

POLICY ANALYSIS:

Impact of Potential Changes to Public Service Loan Forgiveness Program

Preface

The Higher Education Act of 1965, as amended (HEA), offers forgiveness of federal student loans owed by borrowers who make 10 years of payments during periods in which they are employed in public service.¹ In order for this right to forgiveness to vest, a federal loan borrower must meet the assorted qualifications established under the statute and its associated regulations² relating to loan type, repayment plan type, and employer type, among others.

AccessLex Institute is commonly asked whether this program, formally known as the Public Service Loan Forgiveness Program, or PSLF, is subject to modification or repeal by Congress or the U.S. Department of Education (ED), particularly with respect to students who have borrowed for school prior to any such change becoming effective. AccessLex Institute has consistently stated that PSLF can be changed at any time by Congress (by statute) and ED (by regulation, but only consistent with its scope of authority), placing all borrowers' PSLF benefits at risk.

Beyond the statutory/regulatory scheme, we are also questioned as to whether a borrower may have a contractual right to PSLF that protects the program from modification by Congress or ED. This issue brief considers whether the promissory note between the borrower and the federal government, known as the MPN, creates any such contractual right.³

Question Presented

Does the MPN provide a borrower with a contractual right that the terms and conditions of the Public Service Loan Forgiveness program cannot be changed to the borrower's detriment?

Short Answer

Yes and No.

¹ 20 U.S.C. § 1087e(m).

² 34 C.F.R. § 685.219.

³ For this issue brief, we have not reviewed the contract law of the various U.S. States and territories that may give rise to "...rights, remedies and defenses..." (as mentioned in the MPN) or other theories of relief outside of, or ancillary to certain interpretations of, the MPN or any constitutional issues that might arise from such theories of relief, if any.

If a borrower has made 120 payments under PSLF and has met all other PSLF requirements but ED refuses to provide loan forgiveness, AccessLex Institute believes that the MPN likely establishes a contractual basis to claim such loan forgiveness.⁴

However, the MPN does not appear to provide any contractual rights on its face that protect against the qualifying terms and conditions (e.g., type of job or eligible repayment plan) being modified prior to the satisfaction of the 120-payment requirement. In fact, the MPN provides clear notice that any amendments to the HEA will be incorporated by reference into the terms of the MPN. Moreover, this interpretation is supported by published comments from ED.

From a practical standpoint, rarely has Congress enacted changes to HEA or other applicable law that apply negative consequences to borrowers on a retroactive basis, and ED has been reluctant to impose retroactive harm on borrowers. While possible, we do not believe it is likely that Congress will do so in this instance.

That said, changes could still be made to the processes involved in the program that could impact borrower forgiveness. In June 2016, it was reported⁵ that ED had begun revoking its approval of employer certification for borrowers that are employed by non-profits that borrowers assert provide certain types of qualifying services as required by HEA.⁶ In response, an ED spokesperson stated, “In a limited number of cases, after additional review, we could find no evidence of the organization being a nonprofit organization that also provides a qualifying service for purposes of eligibility for the PSLF program.” Without official comment from ED about its certification standards, many believe that the criteria for granting employer certification has become more stringent, thereby excluding from the program borrowers that previously believed they were eligible for loan forgiveness.

Supporting Information

The primary MPN terms⁷ influencing AccessLex Institute’s analysis of this issue are reprinted below.

A Public Service Loan Forgiveness program is also available. Under this program, we will forgive the remaining balance due on your eligible Direct Loan Program loans after you have made 120 payments on those loans (after October 1, 2007) under certain repayment

⁴ A previous version of the MPN included language that stated that under PSLF “eligible Direct Loan Program loans may be cancelled after you have made 120 payments on those loans” (emphasis added). Given the expanded group of potentially eligible borrowers in the newly created REPAYE plan, some borrowers may have an MPN that includes this language.

⁵ Ward, S. (2016, June). “Did government reverse position on qualifications for Public Service Loan Forgiveness program?” ABA Journal. Retrieved from:

http://www.abajournal.com/news/article/did_doe_reverse_position_on_qualifications_for_public_service_loanforgiven.

⁶ 20 U.S.C. § 1087e(m)(3)(B)(i).

⁷ See Federal Direct PLUS Loan Master Promissory Note, expiration date: February 29, 2016, available at <https://studentloans.gov/myDirectLoan/downloadPDF.action?fileName=FDPL-MPN>. PSLF language in the Direct Stafford Loan MPN is identical to that of the Direct PLUS Loan MPN. Language in the Direct Consolidation Loan MPN relating to PSLF is the same, except that it does not include the last sentence about consecutive payments.

*plans while you are employed full-time in certain public service jobs. The required 120 payments do not have to be consecutive.*⁸

The terms and conditions of loans made under this MPN are determined by the HEA and other applicable federal laws and regulations. These laws and regulations are referred to as “the Act” throughout this Borrower’s Rights and Responsibilities Statement. Under applicable state law, excepted as preempted by federal law, you may have certain borrower rights, remedies, and defenses in addition to those stated in the MPN and this Borrower’s Rights and Responsibilities Statement.

NOTE: Any amendment to the Act that affects the terms of this MPN will be applied to your loans in accordance with the effective date of the amendment.⁹ (Emphasis theirs.)

In addition, the following “discussion” published in the final rule adopting various changes to the federal loan program’s regulations in 2008¹⁰, including changes to the MPN, offers a window into the view of the ED (referenced as the “Department” therein) on this issue.

Comment: ...Many commenters urged the Department to incorporate the public service loan forgiveness program as a term and condition in the Department’s Direct Loan master promissory note (MPN). The commenters believed that making this change to the MPN would prevent Congress from repealing the forgiveness benefit after borrowers have spent years working to meet the eligibility requirements...

Discussion: ...With regard to incorporating a description of the public service loan forgiveness benefit in the MPN, the Department is already taking steps to refer to the program in the MPN and other program documents. However, the MPN will continue to state, as it currently does, that the terms and conditions of the loans are subject to the HEA as it is amended in accordance with the effective date of those amendments. Although there is no history in the program of Congress eliminating or reducing a borrower benefit, the Department does not believe that a reference to the public service loan forgiveness program in the MPN would provide the borrower with a contractual right to the benefit should Congress take action to eliminate that benefit from the HEA as of a particular effective date...

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⁸ Id. (Paragraph 22, Borrower Rights and Responsibilities).

⁹ Id. (Paragraph 2, Borrower Rights and Responsibilities).

¹⁰ Federal Register, Vol. 73, No. 206, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program final regulations, Thursday, October 23, 2008, available at <http://www.gpo.gov/fdsys/pkg/FR-2008-10-23/pdf/E8-24922.pdf>.