandemic, an average of 480 people annually sought a discharge of their student loans in bankruptcy.<sup>17</sup> The 2022 figure represents a modest increase from recent years,<sup>18</sup> but a miniscule number of applications compared to how many student loan borrowers are struggling with decades-long debt. More than 43 million borrowers in the United States carry a total of \$1.6 trillion in student loan debt, and more than 2 million borrowers have been repaying those loans for at least 20 years.<sup>19</sup> We have also received reports of uncertainty and delays during review of borrowers’ attestation forms in advance of a recommendation to the judge.<sup>20</sup>

After years of presuming that no relief was available for crushing student loan debt, borrowers now have options. The Biden administration has worked hard to enact policy change to help borrowers, but, as the low number of bankruptcy filers seeking student loan discharges shows, DOJ and ED must work harder to encourage borrowers to seek relief—and deliver on that relief when requested.

The U.S. Trustee Program (USTP), the U.S. government’s bankruptcy watchdog, has broad responsibility for overseeing bankruptcy across the United States.<sup>21</sup> With 21 regions and 89 field office locations,<sup>22</sup> the USTP has visibility into nearly all Federal judicial districts, and the ensuing ability to observe national trends and enact system-wide change. USTP can therefore play a powerful role to dispel the existing perception that student loans are non-dischargeable in bankruptcy. USTP should redouble its efforts to educate bankruptcy attorneys, advocacy

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> New York Times, “Discharging Student Debt in Bankruptcy Is Supposed to Be Easier Than Before,” Tara Siegel Bernard, August 9, 2023, <https://www.nytimes.com/2023/08/09/your-money/student-loan-bankruptcy-discharge.html>.

<sup>18</sup> U.S. Department of Justice, “Justice Department and Department of Education Announce Successful First Year of New Student-Loan Bankruptcy Discharge Process,” press release, November 16, 2023, <https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-successful-first-year-new-student-loan>.

<sup>19</sup> Federal Student Aid, “Federal Student Aid Posts New Quarterly Reports to FSA Data Center,” press release, August 30, 2023, <https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2023-08-30/federal-student-aid-posts-new-quarterly-reports-fsa-data-center>; U.S. Department of Education, “Biden-Harris Administration Announces New Plans to Deliver Debt Relief to Tens of Millions of Americans,” press release, April 8, 2024, <https://www.ed.gov/news/press-releases/biden-harris-administration-announces-new-plans-deliver-debt-relief-tens-millions-americans>.

<sup>20</sup> New York Times, “Discharging Student Debt in Bankruptcy Is Supposed to Be Easier Than Before,” Tara Siegel Bernard, August 9, 2023, <https://www.nytimes.com/2023/08/09/your-money/student-loan-bankruptcy-discharge.html>.

<sup>21</sup> U.S. Trustee Program, U.S. Department of Justice, “About the United States Trustee Program,” <https://www.justice.gov/ust/about-program>.

<sup>22</sup> U.S. Trustee Program, U.S. Department of Justice, “U.S. Trustee Program,” <https://www.justice.gov/ust>.

organizations, bankruptcy trustees, and individuals on how the updated process can benefit borrowers who are crushed by student debt and are contemplating filing for bankruptcy.

We are writing to seek information on USTP's efforts to educate borrowers and others about the new process, and ask that you provide responses to the following questions no later than June 7, 2024:

1. What activities has USTP undertaken to educate bankruptcy attorneys (including bankruptcy and bar associations) about the DOJ/ED student loan bankruptcy process? Please provide specific dates and descriptions for each activity.
2. What activities has USTP undertaken to educate advocacy organizations about the DOJ/ED student loan bankruptcy process? Please provide specific dates, descriptions, and names of organizations.
3. What activities has USTP undertaken to educate United States Trustees about the DOJ/ED student loan bankruptcy process? Please provide specific dates and descriptions, where applicable.
4. What activities has USTP undertaken to educate private trustees about the DOJ/ED student loan bankruptcy process? Please provide specific dates and descriptions, where applicable.
5. What activities has USTP undertaken to educate borrowers about the DOJ/ED student loan bankruptcy process? Please provide specific dates and descriptions, where applicable.
6. What activities does USTP plan to undertake to increase the number of borrowers who utilize the DOJ/ED student loan bankruptcy process? Please provide anticipated dates and descriptions for those activities.
7. What challenges has USTP faced while educating attorneys, borrowers, and others regarding the DOJ/ED student loan bankruptcy process?

Sincerely,



Elizabeth Warren  
United States Senator



Sheldon Whitehouse  
United States Senator