

WHY ARE 99% OF THE APPLICATIONS FOR DEBT DISCHARGE  
UNDER THE PUBLIC SERVICE LOAN FORGIVENESS  
PROGRAM BEING DENIED, AND WILL THIS CHANGE?

By

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## INTRODUCTION

On October 1, 2017 people started to first become eligible for tax-free forgiveness of their remaining student loan debts under the Public Service Loan Forgiveness program (“PSLF program”).<sup>2</sup> I have estimated that given that tens of millions of governmental and non-governmental employees are engaged in public service work<sup>3</sup> eventually as many as 200,000 or more borrowers/year will obtain debt forgiveness under this program, at a cost to taxpayers of as much as \$12 billion to \$18 billion/year.<sup>4</sup> However, these projections as to the eventual large scale and substantial costs of the program are called into question by the strikingly high rates at which the initial wave of applicants for debt forgiveness under the PSLF program have been denied. But as I will discuss in some detail both the number of applications filed annually and the approval rate for those applications are likely to increase significantly over time, although the number of approvals will

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<sup>2</sup> College Cost Reduction and Access Act, Pub. L. No. 110-84, Section 401, 121 Stat.784, 800 (2007) (codified as amended as 20 U.S.C. Section 1087e(m)(2012). There are several technical requirements for eligibility for debt forgiveness under that program. The loans to be forgiven have to be federal Direct Loans, the person has to be enrolled in the 10-Year Standard Repayment Plan or in one of several income-based loan repayment Plans, the person has to have worked for at least ten years in a qualifying public service job since October 1, 2007, and the person has to have made all of the required loan repayments over that time period. *See* Dep’t of Education, Public Service Loan Forgiveness (PSLF): Application for Forgiveness (expiration date 5/31/2020), available at <https://studentaid.ed.gov/sa/sites/default/files/public-service-application-for-forgiveness.pdf>. I will henceforth refer to the PSLF program as a “program,” as is conventional, even though technically it is not a separate program but just a set of eligibility criteria for obtaining debt forgiveness under one or another of several of the various federal student loan repayment Plans.

<sup>3</sup> Gregory Crespi, “Could the Benefits of the Public Service Loan Forgiveness Program be Retroactively Curtailed?,” 51 *Conn. L. Rev.* 1, 11 (forthcoming 2019).

<sup>4</sup> *Id.* at 12-13.

probably not approach the steady-state of 200,000+ approvals/year that I have estimated will eventually be reached<sup>5</sup> until sometime between 2024 and 2028, several years later than I had projected in my earlier work,<sup>6</sup> although there are many factors involved that make forecasting the growth rates and eventual steady-state levels of both the number applications and the number of approvals very difficult.

As of March 31, 2019 the Department of Education (“DOE”) had received 86,006 applications for debt forgiveness under this program over the first 18 months during which applications could be filed.<sup>7</sup> Of those applications the large majority (76,002 applications) had their processing completed by that date.<sup>8</sup> But of those fully processed applications only 864 applications – a minuscule 1.14% of those processed -- had been approved by FedLoan Servicing (“FedLoan”), the DOE’s designated loan servicer for the PSLF program!<sup>9</sup> 74% of the applications were denied by FedLoan for not meeting one or more of the program’s

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<sup>5</sup> *Id.* at \_\_\_\_.

<sup>6</sup> *Id.* at \_\_\_\_.

<sup>7</sup> See Public Service Loan Forgiveness (PSLF) Program Data, available at <https://studentaid.ed.gov/sa/about/data-center/student/loan-forgiveness/pslf-data> (“March 31, 2019 PSLF Program Data”). An earlier 2019 DOE release provided application data for individual three-month periods ending June 30, 2018, September 30, 2018, and December 31, 2018. See Public Service Loan Forgiveness (PSLF) Program Data, available at <https://studentaid.ed.gov/sites/default/files/fsawg/datacenter/library/pslf-report.xls> (“December 31, 2018 PSLF Program Data”).

<sup>8</sup> March 31, 2019 PSLF Program Data, *id.*

<sup>9</sup> *Id.* Once a borrower files an Employment Certification Form, *see infra* n. 13, or a PSLF Application for Forgiveness, *see supra* n. 2, then the servicing of their loan is transferred over to FedLoan if that firm is not already their loan servicer.

requirements, with most but not all of these denials because of an insufficient number of qualifying payments had been made,<sup>10</sup> and another 25% of the applications were denied for failing to provide complete information on the application.<sup>11</sup>

Such a shockingly high 99% denial rate is difficult to understand given how much is at stake for the applicants seeking forgiveness of often large remaining student loan debts.<sup>12</sup> It is particularly surprising given that slightly more than two-thirds of the voluntary annual requests made by borrowers since 2012 that their employment be certified as qualifying public service employment have been granted,<sup>13</sup> with the majority of rejections for certification being due simply to missing information on the certification request form, rather than because of ineligible loans, or because of ineligible employers (which very surprisingly was

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<sup>10</sup> 53% of the applications filed were denied due to an insufficient number of qualifying payments, 16% were denied because of ineligible loans, but only 2% were denied because of ineligible employment dates, and only 2% were denied because of an ineligible employer. *See* March 31, 2019 PSLF Program Data, *supra* n. 7.

<sup>11</sup> *Id.*

<sup>12</sup> Of the 864 applications for debt forgiveness that had been approved as of March 31, 2019, a total of 518 borrowers had had their debts discharged, with a total dollar value of these discharges of \$30.69 million, an average of \$59,244 per borrower. For some borrowers, particularly law school or medical school graduates, the discharged debt could easily exceed \$200,000.

<sup>13</sup> The DOE has never made available to loan servicers or borrowers either a comprehensive list of qualifying employers or detailed employer qualification criteria. The DOE did first make available in 2012 a two-page Employment Certification Form that borrowers can submit to FedLoan annually to have their current employment certified as qualifying. *See* <https://studentaid.ed.gov/sa/sites/default/files/public-service-employment-certification-form.pdf>. As of March 31, 2019 of the 3,213,089 annual requests for certification that have been filed since 2012, 2,181,000 of them have been approved, approximately 68.0% of the requests, with only 5% of the denials being due to an ineligible employer rather than for another reason. *See* March 31, 2019 PSLF Program Data, *supra* n. 7.

the reason given for only 5% of the rejections of employment certification ).<sup>14</sup>

Can it really be that 99% of the applicants either misunderstood the eligibility requirements or were unable to properly complete the relatively straightforward two-page application? Or is there some other reason for such sweeping denials?

One possible partial explanation for such a strikingly high denial rate that I have considered was that the DOE was (and probably still is) directing FedLoan to impose an employment eligibility limitation that the “primary purpose of the employer” must be to provide public service. In other words, an employee who provides otherwise qualifying public service as their duties for an employer whose primary purpose is other than providing public service would not qualify for PSLF loan forgiveness. This limitation would appear to significantly narrow the class of employers that can offer qualifying public service jobs, and thus result in denial of a significant number of otherwise qualified applicants. But this “primary purpose of the employer” limitation is not included in the statutes creating the PSLF program, nor in the DOE’s implementing regulations, and moreover was struck down in federal court in early-2019 as being “arbitrary and capricious” because of the DOE’s failure to comply with Administrative Procedures Act requirements in directing FedLoan to impose that limitation that goes beyond the text of DOE

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<sup>14</sup> March 31, 2019 PSLF Program Data, *supra* n. 7.

regulations.<sup>15</sup> But FedLoan is apparently still applying that “primary purpose of the employer” limitation, as the current PSLF Application for Forgiveness form indicates,<sup>16</sup> even though the DOE to my knowledge has not yet adequately addressed the serious procedural concerns raised by that limitation that are noted in the invalidating court ruling.

Until recently I believed that this judicially-invalidated “principle purpose of the employer” limitation might have been the basis for a significant number of the PSLF denials of applications, denials issued for applications that should have been approved. However, the DOE in its March 31, 2019 quarterly update of PSLF application data for the first time has stated that only 2% of the applications denied were denied due to the employer not being eligible,<sup>17</sup> and likely only a portion of those ineligible employer denials were due to the failure of applicants to satisfy the

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<sup>15</sup> American Bar Association v. United States Dep’t of Education, Civil Action No. 16-2476(TJK) (D.D.C., Feb. 22, 2019) (“ABA v. DOE”), at 2 (granting several of the plaintiffs summary judgment on the basis that “Defendants acted arbitrarily and capriciously when the Department [DOE] changed its interpretation of the PSLF regulation in two ways [including imposing the “primary purpose of the employer” limitation] without displaying awareness of its changed position, providing a reasoned explanation for that decision, and taking into account the serious reliance interests affected.”).

<sup>16</sup> The PSLF Application for Forgiveness indicates that despite the judicial condemnation of this criterion as arbitrary and capricious the DOE is still imposing a “primary purpose of the employer” limitation on non-governmental employers. *See supra* n. 2 at Section 3, Question 13. I have seen no evidence that the DOE has since adequately addressed the concerns expressed in ABA v. DOE, *supra* n. 15, which struck down that limitation.

<sup>17</sup> *See* March 31, 2019 PSLF Program Data, *supra* n. 7. I am a little suspicious about this 2% figure given the large number of entities that have at least some of their employees providing qualifying public service work as their main duty, even though such public service is not the overall entity’s primary purpose. For example, the American Bar Association is one such entity. *See* ABA v. DOE, *supra* n. 15.

“primary purpose of the employer” criterion. Importantly, however, it is not revealed by the DOE data how many additional borrowers who may have met the PSLF statutory and regulatory criteria for debt forgiveness chose not to file an application because they first reviewed the PSLF Application for Forgiveness form or other DOE- or FedLoan-provided information and reasonably concluded that their application would be denied simply because at least one of their employers’ primary purpose was not providing public service. Such statutorily eligible but discouraged persons should really be regarded as another group of de facto application denials, further reducing the effective borrower approval rates, probably down to 1% or perhaps even lower.

In late 2018 the DOE first revealed that as of June 30, 2018 approximately 99% of the PSLF loan forgiveness applications that had been processed had been denied.<sup>18</sup> Partially in response to the adverse public reaction this information provoked<sup>19</sup> on October 16, 2018 a large number of Democratic Senate and House of Representatives members (35 Senators and 118 House members) sent to DOE Secretary Betsy DeVos a very detailed request for information regarding the causes

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<sup>18</sup> See December 31, 2019 PSLF Program Data, *supra* n. 7. A September 2018 General Accountability Office study had revealed earlier that as of April 30, 2018 FedLoan had fully processed 16,890 applications and had granted loan forgiveness to only 55 applicants, a 99.7% denial rate. United States Government Accountability Office, “Public Service Loan Forgiveness: Education Needs to Provide Better Information for the Loan Servicer and Borrowers,” GAO-18-547 (September 2018) at 11. Those April 30, 2018 statistics, however, are not presented in the DOE’s Public Service Loan Forgiveness (PSLF) Program Data tables, *supra* n. 7.

<sup>19</sup> See, e.g., Stacy Cowley, “28,000 Public Servants Sought Student Loan Forgiveness. 96 Got It,” N.Y. Times (Sept. 27, 2018).

for denials of PSLF applications.<sup>20</sup> That letter requested a response no later than November 27, 2018.<sup>21</sup> However, in a manner that foreshadowed the Trump Administration’s later announced policy with regard to all Congressional oversight requests for information and subpoenas the DOE has not as far as I am aware formally responded to this letter, forcing Congress and the public to speculate as to the relative significance of possible explanations for this bizarrely high 99% denial rate.<sup>22</sup> Moreover, that denial rate has not declined since the release of June 20, 2018 applicant information but has instead remained at approximately 99% for the third and fourth quarters of 2018 and for the first quarter of 2019,<sup>23</sup> according to

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<sup>20</sup> See

<https://www.warren.senate.gov/imo/media/doc/2018.10.16%20Letter%20to%20DeVos%20re%20Opportunity%20implementation%20of%20the%20PSLF%20program.pdf>. That Congressional letter in its PSLF Data Request Appendix asked for very detailed information breaking down the application denials on a state-by-state basis, and with regard to the following possible reasons for denial: incomplete applications, ineligible employers, ineligible loan types, insufficient number of payments due to ineligible employment, insufficient number of qualifying payments, insufficient number of payments due to length of time in repayment, both for Direct Consolidation Loans and other loans, insufficient number of payments due to ineligible repayment plan, and ineligible number of payments due to non-timely payments. That letter did not, however, question specifically whether a “primary purpose of the employer” limitation had been imposed to deny applications. The request letter also called for a breakdown of applicants by loan servicer, and also sought similar information regarding denials of applications for employment certification, and certain other related information. *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> The DOE has, however, recently provided a little more information regarding the relative significance of the various reasons for denying applications, although they have not come close to providing the very granular denial information requested by Congress, *see supra* n. 20. See March 31, 2019 PSLF Program Data, *supra* n. 7.

<sup>23</sup> In the third quarter of 2018 there were an additional 15,811 applications processed, of which only 134 were approved, a 99.2% denial rate. In the fourth quarter of 2018 there were an additional 13,569 applications processed, of which only 187 were approved, a 98.6% denial rate, December 31, 2018 PSLF Program Data, *supra* n. 7. In the first quarter of 2019 there were an additional 17,709 applications processed, of which only 254 were approved, again a 98.6%



the most recent available data.

As another Congressional response to this strikingly high PSLF program denial rate Congress approved in 2018 as part of \_\_\_ the Temporary Expanded Public Service Loan Forgiveness program (“TEPSLF program”) which provides \$350 million for loan discharges for borrowers who had enrolled in a repayment plan that did not qualify for the PSLF program, but who otherwise qualified for PSLF program debt forgiveness.<sup>24</sup> For fiscal year 2019 another \$350 million was added to the TEPSLF program by the \_\_\_, for a total of \$700 million now available to borrowers who qualify.<sup>25</sup> However, while out of 38,460 applications for debt forgiveness under that TEPSLF program as of December 31, 2019 a full 37,276 had been processed, only 262 of those applications had been approved, once again a denial rate well over 99%<sup>26</sup> even for a program that relaxed one of the requirements of the PSLF program that had resulted in a substantial proportion of

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denial rate, March 31, 2019 PSLF Program Data, *supra* n. 7.

<sup>24</sup> [give TEPSLF cite] These additional qualifying repayment plans include the Graduated Repayment Plan, the Extended Repayment Plan, the Consolidation Standard Repayment Plan, and the Consolidation Graduated Repayment Plan. Dep’t of Education, “Temporary Expanded Public Service Loan Forgiveness” (2019), available at <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service/temporary-expanded-public-service-loan-forgiveness>. FedLoan has also been designated by the DOE as the loan servicer for processing TEPSLF debt forgiveness applications.

<sup>25</sup> [give TEPSLF modification cite]

<sup>26</sup> Aimee Picchi, “Student Loan Relief for Public Servants: 38,460 applied, only 262 are Accepted,” *CBS News*, [www.cbsnews.com/news/student-loan-relief-for-public-servants-many-apply-few-are-accepted/](http://www.cbsnews.com/news/student-loan-relief-for-public-servants-many-apply-few-are-accepted/) (April 4, 2019). *See also* Danielle Douglas-Gabriel, “Education Department Rejects Vast Majority of Applicants for Temporary Student Loan Forgiveness Program,” *Washington Post* (April 2, 2019). Out of 38,460 – 1,184 = 37, 276 TEPSLF program applications that had been fully processed as of December 28, 2018, only 262 had been granted debt forgiveness, only a 0.7% approval rate. *Id.*

that program's denials.

This high denial rate for the TEPSLF program may be slightly misleading, however, because approximately three-quarters of those denials were not because of a failure to meet a substantive PSLF program requirement but instead only because the applicants had not first filed a PSLF program application and had the application rejected, a threshold filing requirement that some TEPSLF applicants were unaware of and that they can presumably correct and then refile.<sup>27</sup> But even considering only the remaining 8,636 fully processed applications filed after the applicants had first sought and been denied PSLF program relief as required the denial rate was still a very high 97%.<sup>28</sup>

On February 12, 2019 the DOE's Office of Inspector General released a report that was highly critical of the conduct of the DOE's Federal Student Aid office ("FSA office") that oversees the DOE's student loan programs, stating that the FSA office over a two-and-a-half year period through September of 2017 had

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<sup>27</sup> As of December 31, 2018 out of the 38,640 TEPSLF program applications filed 28,640 had been rejected for their failure to first file a PSLF program application, a 74% rejection rate on that criterion alone. *See* Danielle Douglas-Gabriel, *id.* However, even if one only considers the remaining  $9,820 - 1,184 = 8,626$  applications that had been fully processed, and for which the applicants had first filed for and been rejected for PSLF program relief, only  $262/8,626 = 3\%$  were approved. *Id.* The DOE later released TEPSLF application information updated through March 31, 2019 which apparently covered only the TEPSLF applicants who had first filed for and been rejected for PSLF program relief. Out of the 12,429 fully processed applications of that sort as of that date only 442 applications had been approved, only a 3.6% approval rate. 39% of the rejections were due to the borrower not having made 10 years of repayments, 21% were due to the borrower not having met the payment requirements for the past 12 months, and 12% were due to ineligible loans. No further breakdown was provided regarding the remaining 28% of the rejections. *See* March 31, 2019 PSLF Program Data, *supra* n. 7.

<sup>28</sup> Danielle Douglas-Gabriel, *id.*

failed to use data that it had collected regarding loan servicer failure to meet proper standards, had continued to provide contractual opportunities to loan servicers that had engaged in controversial actions with regard to borrowers, and that it had not responded to information suggesting that some loan servicers had miscalculated the amounts of borrower debt.<sup>29</sup> On April 3, 2019 several prominent Democratic Senators wrote to the Director of the Consumer Finance Protection Bureau (“CFPB”) Kathleen Kraninger demanding more information regarding the CFPB’s oversight of the loan servicers that the DOE utilizes to manage its student loan portfolio, including both FedLoan and the other eight loan servicer contractors.<sup>30</sup> Director Kraninger responded by letter on April 23, 2019,<sup>31</sup> stating somewhat surprisingly that the DOE’s loan servicers are now refusing to provide the CFPB with information that it has requested that is necessary for supervisory examination purposes, and that the loan servicers have not refused to provide this information on their own initiative but instead have done so based on guidance provided to those servicers by the DOE, guidance purportedly based on borrower privacy concerns.<sup>32</sup> As far as I am aware the DOE has not yet responded to this CFPB

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<sup>29</sup> Office of Inspector General, U.S. Dep’t of Education, “Federal Student Aid: Additional Actions Needed to Mitigate the Risk of Servicer Noncompliance with Requirements for Servicing Federally Held Student Loans,” ED-OIG/A05Q0008 (Feb. 12, 2019).

<sup>30</sup> See <https://apps.npr.org/documents/document.html?id=5796108-Letter-to-CFPB-on-PSLF-Oversight>.

<sup>31</sup> See <https://www.npr.org/documents/2019/may/042319-letter.pdf>.

<sup>32</sup> *Id.* Former CFPB student loan ombudsman Seth Frotman reacted strongly to Kraninger’s disclosure of loan servicer non-cooperation: “It’s actually quite remarkable...The

allegation.

One would hope that the PSLF and TEPSLF program application denial determinations have all been reached in good faith and simply reflect a near-universal failure of the applicants to meet the statutory and regulatory program requirements, or to provide the requested information necessary to review their applications.<sup>33</sup> I suspect, however, that the situation is more complicated and problematic than that. What I think that we have here is an unfortunate “perfect storm” resulting from the combination of three factors: 1) a relatively technical set of statutory and regulatory PSLF program eligibility requirements that are apparently very difficult for borrowers to understand, 2) the prior (and probably continuing) imposition by the PSLF program loan servicer FedLoan, under DOE directive, of a restrictive “primary purpose of the employer” limitation with regard to qualifying employers that is not to be found in either the PSLF statutes or in the implementing DOE regulations, and that as noted has been struck down in recent litigation as imposed in an “arbitrary and capricious” manner,<sup>34</sup> and 3) ineffective

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head of the Consumer Financial Protection Bureau is telling the world that the secretary of education has put in place a series of policies that are obstructing federal law enforcement officials from standing up for the millions of Americans with student debt.” Chris Arnold, “CFPB Chief Says Education Department is Blocking Student Loan Oversight,” NPR (May 16, 2019), available at <https://www.npr.org/2019/05/16/723568597/cfpb-chief-says-education-department-is-blocking-student-loan-oversight>.

<sup>33</sup> I concede that I may be somewhat naive in assuming such good faith on the part of the Trump Administration in implementing a pre-Administration program that it does not favor and has repeatedly sought to terminate. [cite to 2017 and 2019 budget proposals]

<sup>34</sup> See *ABA v. DOE*, *supra* n. 15.

DOE outreach efforts to inform borrowers as to the PSLF and TEPSLF programs' precise eligibility criteria, along with poor (if not virtually non-existent) oversight by DOE of the activities of the firms engaged to provide loan servicing and to inform borrowers of their repayment options in general, and of the complicated PSLF program requirements in particular.

If I am correct in my analysis then one would expect the number of PSLF applications and their approval rates to each eventually rise very significantly as the benefits of the PSLF program and the reasons for the 99% denial rate become better publicized and bring into sharper focus for later potential applicants the attractiveness of the program and its eligibility requirements, and as the proportion of potential applicants who are ineligible due to having taken out the wrong kinds of federal loans or having enrolled in the wrong kinds of repayment programs declines sharply over time,<sup>35</sup> except to the extent that future denials or potential

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<sup>35</sup> Travis Hornsby in two related substantial blog postings has convincingly argued in some detail that the combination of the replacement of the FFELP loan program by Direct Loans in 2010, and the availability of much more attractive income-based loan repayment programs after the adoption of the Income-Based Repayment program in 2007, and especially after the initiation of the Pay As You Earn program beginning in 2012, will lead a far higher rate of PSLF application approvals for those persons graduating from now Direct Loan-financed undergraduate or graduate programs in 2014 or later, once they begin to meet the ten-year public service employment requirements in 2024 and afterwards. Travis Horner, "What is the PSLF Snowball?" (Feb. 23, 2019), available at <https://www.studentloanplanner.com/podcast-what-is-pslf-snowball/>; Travis Horner, "PSLF Snowball Effect: Why the Approval Rate Will Hit Over 50% by 2024" (Dec. 19, 2018), available at <https://www.studentloanplanner.com/pslf-snowball-effect/>. Preston Cooper in a short *Forbes* article has also offered this argument, noting especially that in 2007 when the PSLF program was adopted only 21% of the outstanding federal student loans were the Direct Loans which qualify for PSLF program debt forgiveness, a percentage now steadily increasing each year since the previously dominant FFELP program for government-

PSLF applicant decisions not to apply are due to continuing application by FedLoan of the judicially-invalidated “primary purpose of the employer” limitation to limit employer eligibility. In particular, each year an increasing proportion of outstanding student loans are the federal Direct Loans that are eligible for debt forgiveness under the PSLF program, rather than the federally guaranteed private loans formerly made under the now-discontinued Federal Family Education Loan Program (“FFELP program”)<sup>36</sup> that are ineligible for PSLF program debt forgiveness, and that comprised the bulk of student lending prior to mid-2010 when that lending program was terminated,<sup>37</sup> and also each year an increasing proportion of borrowers now enroll in eligible income-based loan repayment programs. One would certainly expect a significant rise in approval rates over time as well for the new TEPSLF program, for the same reasons, and again except to the extent that the “primary purpose of the employer” limitation is applied by FedLoan as a basis for denials, and as a means of discouraging applications, particularly given that apparently a full three-quarters of the initial denials under this program

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guaranteed private loans was terminated in 2010. Preston Cooper, “Everyone Calm Down About Rejected Student Loan Forgiveness Applications,” *Forbes* (Sept. 25, 2018), available at [www.forbes.com/sites/prestoncooper2/2018/09/25/everyone-calm-down-about-rejected-student-loan-forgiveness-applications/#19fc18237f6f](http://www.forbes.com/sites/prestoncooper2/2018/09/25/everyone-calm-down-about-rejected-student-loan-forgiveness-applications/#19fc18237f6f). Cooper also notes that many borrowers who have a “gap” in their qualifying payment records for one reason or another, and who therefore had not yet made all of the required 120 qualifying monthly payments when they applied in late-2017 or 2018, will soon start becoming eligible in greater numbers as they make additional qualifying payments, and that borrowers will learn from the early denials and will increasingly make sure that they are enrolled in qualifying repayment plans, and will also make greater efforts to submit properly completed applications. *Id.*

<sup>36</sup> [cite to FFELP program]

<sup>37</sup> [cite to termination of FFELP program]

were simply due to the applicants failing to first file and then be rejected for loan forgiveness under the PSLF program, a threshold problem that can easily be rectified by borrowers prior to refiling their applications.

Let me first discuss in more detail the statutory PSLF program eligibility requirements and the DOE's regulatory interpretation thereof. I will then very briefly discuss the different eligibility requirements for the newer TEPSLF program. I will then turn to discuss in relatively general terms the inadequate DOE outreach and oversight efforts made to ensure that borrowers are adequately informed regarding the requirements for these programs, and that their loan accounts are properly managed by the loan servicers. Finally, I will offer my overall conclusions. I will not in this short article address any of the recent proposals that have been made to legislatively change the PSLF program, either to prospectively curtail it or to expand its eligibility or benefits,<sup>38</sup> since such proposals have very little prospect for adoption given the current pervasive partisan Congressional gridlock.

## THE PSLF PROGRAM ELIGIBILITY REQUIREMENTS

For a student loan borrower to be eligible for tax-free loan forgiveness under

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<sup>38</sup> [cite to and briefly describe the Obama Administration proposal to limit the PSLF program, and the Trump Administration 2017 and 2019 budget proposals to prospectively curtail the PSLF program, and the Kaine/Gillibrand "What You Can Do for your Country Act of 2019"].

the PSLF program several statutory requirements must be met.<sup>39</sup> First of all, the loans must be federal Direct Loans. Private, government-guaranteed loans made under other federal student loans programs – such as the formerly popular FFELP program or the Federal Perkins Loan program -- are eligible only if they are later consolidated into a Direct Consolidation Loan, but loan repayments made on those consolidated loans will not begin to qualify towards the 120 monthly payments required for debt forgiveness until after the consolidation. The consolidation of formerly ineligible loans therefore starts a new required 10-year period for making qualifying repayments, with this postponement significantly reducing if not completely eliminating the benefits of eventual debt forgiveness for many borrowers.

Second, to be eligible for debt forgiveness borrowers must enroll in and make regular loan repayments under one or another of the Direct Loan repayment programs, which include the 10-year Standard Repayment Plan and several different income-based repayment plans.<sup>40</sup> Certain other widely used federal student loan repayment plans, such as the Graduated Repayment Plan or the Extended Repayment Plan, do not qualify (although payments made under those

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<sup>39</sup> See Public Service Loan Forgiveness: Application for Forgiveness, *supra* n. 2.

<sup>40</sup> If a borrower is operating under the 10-Year Standard Repayment Plan, however, then they will have fully paid off their loans by the end of the 10-year period, thus mooting the question of debt forgiveness. The relevant income-based repayment plans that may lead to debt forgiveness under the PSLF program are the now rarely-used Income-Contingent Repayment Plan, and several far more popular choices: the Income-Based Repayment Plan, the Pay As You Earn Plan, and the Revised Pay As You Earn Plan.



other plans may now qualify under the TEPSLF program).

Third, the 120 monthly payments must be made while the borrower is working full-time<sup>41</sup> in a “public service job” after October 1, 2007, and the borrower must be so employed when applying for debt forgiveness. The criteria for employment to qualify as a “public service job” are set forth by statute<sup>42</sup> and in the implementing DOE regulations,<sup>43</sup> but the proper scope of that statutory phrase is open to dispute and has arguably been mischaracterized by the DOE in its regulations and with its “primary purpose of the employer” gloss on those regulations.<sup>44</sup> The payments need not be consecutive; “gaps” in making qualified

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<sup>41</sup> This is defined as at least 30 hours/week. *See* 20 U.S.C. Section 1087e.

<sup>42</sup> 20 U.S.C. Section 1087e(m)(3)(B).

<sup>43</sup> 34 C.F.R. Section 685.219 (2008).

<sup>44</sup> The DOE’s regulations implementing the PSLF program with regard to qualifying employment are on their face not consistent with the statutory criteria, but are simultaneously both under-inclusive and overbroad. The regulations define a new term – “public service organization” – that is not referenced at all in the statutory eligibility criteria, and the regulations then require employment by such an organization for the employment to qualify as a public service job. This interpretation of the statute as so limiting the class of qualifying non-governmental and non-501(c)(3) employers, rather than as focusing solely on the nature of the employment undertaken for such employers, however, appears very strained in light of the statutory text and has not yet to my knowledge been litigated.

Second, the DOE has attempted to argue that its regulations also properly embody a further limitation on qualifying non-governmental and non-501(c)(3) employers that their “primary purpose” must be providing public services, although there is no explicit reference to such a limitation in either the statute or the implementing regulations, and this limitation has been struck down in federal court as “arbitrary and capricious” in the absence of meeting the Administrative Procedures Act’s requirements for a reasoned decision making process supporting that result, *see* ABA v. DOE, *supra* n. 15. Despite that adverse court ruling the DOE’s PSLF Application for Forgiveness still explicitly incorporates a “primary purpose of the employer” limitation, *see supra* n. 2 at Section 3, Question 13.

I suspect that the DOE with its regulations and their “primary purpose of the employer” gloss has not been specifically trying to limit borrower eligibility (although this is a possibility) but has instead primarily been trying to avoid the substantial administrative burden of having to

payments due to changing employers or for other reasons are permitted, so long as a total of 120 qualified monthly payments are made, although no payments made while borrowers are either in deferment or in forbearance status will qualify. As I have previously noted, the DOE has made available since 2012 an Employment Certification form which borrowers can (but are not required to) submit annually to FedLoan to have their current employment certified as qualifying.<sup>45</sup>

Even given these rather technical and confusing program eligibility criteria one would not expect to see such a bizarrely high 99% application denial rate. How could this happen? In my opinion there are a number of contributing factors. First of all, one likely reason for many of the denials is that when the PSLF program was first adopted in 2007 only 21% of the outstanding federal student loans were Direct Loans,<sup>46</sup> and this percentage did not start to significantly increase until the FFELP program was discontinued in mid-2010 and was replaced by the subsequent issuance of Direct Loans to new borrowers. A significant but not overwhelming proportion of the persons seeking debt forgiveness under the

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determine on an individual employee case-by-case basis for employees of such employers whether the employee's duties qualify as a public service job, as well as narrow the class of potentially eligible employees. These measures taken together do substitute a much more manageable organization-level determination of the eligibility of employees for the more difficult individual job duty-based assessment. But it is not clear that mere administrative convenience concerns justify such a significant departure from and narrowing of the statutory job duty-based eligibility criteria. For more discussion of these interpretive questions *see generally* Gregory Crespi, "The Public Service Loan Forgiveness Program: The Need for Better Employment Eligibility Regulations," 66 *Buff. L. Rev.* 819 (2018).

<sup>45</sup> *See supra* n. 13.

<sup>46</sup> *See* Travis Horner, *supra* n. 35; Preston Cooper, *supra* n. 35.

PSLF program that were denied have been denied because their loans are not the federal Direct Loans to which the program is limited.<sup>47</sup> Many borrowers working in public service jobs since 2007 or later, and now having completed 10 years of qualifying employment, probably did not realize when they filed their PSLF applications that their FFELP or Perkins program loans were ineligible and had to be first consolidated into an eligible Direct Consolidation Loan before the required 10-year period of qualifying employment could even begin. In addition, some commentators have noted that the loan servicers may in some instances have a financial incentive not to provide FFELP borrowers with correct information regarding the PSLF program criteria, since that information might then encourage borrowers to consolidate their non-qualifying FFELP loans managed by those servicers into qualifying Consolidated Direct Loans, to the financial disadvantage of the FFELP lenders (and to loan servicers other than FedLoan who would thereby lose a customer and revenue), and that the DOE has not exercised sufficient oversight over the loan servicers to prevent such opportunistic behavior.<sup>48</sup>

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<sup>47</sup> See March 31, 2019 PSLF Program Data, *supra* n. 7 (noting that 16% of the PSLF application denials were because of “No Eligible Loans”).

<sup>48</sup> “The companies that own and service older FFELP loans have a financial disincentive that discourages these companies from providing adequate and actionable information to borrowers to get on track for PSLF. Specifically, once a borrower is advised of her right to pursue PSLF and takes action to get on track, the borrower would have to immediately consolidate her loan—costing the lender future interest revenue and costing the loan servicer a customer. Borrowers often describe being led astray by their FFEL servicers.” Student

Borrowers with ineligible loans can take steps to rectify this problem through consolidating their loans into a new Consolidated Direct Loan, but unfortunately such efforts will be effective only to the limited extent that after consolidation they will have to now commence an additional 10-year period of qualifying employment before they are eligible for tax-free debt forgiveness, significantly reducing or even eliminating the benefits of the PSLF program for many borrowers. The new TEPSLF program does not address this difficulty for borrowers that seek debt forgiveness that stems from their having ineligible loans, but only provides relief for borrowers who have eligible Direct Loans but who have chosen an ineligible repayment plan.

It is also clear that a significant proportion of PSLF program applicants were denied debt forgiveness because they had not enrolled in a qualifying repayment plan.<sup>49</sup> Once informed of this problem borrowers are free to change to a qualifying repayment plan, but this action will then again only serve to start a new 10-year period of qualifying employment before debt forgiveness is available, giving no consideration to their prior qualifying public service employment, therefore

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Borrower Protection Center, “Keeping the Promise of Public Service Loan Forgiveness,” (Dec. 19, 2018), at 11 (“Keeping the Promise”) (available at <https://protectborrowers.org/wp-content/uploads/2018/12/SBPC-AFT-PSLF-Investigation.pdf>).

<sup>49</sup> See March 31, 2019 PSLF Program data, *supra* n. 7 (noting that 53% of PSLF applications denied were due to insufficient “Qualifying Payments,” although not making clear whether this category only referred to applicants who had enrolled in the wrong repayment plan, or also included applicants who were enrolled in a qualifying repayment plan but who had not made all of the required 120 monthly payments).

reducing or even eliminating the benefits of eventual debt forgiveness.

Once again, commentators have noted that loan servicers often provide borrowers with incorrect information regarding the eligibility for the PSLF program of the various repayment options, as well as often fail to process in a timely manner the annual borrower certifications of income required for the various income-based repayment plans.<sup>50</sup> Delaying certification can lead to a borrower being placed in forbearance and then having perhaps several of their subsequent payments no longer qualifying towards the required 120 monthly payments for PSLF relief until the certification problem is resolved.<sup>51</sup> This particular difficulty is the focus of the TEPSLF program, which expands debt forgiveness eligibility to borrowers otherwise qualifying for PSLF program debt forgiveness except for their unwise initial choice of a non-qualifying repayment plan.

Some substantial proportion of the PSLF application denials are surely due to the fact that the applicants have not completed 10 years of qualifying public service employment and made all of their required loan repayments during that time period. Approximately one-third of the annual employment certification requests are denied by FedLoan,<sup>52</sup> which suggests that many borrowers who do not

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<sup>50</sup> Keeping the Promise, *supra* n. 48, at 12.

<sup>51</sup> Keeping the Promise, *supra* n. 48, at 14.

<sup>52</sup> See March 31, 2019 PSLF Program Data, *supra* n. 7.

regularly request such annual certifications may be incorrect in their belief that all 10 years of their employment that they later submit for FedLoan review will qualify as public service work. Looking at the two-page PSLF Application for Forgiveness form what immediately jumps out in this regard is the question posed at Section 3, Question 13 which indicates that the DOE is apparently still imposing through FedLoan a “primary purpose of the employer” limitation regarding which non-governmental and non-501(c)(3) employers would qualify to offer public service jobs,<sup>53</sup> entirely separate from the nature of the work that an employee’s job requires which is the sole focus of the statutory eligibility criteria for non-governmental employees. But as I have discussed no such “primary purpose of the employer” limitation regarding which employers may provide public service jobs appears in either the relevant statutes or in the implementing DOE regulations,<sup>54</sup> and that limitation has recently been struck down in federal court as “arbitrary and capricious.”<sup>55</sup> This suggests that some proportion of these prior 2017 and 2018 denials (and probably also denials since issued in 2019) are incorrect, although this

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<sup>53</sup> “Which of the following services does your employer provide as its primary purpose? [a list of 13 services follows, along with a “none of the above” option] Check all that apply and then continue to section 4. If you you [word repetition mistake in original] check “none of the above”, do not submit this form.” Public Service Loan Forgiveness (PSLF): Application for Forgiveness, *supra* n. 2, at Section 3, Question 13.

<sup>54</sup> See generally Crespi, *supra* n. 44, regarding inconsistencies between the statutory eligibility criteria and the DOE implementing regulations and the “primary purpose of the employer” criterion.

<sup>55</sup> See *ABA v. DOE*, *supra* n. 15.

is apparently a relatively small proportion if the DOE is to be believed.<sup>56</sup> And again it is unclear how many additional borrowers who may have met the statutory and regulatory criteria for debt forgiveness chose not to file an application because they first reviewed the application form and reasonably concluded that their application would be denied simply because their employer's primary purpose was not providing public service.

Finally, approximately 26% of the PSLF applications were denied due to missing information.<sup>57</sup> The DOE has not publicly broken down the nature and proportions of the various information gaps meriting denials, but looking at the rather straightforward two-page application form it would appear that the most likely application deficiencies would be with regard to the Section 3 information that must be provided with regard to each employer over the 10-year period regarding the specific periods of employment and the character of the activities of that employer (including Question 13. as to the employer's "primary purpose").<sup>58</sup>

## THE TEPSLF PROGRAM ELIGIBILITY REQUIREMENTS

The TEPSLF program requirements for debt forgiveness differ in only two regards from the requirements of the PSLF program. First, the TEPSLF program

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<sup>56</sup> See March 31, 2019 PSLF Program Data, *supra* n. 7.

<sup>57</sup> See March 31, 2019 PSLF Program Data, *supra* n. 7.

<sup>58</sup> See generally Crespi, *supra* n. 44, regarding inconsistencies between the statutory eligibility criteria and the DOE implementing regulations and other interpretations.

removes the requirement that the borrower must have enrolled in either the 10-year Standard Repayment Plan or an income-based repayment Plan and also allows persons who have enrolled in certain other repayment Plans to seek debt forgiveness.<sup>59</sup> That change was the sole purpose for creation of the TEPSLF program, and that program consequently leaves in force the other PSLF program requirements. Second, unlike the PSLF program there has been only a specific amount of funding allotted to the TEPSLF program – initially \$350 million and now \$700 million – and once that funding is exhausted no more applicants will be provided debt forgiveness under the program unless additional funds are allocated by Congress.<sup>60</sup>

Unlike the PSLF program the DOE has not yet provided borrowers with a specific form to file for relief under the TEPSLF program. What borrowers are now advised to do, after first filing a PSLF program application and being rejected, is to then send an appropriate email to the DOE requesting reconsideration of their application under the TEPSLF program, a request to be processed by FedLoan.<sup>61</sup>

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<sup>59</sup> These additional qualifying repayment plans include the Graduated Repayment Plan, the Extended Repayment Plan, the Consolidation Standard Repayment Plan, and the Consolidation Graduated Repayment Plan. Dep’t of Education, “Temporary Expanded Public Service Loan Forgiveness” (2019), available at <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service/temporary-expanded-public-service-loan-forgiveness>.

<sup>60</sup> [cite to money spent to date on TEPSLF program discharged debts]

<sup>61</sup> According to personal finance adviser Robert Farrington borrowers who have had their PSLF applications rejected but who believe they may qualify under the TEPSLF program should send an email to [TEPSLF@myfedloan.org](mailto:TEPSLF@myfedloan.org), with a subject line stating “TEPSLF Request”, and



## DEPARTMENT OF EDUCATION OUTREACH AND OVERSIGHT EFFORTS

The efforts by the DOE over the years to reach out to and inform prospective applicants as to the requirements of the PSLF or TEPSLF programs, and to exercise oversight over its PSLF and TEPSLF program loan servicer FedLoan in the evaluation of Employment Certification requests and Applications for Forgiveness, and to more generally ensure that borrowers are adequately informed as to their debt forgiveness options and requirements, have been harshly criticized by many informed commentators.

As one example, the Government Accountability Office in a September, 2018 Report found fault with the DOE for not providing key information to the FedLoan and to borrowers.<sup>62</sup> In addition, the DOE's Office of Inspector General

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then in the body of the email state "I request that the Education Department reconsider my eligibility for Public Service Loan Forgiveness," and include the same name under which the initial PSLF application that was denied was filed, and also include one's date of birth in the MM/DD/YYYY format. Robert Farrington, "The Guide to Temporary Expanded Public Service Loan Forgiveness," (May 5, 2019) (available at <https://thecollegeinvestor.com/24410/temporary-expanded-public-service-loan-forgiveness/>). See also Dep't of Education, "Temporary Expanded Public Service Loan Forgiveness" (2019), *supra* n. 59.

<sup>62</sup> "[The Department of] Education has used various outreach methods to inform borrowers about PSLF, but the large number of denied borrowers suggests that many are still confused by the program requirements...[The Department of] Education provides piecemeal guidance and instructions to the PSLF servicer it contracts with to process certification requests and loan forgiveness applications. This information is fragmented across the servicing contract, contract updates, and hundreds of emails. As a result, PSLF servicer officials said their staff is sometimes unaware of important policy clarifications. Education officials say they plan to create a comprehensive PSLF servicing manual but have no timeline for doing so,...[The Department of] Education has not provided the PSLF servicer and borrowers with a definitive source of information for determining which employers qualify a borrower for loan forgiveness, making it

Report that I have previously noted that covers the January 2015 through September 2017 time period also offers the same strong criticisms, as well as several others.<sup>63</sup> And a scathing report issued in December of 2018 by the Student Borrower Protection Center, a non-profit organization headed by Executive Director Seth Frotman, the former Student Loan Ombudsman for the CFPB, called for the DOE to release key data that would reveal in detail the precise reasons for the 99% denial rate for PSLF and TEPSLF applications, which the report argues in some considerable detail is largely due to DOE and loan servicer failures to properly inform borrowers as to program requirements, and to properly manage their loan accounts.<sup>64</sup> There have also been similar criticisms of the

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difficult for the servicer to determine whether certain employers qualify and for borrowers to make informed employment decisions...[The Department of] Education does not ensure the PSLF servicer receives consistent information on borrowers' prior loan payments from the eight other federal loan servicers, which could increase the risk of miscounting qualifying payments. Borrowers also lack sufficiently detailed information to easily identify potential payment counting errors that could affect their eligibility for loan forgiveness. These weaknesses are contrary to federal internal control standards for using and communicating quality information, creating uncertainty for borrowers and raising the risk that some may be improperly granted or denied loan forgiveness." United States Government Accountability Office, "Public Service Loan Forgiveness: Education Needs to Provide Better Information for the Loan Servicer and Borrowers," GAO No. GAO-18-547 (September, 2018) at 1.

<sup>63</sup> See *supra* n. 29 and the associated text.

<sup>64</sup> "[The DOE] and its contracted loan servicers have never revealed key documents and data that show how and why these breakdowns [that lead to such high denial rates] occur. From [DOE's] guidance for implementation of the PSLF program, to servicers' data and execution of program requirements, to government audits documenting breakdowns in processing and technology, there exists evidence demonstrating the scope of harm to borrowers. But this critical information currently sits in the shadows, out of reach from public scrutiny. Although millions of American workers are relying on the promise of PSLF, [the DOE] continues to shield the missteps of the student loan servicing industry at the expense of millions of dedicated public service workers." Keeping the Promise, *supra* n. 48. The DOE has responded to some modest extent to these demands for more information regarding PSLF and TEPSLF application denials,

implementation of the PSLF program by DOE and FedLoan offered by a wide range of other law enforcement agencies, government auditors, and non-profit organizations,<sup>65</sup> as well as asserted in various litigation contexts.<sup>66</sup>

The serious deficiencies of DOE’s public information and borrower outreach efforts, and especially its excessively lax oversight of its loan servicers and in particular of FedLoan’s management of the PSLF and TEPSLF programs, are clearly evident to all close observers and are well documented. Those deficiencies have contributed significantly to the extremely high rejection rates of debt forgiveness applications under the PSLF and TEPSLF programs, as well as to many other difficulties encountered by student loan borrowers. While I will leave to others (such as the authors of the several reports here cited) to suggest exactly what specific DOE actions would be most appropriate and effective to remedy these deficiencies – actions which in my opinion will require as a predicate a new Presidential Administration and DOE leadership that is much more sympathetic to

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*see* March 31, 2019 PSLF Program Data, *supra* n. 7.

<sup>65</sup> *See, e.g.*, U.S. Dept. of Education, Office of the Inspector General, “The Department’s Communication Regarding the Costs of Income-Driven Repayment Plans and Loan Forgiveness Programs” (Jan. 31, 2018) (available at <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2018/a09q0003.pdf>); Consumer Financial Protection Bureau, “Staying on Track While Giving Back: The Cost of Student Loan Servicing Breakdowns for People Serving their Communities (June 2017) (available at [https://files.consumerfinance.gov/f/documents/201706\\_cfpb\\_PSLF-midyear-report](https://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report)); Office of Attorney General Maura Healy, “AG Healey Sues to Protect Public Service Loan Forgiveness” (Aug. 23, 2017) (available at <http://www.mass.gov/ago/news-and-updates/press-releases/2017/2017-08-23-pheaa-lawsuit.html>); The Century Foundation, “Student Loan Borrower Relief Hiding in Plain Sight” (July 21, 2016) (available at <https://tcf.org/content/report/student-loan-borrower-relief-hiding-plain-sight/?agreed=1>).

<sup>66</sup> [cite to relevant loan servicer litigation]

student borrower concerns and less solicitous of loan servicer interests than are the current Trump Administration and senior DOE officials -- I think that it is clear beyond reasonable argument that better DOE oversight of loan servicer efforts to publicize and implement the PSLF and TEPSLF programs, whether that loan servicer remains FedLoan or is a newly engaged firm, along with better alignment of the employment eligibility criteria that are imposed with the applicable statutes, would together significantly increase the rate at which debt forgiveness applications filed under these programs would be approved.

## CONCLUSIONS

The current 99% denial rate for loan forgiveness applications filed under the PSLF or TEPSLF programs is bizarrely high and merits close scrutiny. That denial rate appears to stem from the combination of: 1) a relatively technical set of statutory and regulatory PSLF program eligibility requirements that are apparently difficult for borrowers to understand, 2) the prior (and probably continuing) imposition by the PSLF program loan servicer FedLoan, under DOE directive, of a restrictive “primary purpose of the employer” limitation on qualifying employers that is not to be found in either the PSLF statutes or in the implementing DOE regulations, and that as noted has been struck down as “arbitrary and capricious” in recent litigation, and 3) ineffective DOE outreach efforts to inform borrowers as to

the PSLF and TEPSLF programs' precise eligibility criteria, along with totally inadequate oversight by DOE of the actions of its loan servicers, particularly of FedLoan, the firm engaged to provide PSLF and TEPSLF program loan servicing.

Both application volume and approval rates under each of these two programs will surely rise significantly over time, if only because each year an increasingly large proportion of outstanding federal student loans (that will eventually approach 100%) are the Direct Loans which are eligible for forgiveness under these programs, and because each year an increasing proportion of borrowers enroll each year in eligible income-based loan repayment programs, and of course because the many application denials and the resulting publicity are likely to lead to better borrower understanding of the programs' requirements. But both application rates and approval rates will likely rise somewhat more rapidly, and eventually to a higher steady-state level, if the DOE explicitly drops its judicially-invalidated "primary purpose of the employer" limitation regarding which non-governmental and non-501(c)(3) employers may offer qualifying "public service jobs," and perhaps also discards its statutorily ungrounded "public service organizations" restriction of such employers,<sup>67</sup> Most important of all, the DOE needs to finally get its act together to engage in more effective communications with borrowers as to these two programs' requirements, and to

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<sup>67</sup> See generally Crespi, *supra* 44, on these statutory interpretation questions.

engage in more effective management and oversight of all of its loan servicers.