

# THE PARAMETERS OF TRUST: PUBLIC SERVICE LOAN FORGIVENESS AND PRIORITIZING RELIABLE AGENCY COMMUNICATIONS

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## ABSTRACT

*In 2007, the Public Service Loan Forgiveness (PSLF) program was enacted to encourage qualified individuals to seek employment in the public sector. A decade later in 2017, the first round of qualified applicants are eligible to receive forgiveness on the remaining balances of their student loans provided they work for a qualifying employer and have made 120 on-time payments under an approved repayment program. However, the PSLF program has been criticized as duplicative and expensive, resulting in the current administration's decision to eliminate or modify it. This comment explores the issue of whether an individual can justifiably rely on a program, such as the PSLF program, that induces the public to change their behavior according to various regulations. In order to restore public confidence in the Department of Education, the agency should issue guidance and create hardship exceptions for individuals who have detrimentally relied on the availability of the program. By doing so, the public will have a better understanding of what exactly will change going forward and how to ensure that their payments in furtherance of obtaining the benefit are approved.*

## TABLE OF CONTENTS

Introduction .....	234
I. The Attempted Solution to Student Loan Debts .....	237
A. Current Eligibility and Proposed Changes .....	238
II. Floating Information, Trial Balloons, Proposals, and Change of Position: On What Can You Rely?.....	242
A. Communications That Look Reliable .....	243

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B. Communications That Look Unreliable .....	247
III. Where Can ED Go From Here? .....	249
A. Discretion, Interpretation, and Detrimental Reliance .....	250
B. Estoppel .....	252
IV. The Parameters of Trust: A Prioritization System .....	254
A. Guidance .....	255
B. Hardship Exceptions .....	258
Conclusion .....	260

## INTRODUCTION

Student loan debt is ubiquitous—the Federal Reserve reported that 44 million borrowers by September 2017 owed more than \$1.48 trillion in student loans.<sup>1</sup> During President Obama’s eight years in office, one out of an estimated 8.7 million Americans with outstanding student loans defaulted on payments roughly every twenty-nine seconds,<sup>2</sup> and over 16% of consumers with student loans were at least thirty days past due on payments.<sup>3</sup>

The Public Service Loan Forgiveness (PSLF) program is a repayment plan for public service employees.<sup>4</sup> Borrowers are eligible to have the remaining balance on their qualifying loans cancelled by the Department of Education (ED) if they have made 120 monthly payments under an approved payment plan while employed full-time by a qualifying public service employer.<sup>5</sup> Relying on representations made by the ED, over one million borrowers have

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1. See *Consumer Credit Table—G19*, FED. RESERVE (Jan. 8, 2018), <https://www.federalreserve.gov/releases/g19/current/default.htm>; see also Alan Gin, *Student Loan Debt Doesn’t Just Harm Students. It Hurts the U.S. Economy, Too*, SAN DIEGO UNION-TRIB. (Sept. 22, 2017), <http://www.sandiegouniontribune.com/opinion/commentary/sd-utbg-student-loan-crisis-fix-20170922-story.html> (“Student debt is now second only to mortgage debt (\$8.9 trillion) . . . and exceeds that of credit cards (\$764 billion) and home equity loans (\$452 billion) combined.”).

2. See Shahien Nasiripour, *DeVos Undoes Obama Student Loan Protections*, BLOOMBERG (Apr. 12, 2017, 10:20 AM), <https://www.bloomberg.com/news/articles/2017-04-11/devos-undoes-obama-student-loan-protections>.

3. See Alexei Alexandrov & Dalié Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 HARV. L. & POL’Y REV. 175, 176 (2017).

4. See 20 U.S.C. § 1087e(m) (2012) (amending the Higher Education Act of 1965 to include the Public Service Loan Forgiveness (PSLF) Program); 34 C.F.R. § 685.219(a) (2016) (setting forth eligibility requirements under the PSLF program).

5. See *Public Service Loan Forgiveness*, U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service#qualifying-employment> (last visited Feb. 17, 2018).

submitted employment certification forms to the ED as of June 2017.<sup>6</sup> More than 550,000 of those individuals have either entered into a field in the public sector or taken out loans with the understanding that they would be eligible for the PSLF program.<sup>7</sup>

Government employers, nonprofit organizations, military service members, and other employers in the public sector rely on the PSLF program for recruiting attractive candidates by advertising loan forgiveness eligibility and affordable monthly payment obligations.<sup>8</sup> Some of these employers are required by law to recruit individuals with advanced degrees.<sup>9</sup> Without the PSLF program and the ability to finance these advanced degrees, low pay may discourage many borrowers from pursuing careers in the public sector.<sup>10</sup> Similarly, candidates rely on the program to finance degrees from institutions they otherwise would be unable to afford.<sup>11</sup>

The National Legal Aid and Defender Association (NLADA) surveyed 2,000 civil legal aid lawyers and public defenders to understand the potential impact of the proposed changes to the PSLF program.<sup>12</sup> Some respondents indicated that they would not have entered into their respective careers without the assurance of loan forgiveness, and others indicated they would likely leave for a higher paying job if the program were to be eliminated.<sup>13</sup> If this were to happen, the quality and availability of public defenders would suffer

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6. See FEDERAL STUDENT AID, PUBLIC SERVICE LOAN FORGIVENESS EMPLOYMENT CERTIFICATION FORMS REPORT (2017).

7. See CONSUMER FIN. PROT. BUREAU, STAYING ON TRACK WHILE GIVING BACK (2017).

8. See Chris Morgan, *The Future of PSLF: Law School Loans Under Fire*, AM. BAR ASS'N (Apr. 19, 2017), <https://abaforlawstudents.com/2017/04/19/pslf-law-school-loans-fire/>; see also ABA COMM'N ON LOAN REPAYMENT AND FORGIVENESS, LIFTING BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 28 (2003) (citing a New York State Bar Association study that (1) found that 64% of responding agencies reported that student loan debts impeded their ability to recruit good attorneys; and (2) indicated that the other 36% tended to be federal and state government agencies that offered higher salaries”).

9. See CONSUMER FIN. PROT. BUREAU, *supra* note 7, at 1.

10. See *id.* at 2–4 (noting that borrowers in the public sector often report suffering from additional negative economic effects as a result of this debt, such as “declines in homeownership, retirement security, asset formation, and access to a strong financial future”) (citations omitted).

11. See JASON DELISLE & ALEXANDER HOLT, NEW AMERICA, ZERO MARGINAL COST: MEASURING SUBSIDIES FOR GRADUATE EDUCATION IN THE PUBLIC SERVICE LOAN FORGIVENESS PROGRAM 23 (2014).

12. NAT'L LEGAL AID & DEF. ASS'N, THE CRITICAL ROLE OF PUBLIC SERVICE LOAN FORGIVENESS IN ACCESS TO COUNSEL AND EQUAL JUSTICE 1, 4 (2015).

13. *Id.* at 8–9.

from decreased recruitment and retention.<sup>14</sup> The NLADA report concludes by observing that even a minor change in the program—such as capping the amount of loan forgiveness at \$57,000—can result in negative consequences not only for individual borrowers, but also for those in need of specialized assistance from affordable public servants or organizations.<sup>15</sup>

Criticism of the PSLF program primarily centers around the fact that the program unfairly allocates government subsidies to some borrowers under unequal terms at the exclusion of other borrowers.<sup>16</sup> In response, the ED has considered eliminating or significantly modifying the program, leaving many borrowers unclear of their future financial livelihood.<sup>17</sup> Moreover, on December 13, 2017, the House Committee on Education and the Workforce passed the Promoting Real Opportunity, Success, and Prosperity through Education Reform (PROSPER) Act.<sup>18</sup> If enacted, the PROSPER Act would eliminate the PSLF program and leave only standard repayment and income-based repayment options available to borrowers.<sup>19</sup> However, the PROSPER Act is only the beginning of the discussion surrounding Higher Education Act's reauthorization, and does not solve the problems that will inevitably arise if the PSLF program is eliminated.<sup>20</sup>

This Comment asks what will happen to individuals who relied on various forms of ED expression—that is, actions, (mis)representations, findings, publications, bulletins, Tweets, or written confirmations from a departmental

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14. *Id.* at 10–11; *see also* Morgan, *supra* note 8 (noting that the program “is not just a one-way street for young lawyers,” but rather is “critical to the public sector’s ability to recruit and retain top talent”). A survey of 326 public interest and government employers revealed that 68% of responding agencies reported difficulty with recruitment and retention, with many respondents blaming low salaries and educational debt. *See* ABA, *LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE* 27 (2003).

15. NAT’L LEGAL AID & DEF. ASS’N, *supra* note 12, at 10–11.

16. *See generally* DELISLE & HOLT, *supra* note 11. For example, the amount forgiven under the PSLF program is not considered income for federal tax purposes unlike other repayment plans such as the Income-Contingent Repayment plan, which treats the benefit as taxable income. *See* Robert Shireman, *Learn Now, Pay Later: A History of Income Contingent Student Loans in the United States*, 671 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 197–98 (2017).

17. *See generally* Ashlee Kieler, *Public Service Loan Forgiveness Is Proving Difficult to Navigate—Here’s How to Make Sure You Qualify*, BUS. INSIDER (June 28, 2017, 10:25 AM), <http://www.businessinsider.com/public-service-loan-forgiveness-2017-6> (discussing ways in which borrowers can prepare for the consequences that would follow from eliminating the PSLF program and the administration’s reasoning behind its proposal).

18. *See* H.R. 4508, 115th Cong. (2017).

19. Alessandra Lanza, *Potential Effects of PROSPER Act on Student Loans*, U.S. NEWS (Dec. 13, 2017, 10:00 AM), <https://www.usnews.com/education/blogs/student-loan-ranger/articles/2017-12-13/potential-effects-of-prosper-act-on-student-loans>.

20. *See id.*

agent—assuring them of their eligibility in the PSLF program. What about the individuals who took out loans under the assumption that they would be eligible for forgiveness? Part II addresses the ED’s threatened elimination of the PSLF program, its swift withdrawal of that threat, and the various floating proposals that have left many borrowers’ heads spinning—some reassured, others uncertain. Did the agency’s retreat effectively render the issue moot? Part III asks whether the ED should be deciding this issue at all—that is, what deference does Congress owe the agency’s actions under these circumstances? Part IV discusses the various forms of the agency’s communications diffused across countless mediums. It also prioritizes the varying degrees of reliability of certain forms of communications, paying careful attention to mediums that appear reliable or that people reasonably expect to be reliable. Finally, Part V recommends a solution for those who relied upon the PSLF program and who were excluded from eligibility after October 1, 2017.

### I. THE ATTEMPTED SOLUTION TO STUDENT LOAN DEBTS

Students and families are eligible for federal financial assistance under Title IV of the Higher Education Act of 1965.<sup>21</sup> Title IV authorizes grant programs that do not require repayment by the recipient.<sup>22</sup> The PSLF program and the Income-Based Repayment plan are two distinct programs that became effective October 1, 2007 as part of the College Cost Reduction and Access Act (CCRAA).<sup>23</sup> The CCRAA, which amended the statutory provisions contained in the 2008 Higher Education Opportunity Act, redirected taxpayer subsidies away from student loan companies and toward increased grants and benefits for borrowers.<sup>24</sup> Because the CCRAA amendments did not substantively change the 2008 Higher Education Opportunity Act, the ED promulgated the PSLF program without following notice-and-comment or negotiated rulemaking procedures.<sup>25</sup>

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21. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, 1232 (1965) (codified as amended in scattered sections of 20 U.S.C.).

22. See 20 U.S.C. §§ 1070–1099d (2012).

23. See College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784 (2007) (codified as amended in scattered sections of 20 U.S.C.).

24. See 34 C.F.R. §§ 682.215(a)(2), 685.221(a)(2) (2016) (excluding defaulted loans from the category of eligible loans for Income-Based Repayment (IBR) and deleting the proposed amendments regulating a guaranty agency’s consideration of a defaulted loan for IBR and the reimbursement to a guaranty agency on a defaulted loan that was forgiven under IBR); *The College Cost Reduction and Access Act*, INST. FOR COLL. ACCESS & SUCCESS, <http://ticas.org/initiative/page/college-cost-reduction-and-access-act> (last visited Jan. 27, 2018).

25. See Federal Perkins Loan Program, Federal Family Education Loan Program, and

The 2007 version of the PSLF program encouraged borrowers to pursue careers in the public sector without the burden of unmanageable monthly payments.<sup>26</sup> As such, eligibility procedures neither began with an application process nor required borrowers to obtain approval.<sup>27</sup> Commentators expressed concern that borrowers and employers would be unable to guarantee receipt of benefits at the end of the ten-year period.<sup>28</sup> Moreover, postponing eligibility determinations until the very end of the payment period would place a heavy burden on borrowers—the majority of whom are recent graduates—to retain supporting documentation of their employment for the entire ten years.<sup>29</sup> Despite these concerns, the ED ultimately insisted in the final rule that borrowers should bear the ultimately responsibility to supply the requisite documentation supporting their eligibility.<sup>30</sup>

#### A. Current Eligibility and Proposed Changes

The PSLF program has undergone significant change since it took effect in 2007. As enacted, the program's eligibility requirements were thin and its definitions were broad.<sup>31</sup> For example, ambiguity arose with respect to what qualified as a “public service employer.” The scope of eligible public service employment is not limited to working for a government agency or an organization that is tax-exempt under § 501(c)(3) of the Internal Revenue Code<sup>32</sup>—it also covers teachers, nurses, and other professionals who provide certain

William D. Ford Federal Direct Loan Program, 73 Fed. Reg. 63,232, 63,233 (Oct. 23, 2008) (codified at 34 C.F.R. pts. 674, 682 & 685); *see also* Administrative Procedure Act, 5 U.S.C. §§ 553–559, 561–569 (2012) (providing the processing for notice-and-comment and negotiated rulemaking).

26. *See generally* Pub. L. No. 110-84, 121 Stat. 784 (providing grants and benefits for borrowers without expansive limitations on repayment eligibility).

27. *See* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. 37,693, 37,722–23 (proposed July 1, 2008) (codified at 34 C.F.R. pts. 674, 682, & 685).

28. Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. at 63,241–42.

29. *Id.*

30. *Id.* at 63,242.

31. *See, e.g., id.* at 63,257 (“Public interest law refers to legal services provided by a public service organization that are funded in whole or in part by a local, State, Federal, or Tribal government.”). Under this broad definition, nearly 25% of the U.S. workforce qualifies as “public interest” employees. *See* GOV'T ACCOUNTABILITY OFFICE, GAO-15-663, FEDERAL STUDENT LOANS: EDUCATION COULD DO MORE TO HELP ENSURE BORROWERS ARE AWARE OF REPAYMENT AND FORGIVENESS OPTIONS 27 n.40 (2015).

32. I.R.C. § 501(c)(3) (2012).

public services.<sup>33</sup> In 2008, the ED narrowed the definition of eligible employers, choosing to explicitly list qualifying jobs, such as emergency management personnel, military service members, health care providers, and teachers in public education.<sup>34</sup>

To qualify for the PSLF program, borrowers must meet four requirements. The borrower: (1) must have a qualifying loan, (2) must be enrolled in a qualifying repayment plan, and (3) while the borrower is working for a qualified public service employer, he or she must (4) make 120 on-time, qualifying payments.<sup>35</sup> The current framework for student loan repayment under the PSLF program specifies that each payment must be made under an approved Income-Driven Repayment plan and that only Direct Loans are eligible.<sup>36</sup> Qualifying Income-Driven Repayment plans include the Income-Contingent Repayment plan,<sup>37</sup> the Income-Based Repayment plan,<sup>38</sup> the

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33. See 20 U.S.C. § 1087e(m)(3)(B)(i) (2012); Morgan, *supra* note 8, at 24; see also Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 215, 231–32, 231 n.126 (2014) (noting that employees of labor unions, government contractors, partisan political organizations, religious organizations, or any for-profit businesses are excluded from coverage under the PSLF program); *Public Service Loan Forgiveness*, *supra* note 5 (addressing common questions regarding eligibility and certification for PSLF).

34. See Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. at 63,236. The definition also included social workers in a public child or family service agency, public interest law service, early childhood education service, public service for individuals with disabilities, public service for the elderly, public library sciences, school-based library sciences and other school-based services. See 20 U.S.C. § 1087e(m)(3)(B)(i).

35. Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. at 63,236.

36. 34 C.F.R. § 685.219(c) (2016); see, e.g., Melanie Lockert, *The Complete List of Student Loan Forgiveness Programs and Options*, STUDENT LOAN HERO (July 16, 2017), <https://student-loanhero.com/featured/the-complete-list-of-student-loan-forgiveness-programs/> (describing various payment plans).

37. Income-Contingent Repayment Plan, 34 C.F.R. § 685.209(b) (providing access to loans with no initial income requirements; 20% discretionary income; pay equivalent of repayment plan with a fixed income for 12 years, adjusted according to individual's income).

38. Income-Based Repayment Plan, 34 C.F.R. § 685.221 (providing access to loans for borrowers, usually those with financial hardship; if you have loans from before July 1, 2014, payment is no greater than 15% discretionary income; payments for 25 years; if loans were obtained *after* July 1, 2014, loan no greater than 10% discretionary income; forgiven after 20 years) (emphasis added).

Pay As You Earn (PAYE) plan,<sup>39</sup> and the Revised Pay As You Earn repayment (RePAYE) plan.<sup>40</sup> Under these programs, the Direct Loan payment is reduced to no more than 10% of the borrower's discretionary income.<sup>41</sup> The PSLF program payment requirement can be met so long as the monthly amount is not less than the amount the borrower would have paid under the Direct Loan standard repayment plan.<sup>42</sup> Thus, the earliest date a borrower under the PSLF program can actually qualify to receive the benefit payment is October 1, 2017.

Borrowers are eligible for enrollment in Income-Driven Repayment plans according to factors such as partial financial hardship. The partial financial hardship determination includes verifying the borrower's annual income and the amount due on the outstanding loan(s).<sup>43</sup> In other words, "a partial financial hardship exists when the annual amount due on all of a borrower's eligible loans, as calculated under a standard ten year repayment plan, exceeds 15% of 'discretionary income.'"<sup>44</sup> As such, borrowers must sign and certify an Internal Revenue Service consent form, which tracks tax information independent of the ED and alleviates (but does not eliminate) the burden of confirming the borrowers' financial requirements.<sup>45</sup> Loan servicers are obligated to notify borrowers once they have established partial

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39. Pay As You Earn Plan (PAYE), 34 C.F.R. § 685.209(a) (providing access to loans for borrowers whose payments are no greater than 10% discretionary income; loan forgiven after 20 years; loan repayment will never exceed ten-year standard repayment and loan forgiven at the end of the term).

40. Re-Pay As You Earn Plan (RePAYE), 34 C.F.R. § 685.209(c) (providing access to loans beginning after December 17, 2015; open to all Direct Loan Borrowers regardless of when loan was taken out; caps payment at 10% discretionary income; forgiven after 20 years; includes interest subsidy help cover 50% interest in cases where new payments cannot keep up with accruing interest).

41. See *supra* notes 37–40.

42. See 20 U.S.C. §§ 1078(a)(9)(A), 1087e(d) (2012).

43. See 34 C.F.R. §§ 682.215(f), 685.221(f) (establishing the conditions that a borrower must satisfy to qualify for loan forgiveness under IBR, how a loan holder determines whether a borrower made qualifying payments, and provide that the Department of Education (ED) will repay or cancel the loan after twenty-five years if the borrower makes qualifying payments and meets certain requirements).

44. See *Partial Financial Hardship*, EQUAL JUSTICE WORKS, <http://www.equaljustice-works.org/resources/student-debt-relief/income-based-repayment/partial-financial-hardship> (last visited Nov. 7, 2017) (noting that a law school graduate practicing as a civil legal aid attorney typically has a high debt-to-income ratio and will qualify for partial financial hardship).

45. See Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. 63,231, 63,236 (Oct. 23, 2008) (codified at 34 C.F.R. pts. 674, 682, & 685).



financial hardship.<sup>46</sup> If a borrower shows partial financial hardship, the loan servicer places the borrower on an Income-Driven Repayment plan.<sup>47</sup> Finally, the loan servicer must identify information that borrowers are required to continually provide in order to remain enrolled in the payment plan.<sup>48</sup>

Nine student loan servicers are currently under contract with the ED, are responsible for handling payment collection and deferment, and provide general customer service for the PSLF program.<sup>49</sup> These loan servicers are agency officials who each act in an independent capacity.<sup>50</sup> The number of companies providing information related to student loans—including the PSLF program eligibility requirements and other income-driven repayment options—results in information asymmetry within the ED.<sup>51</sup> Nevertheless, Congress intended for the ED to offer loan forgiveness through this program; as such, it authorized the agency to delegate authority to loan servicers who carry out Congress's dictate by serving as the primary point of contact for borrowers.<sup>52</sup>

Moreover, because the ED ultimately oversees the handling of student loans, the enormous amount of student debt is fully committed to the agency.<sup>53</sup> If, however, the burden was shifted to the Treasury Department, the debt would be even less manageable, because the Treasury Department is not equipped to handle the types of operational problems students face and that currently burden the ED.<sup>54</sup> The Trump Administration seeks to “re-envision the role of the federal government in providing funding for higher

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46. See 34 C.F.R. § 682.215(e)(2).

47. *Id.*

48. See *id.*; see also Income-Based Repayment Notifications, 80 Fed. Reg. 53,143–44 (Sept. 2, 2015).

49. See Roger Yu & Kevin McCoy, *Trump to Grant Student Loan Servicing Work to Just One Company*, USA TODAY (May 22, 2017, 9:17AM), <https://www.usatoday.com/story/money/2017/05/22/trump-grant-student-loan-servicing-work-just-one-company/102004374/> (“The nine loan service providers are: Navient, CornerStone, Granite State, Great Lakes Educational Loan Services, HESC/Edfinancial, MOHELA, Nelnet, OSLA Servicing and FedLoan Servicing (also known as Pennsylvania Higher Education Assistance Agency, or PHEAA).”).

50. See generally CONSUMER FIN. PROT. BUREAU, *supra* note 7, at 28 (mentioning that Fed-Loan Servicing brand is an independent contractor employed by the ED).

51. See Yu & McCoy, *supra* note 49.

52. See Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. 63,231, 63,245 (Oct. 23, 2008) (codified at 34 C.F.R. pts. 674, 682 & 685).

53. See Baker Donelson, *Washington, D.C. Update—June 2017*, JD SUPRA (June 28, 2017), <http://www.jdsupra.com/legalnews/washington-d-c-update-june-2017-67367/>.

54. See *id.*

education”—notably, through a proposed elimination of the PSLF program.<sup>55</sup> Citing a growing need to stabilize agency spending, the proposed budget cut sets out to guarantee that undergraduate student debt relief is not overshadowed by high-income, high-balance graduate borrowers.<sup>56</sup>

The PROSPER Act is Congress’ first attempt to address many of the Trump administration’s goals for student debt and higher education.<sup>57</sup> Though the bill does not specifically state that the PSLF program is eliminated, it prohibits new borrowers from obtaining Direct Loans, thereby precluding their eligibility to receive the benefit.<sup>58</sup> However, Direct Loan borrowers who have existing loans prior to June 30, 2019 would be allowed to take out Direct Loans through October 1, 2024.<sup>59</sup> Accordingly, the PSLF program would be available for those borrowers who meet the existing requirements and began borrowing for college at least before 2019.<sup>60</sup>

## II. FLOATING INFORMATION, TRIAL BALLOONS, PROPOSALS, AND CHANGE OF POSITION: ON WHAT CAN YOU RELY?

The regulatory state communicates with the public through formal and informal communications: from rules, comments, and notices to informal conversations with technical staff.<sup>61</sup> A simple Internet search for “public service loan forgiveness eligibility” yields information from numerous sources, including government agencies, universities, newspapers, loan servicing companies, and even the Secretary of Education herself. Unsurprisingly, the public believes that the information they access is reliable if it bears the official license of the United States government.<sup>62</sup> However, conceptualizing “the government” as a singular entity that is obligated to convey accurate

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55. *Id.*

56. OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: A NEW FOUNDATION FOR AMERICAN GREATNESS FOR FISCAL YEAR 2018 20 (2017). For example, the budget suggests streamlining student Income-Driven Repayment plans into a single plan that would cap a borrower’s monthly payment at 12.5%. *Id.* Furthermore, undergraduate borrowers would be eligible to have their balances forgiven after fifteen years of repayment whereas graduate debt would be eligible for repayment only after thirty years. *Id.*

57. PROSPER Act, H.R. 4508, 115th Cong. (2017).

58. *See* Lanza, *supra* note 19.

59. *See id.*

60. *Id.*

61. *See* Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own “Laws”*, 64 TEX. L. REV. 1, 2 (1985).

62. *See* Frank C. Newman, *Should Official Advice Be Reliable? Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374, 374 (1953).

and reliable information is a common misconception.<sup>63</sup> The government is comprised of thousands of agencies, departments, branches, boards, committees, groups, and agents that often “say” or “do” things under actual, apparent, or no authority at all.<sup>64</sup> Consequently, the public should exercise caution when relying on any agency communication.

Regardless of origin, it is possible to categorize agency communications into two categories: communications that look reliable and communications that look unreliable. Whether information in these two categories can be relied on varies according to the procedure followed by the agency, the substance of the information conveyed, and to whom the communication was conveyed.<sup>65</sup> Of course, these categories are not all-encompassing, and exceptions are common. However, the organizational system is only meant to aid in understanding the broader question of when reliance on federal agencies is justifiable and when it is unquestionably not.

#### A. Communications That Look Reliable

The public is justified in relying on legislation Congress passes, but it is also reasonable to expect the public to rely on rules that are the result of formal rulemaking procedures.<sup>66</sup> Like a statute, a reviewing court generally

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63. See, e.g., *Fin. Crisis Inquiry Comm’n v. Merrill*, 332 U.S. 380, 383 (1947) (“It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability.”); see also POPPER ET AL., *ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH* 898 n.1 (3d ed. 2016) (“The idea that a citizen ought to be able to rely on direct instruction provided by one who appears to be acting on behalf of a government agency is reasonable enough—but it somewhat misunderstands the very notion of government.”); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 810–11 (2001) (observing that the “anthropomorphic tendency to treat agencies as if they were a single human actor is particularly distracting and distorting when one is analyzing a medium that the constituent elements of complex institutions use to speak to each other”).

64. See *Merrill*, 332 U.S. at 384 (“[A]nyone entering into an arrangement with the Government takes a risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.”); POPPER ET AL., *supra* note 63 (“Taken as a whole, the government is, quite simply, not like any other party in a transaction, as the Court made clear more than 60 years ago [in *Merrill*].”).

65. See Newman, *supra* note 62, at 378–83.

66. Rules that are issued through formal rulemaking procedures are “made on the record after opportunity for an agency hearing [following the procedures of] sections 556 and 557 of this title.” 5 U.S.C. § 553(c) (2012). See generally Raven-Hansen, *supra* note 61, at 47 (“Legislative regulations affect individual rights and obligations by definition, and the procedures with which they are issued—notice, public participation, agency deliberation, formal publication—all invite the public to expect agency compliance.”).

will not consider whether the agency was justified in applying or creating a rule, as it is considered to have “the force and effect of law.”<sup>67</sup> Legislative rulemaking is the most formal, and thus the most reliable, form of agency communication because it follows the procedures for public participation and publication under the Administrative Procedure Act (APA).<sup>68</sup> Legislative rules do not always resemble a statute.<sup>69</sup> For example, a “rule” under the APA could be anything promulgated in accordance with § 551’s requirements and is generally applicable in the future.<sup>70</sup> Thus, where an agency declares that a communication has the status of a legislative rule or is promulgated in accordance with notice-and-comment procedures, it will usually be characterized as legislative and is one on which the public can justifiably rely.<sup>71</sup>

The same principle is true with respect to an agency’s obligation to abide by its own rules.<sup>72</sup> For example, if an agency formally adopts regulations that prescribe a procedure to be followed in administrative proceedings, the public can rely on the agency as being legally bound to follow that procedure.<sup>73</sup>

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67. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (noting that agencies exercising quasi-legislative power must have been granted that authority by Congress and are subject to the limitations Congress imposes).

68. See William R. Andersen, *Informal Agency Advice—Graphing the Critical Analysis*, 54 ADMIN. L. REV. 595, 602 (2002) (acknowledging that, operationally, legislative rules are the most reliable because a “reviewing court will not entertain a party’s challenge to the wisdom of the rule, only to its procedural correctness, its applicability, its freedom from arbitrariness, and its consistency with the constitution”).

69. See *id.* at 599.

70. 5 U.S.C. § 551; see, e.g., *Linoz v. Heckler*, 800 F.2d 871, 877–78 (9th Cir. 1986) (invalidating rule that denied applicant Medicaid benefit in hospital manual, which constituted a substantive rule that required notice-and-comment rulemaking procedure); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004) (noting that interpretive rules do not have fixed criteria for determining the difference between an interpretation and a new rule that is effectively a new regulation).

71. See Andersen, *supra* note 68, at 606 (discussing the issue of distinguishing between interpretive and legislative rules, particularly rules that in effect are legislative but not classified as such by the agency); see also Dorit Rubinstein Reiss, *Relying on Government in Comparison: What Can the United States Learn from Abroad in Relation to Administrative Estoppel?*, 38 HASTINGS INT’L & COMP. L. REV. 75, 94 (2015) (noting that agency materials “that were either intended to confer benefits and protections on the public, or were created through a formal process . . . [create] public expectations that it will comply with these statements”).

72. See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (holding that administrative agencies are bound to follow their own rules and regulations and may not depart from existing rules without employing appropriate rulemaking procedures to supersede or amend the agency’s position in the previous legislative regulation).

73. *Id.* at 266–67.

In *United States ex rel. Accardi v. Shaughnessy*,<sup>74</sup> the U.S. Supreme Court held that the Board of Immigration Appeals (the Board) was required to exercise its own judgment over the petitioner's appeal of his denied suspended deportation pursuant to existing valid regulations.<sup>75</sup> The petitioner alleged that the Attorney General's "hit list" of deportees whom he planned to deport (which included the petitioner) improperly precluded the Board from exercising its independent discretion.<sup>76</sup> In finding for the petitioner, the Court reaffirmed the Board's duty to comply with existing regulations and ordered that the petitioner be permitted to prove that the Board had not done so on remand.<sup>77</sup>

Whereas formal rules and regulations look reliable and generally are, other informal agency communications look reliable to the public but are not always reliable. When an agency issues guidance to interpret one of its regulations, it does not need to follow notice-and-comment rulemaking procedures under the APA.<sup>78</sup> An agency engaging in "interpretive rulemaking" acts without an express delegation of rulemaking authority in order to fill in gaps in existing rules and regulations, or to put the public on notice of anticipated policies.<sup>79</sup> Given this express purpose, it is reasonable that the public might take the information in these communications at face value and conform their behavior accordingly.<sup>80</sup> However, because the agency is free to change its interpretation without notice to the public, interpretive rules are generally non-reviewable because they are not considered final agency action.<sup>81</sup> Therefore, because these rules are typically issued quickly and inexpensively, they merely represent a flexible way for agencies to supplement

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74. 347 U.S. 260 (1954).

75. The regulations provided that the Board of Immigration Appeal's decision would be final except when reviewed by the Attorney General. *Id.* at 266 (citing 8 C.F.R. § 6.1(d)(1) (Rev. 1952)).

76. *See Accardi*, 347 U.S. at 262, 267 (offering proof that the Commissioner of Immigration told his lawyer that nothing could be done because the petitioner's name was on the list of "unsavory characters").

77. *Id.* at 267–68.

78. *See* 5 U.S.C. § 553(b)(A) (2012) (exempting "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice" from the notice-and-comment requirement). Interpretive rules are still required to be published in the *Federal Register*. *See id.* § 552(a)(1)(D).

79. *See, e.g., Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (citing *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)) (noting that issuing interpretive rules is easier for agencies because they do not have the force and effect of law, but rather "advise the public of the agency's construction of the statutes and rules which it administers").

80. *See Andersen, supra* note 68, at 596.

81. *See, e.g.,* 5 U.S.C. §§ 553(b)(B), (d)(3) (permitting rules to be promulgated without notice-and-comment procedures for "good cause" in the case of an emergency); *cf. Snowa v.*

existing law and are generally unreliable forms of agency communications.<sup>82</sup>

Advisory opinions may come in the form of statements or letters and express to the public the agency's position on a set of facts or policy.<sup>83</sup> In *Perez v. Mortgage Bankers Ass'n*,<sup>84</sup> the Department of Labor issued opinion letters informing mortgage-loan officers they did not qualify for the administrative exception to overtime pay requirements under the Fair Labor Standards Act of 1938.<sup>85</sup> The U.S. District Court for the District of Columbia, in reviewing a challenge to revised findings issued by the agency, previously held that the interpretation constituted an interpretive rule exempt from notice-and-comment procedures.<sup>86</sup> On appeal, the U.S. Circuit Court of Appeals for the District of Columbia reversed, holding in part that the 2004 interpretation conflicted with the present interpretation significantly and that the 2010 interpretation had to be vacated.<sup>87</sup> Finally, the Supreme Court granted certiorari to clarify the issue, concluding that interpretive rules are not subject to notice-and-comment rulemaking requirements pursuant to the plain language in § 553(b) of the APA.<sup>88</sup> As illustrated by the Court's opinion, guidance documents are communications that are ultimately unreliable because they can be changed quickly.

Other forms of agency communications that seem reliable but are sometimes unreliable are informal agency adjudications and negotiated rulemakings.<sup>89</sup> Although formal adjudication resembles a judicial proceeding before an Article III court, only the parties to an administrative adjudication

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Comm'r of Internal Revenue, 123 F.3d 190, 197 (4th Cir. 1997) (holding that nonlegislative rules are generally given considerable weight if they are promulgated in furtherance of the congressional mandate "in a reasonable manner").

82. See, e.g., *Hocor v. USDA*, 82 F.3d 165, 167 (7th Cir. 1996) (recognizing the power of administrative agencies to interpret their own legislative rules, and discussing the reasons why formalities during that process are unnecessary); see also Manning, *supra* note 70, at 914–16.

83. See Strauss, *supra* note 63, at 805 (noting that these types of communications are "salutary forms of informal agency action" and their weight typically turns on a court's determination of their finality).

84. 135 S. Ct. 1199 (2015).

85. *Id.* at 1204–05.

86. *Id.* at 1205 (citing *Mortg. Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193, 203 n.7 (D.D.C. 2012) (declining to apply the decision in *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 589 (1997), because the Mortgage Bankers Association could not show they detrimentally relied on the 2004 interpretation)).

87. *Id.* at 1205–06 (citing *Mortg. Bankers Ass'n v. Harris*, 720 F.3d 966, 967 (D.C. Cir. 2013)).

88. *Perez*, 135 S. Ct. at 1206.

89. See Peter H. Schuck & Steven Kochevar, *Reg. Neg Redux: The Career of a Procedural Reform*, 15 THEORETICAL INQUIRIES L. 417, 445 (2014).

are bound by its decisions.<sup>90</sup> Moreover, because adjudication leads to some sort of “order,” or retrospective decision about a particular party, courts will review the agency’s decision on the administrative record using the “substantial evidence” test.<sup>91</sup> Similarly, negotiated rulemaking procedures seem reliable because both parties to the negotiation are actively representing their interests.<sup>92</sup> Nevertheless, these types of informal rulemaking procedures are not always reliable because courts will give great weight to the agency’s position despite the fact that resulting interpretations are not always fair or open to full public participation.<sup>93</sup>

Finally, when the public seeks clarification or confirmation of their understanding of official agency information or action, they will likely assume the information they receive is correct and conform their behavior accordingly.<sup>94</sup> Agency communications in the form of oral advice, informal guidance documents, or actions addressed to subordinate officials are not legally binding on the agency nor the public;<sup>95</sup> therefore, they are ultimately unreliable.<sup>96</sup>

### *B. Communications That Look Unreliable*

Handbooks and staff manuals promulgated by an administrative agency may additionally seem unreliable to the public; however, courts hold that these documents will bind an agency under certain circumstances.<sup>97</sup> While this type of agency communication is not as reliable as formal or most informal rules, the agency is held to a higher standard if it interprets a statute without a lawmaking pretense in mind and without going through notice-

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90. See POPPER ET AL., *supra* note 63, at 629 (explaining that agency adjudications permit “only the parties to the proceeding and those interveners the agency determines will be of value in the decisionmaking process”).

91. See 5 U.S.C. § 706(2)(E) (2012).

92. See Negotiated Rulemaking Act, 5 U.S.C. §§ 561–569; see also Robert Choo, *Judicial Review of Negotiated Rulemaking: Should Chevron Deference Apply?*, 52 RUTGERS L. REV. 1069, 1095 (explaining that parties to negotiated rulemakings typically agree “to support the consensus proposal and refrain from litigation once it becomes final”).

93. See Choo, *supra* note 92, at 1097–1100 (concluding that negotiated rulemaking should be more strictly reviewed than what is required under the *Chevron* doctrine).

94. See POPPER ET AL., *supra* note 63, at 895.

95. See Newman, *supra* note 62, at 379–80.

96. See, e.g., *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 416 (1990) (declining to require the agency to deliver benefits to a federal employee who relied on an agent’s inaccurate advice; noting that the claimant in that case failed to prove “affirmative misconduct” that would warrant such a remedy). See generally Reiss, *supra* note 71, at 79–88 (discussing Supreme Court jurisprudence surrounding the issue of reliance on an agency’s misrepresentation of a regulation).

97. See, e.g., *De La Mota v. U.S. Dep’t of Educ.*, 412 F.3d 71, 82 (2005).

and-comment procedures.<sup>98</sup>

For example, when Marisol De La Mota, one of three public service attorneys who provided legal services for children in low-income families, was denied cancellation of her student Perkins Loans under a provision in the Higher Education Act, she challenged the ED's interpretation of the program under the APA.<sup>99</sup> On appeal from the U.S. District Court for the Southern District of New York,<sup>100</sup> the Second Circuit noted that the ED provided participation instructions through handbooks and gave ad hoc advice through telephone conversations and e-mails to the lending institutions.<sup>101</sup> In addition, the ED issued a Student Financial Aid Handbook to participating schools,<sup>102</sup> and continued to advise the participating schools regarding how to handle applications for loan forgiveness.<sup>103</sup> Notably, the Handbooks contained a qualification not present in the statute: that services provided by lawyers like De La Mota be extended "only" to high-risk children.<sup>104</sup>

The court first examined the legislative history of the program, noting that it was enacted to encourage qualified graduates to enter into typically low-paying careers that provide necessary legal services for children and low-income families.<sup>105</sup> The court opined that the ED applied its interpretation of the statute "as articulated through the two agency Handbooks . . . and a few ad hoc e-mails."<sup>106</sup> Because the Handbook and statements by ED employees lacked the authority to make policy, the statutory text and congressional intent prompted the court to reverse in favor of De La Mota.<sup>107</sup> While the outcome in *De La Mota* was favorable for the borrowers, it is common for reviewing courts to give deference to an agency's interpretation of its own

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98. *Id.* at 79.

99. *Id.* at 76. The program authorized cancellation to borrowers "providing, or supervising the provision of, services to high-risk children who are from low-income communities and the families of such children." *Id.* at 82 (quoting 20 U.S.C. § 1087ee(a)(2)(I) (2012)).

100. *De La Mota v. U.S. Dep't of Educ.*, No. 02 Civ. 4276, 2003 WL 22038741, at \*2-3 (S.D.N.Y. Aug. 29, 2003).

101. *See De La Mota*, 412 F.3d at 75 (noting that the borrower applies to the lending school, which ultimately determines whether the applicant is eligible for loan cancellation).

102. *Id.*

103. *Id.* at 76.

104. *Id.* (continuing to describe a "neutral, independent office" called "the Federal Student Aid Ombudsman," which acted as a "[ED] contact for borrowers and, on request, attempt[ed] to resolve disputes with lenders, though the Ombudsman lack[ed] the power to reverse a determination by a lending institution").

105. *Id.* at 78 (quoting H.R. REP. NO. 102-447, at 66 (1992)).

106. *Id.*

107. *Id.* at 82.



regulations articulated through handbooks, manuals, and even private letters.<sup>108</sup>

Another form of communication on which the public cannot justifiably rely is information disseminated through the media.<sup>109</sup> At nearly every level, agency officials provide information, guidance, findings, or simply communicate with the public on a wide range of subjects—from how to benefit from the national forests to whether someone can market securities.<sup>110</sup> It is not difficult to imagine the ramifications of fake media platforms disseminating inaccurate or misleading information while bearing the official license of official government communication.<sup>111</sup> To maintain the integrity of the administrative state, federal agencies should exercise due diligence in order to ensure their information is reliable and accurate.<sup>112</sup> As a practical matter, these communications are patently unreliable given that they do not provide official, binding information.<sup>113</sup>

### III. WHERE CAN ED GO FROM HERE?

A paradigm exists between an agency's need to supply the public with information and peoples' expectations that the information disseminated by the government is reliable.<sup>114</sup> Understanding and measuring the reliability of agency communications depends in part upon whether the agency has the authority to decide the particular issue in the first place.<sup>115</sup> If so, the question

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108. See, e.g., *Polycarpe v. E&S Landscaping Serv., Inc.*, 616 F.3d 1217, 1225 (11th Cir. 2010) (holding that agency opinion letters are considered persuasive authority that, although not binding on the court's review, are accorded "respect"); *Cnty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir. 2002) (quoting *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497 (2002) ("[E]ven relatively informal [Health Care Financing Administration] . . . interpretations, such as letters from regional administrators, 'warrant[] respectful consideration' due to the complexity of the statute and the considerable expertise of the administering agency.")).

109. See Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 *ECOLOGY L.Q.* 657, 660 (2008) ("Indeed, the ability to provide the public with easy access to information through the internet has transformed the way administrative agencies operate.").

110. See Newman, *supra* note 62, at 374–75, 378.

111. See Matthew P. Hintz, *An Interview with Elizabeth Day Hochberg, Assistant General Counsel, General Services Administration*, *LANDSLIDE*, March–April 2014, at 9, 58.

112. *Id.* at 9.

113. For more on the effects of modern technology and the way administrative agencies operate, see Kalen, *supra* note 109, at 660–73.

114. See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 *MICH. L. REV.* 2073, 2120 (2005); Newman, *supra* note 62, at 374.

115. See Kalen, *supra* note 109, at 659.

becomes whether the agency can remedy the challengers' injuries on an ad hoc basis, or is it necessary to change the rule such that it only affects future rights and obligations.

*A. Discretion, Interpretation, and Detrimental Reliance*

Whether agency communications are reliable is a concept that cannot be divorced from the level of deference courts will afford those policies in any particular case.<sup>116</sup> Put simply, if a court decides that "Congress has directly spoken to the precise question at issue," courts must adhere to the statutory command.<sup>117</sup> Conversely, if the statutory language is ambiguous, courts may defer to the agency's reasonable interpretation.<sup>118</sup>

Agencies have declared in the past that specific programs do not create any right or benefit to rely on.<sup>119</sup> For example, the Obama Administration's Deferred Action for Childhood Arrivals (DACA) policy initiative provided young, undocumented immigrants brought into the United States as children an opportunity to avoid deportation.<sup>120</sup> Secretary of the Department of Homeland Security, Janet Napolitano, signed the directive, which stated in part that "in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the nation's immigration laws against certain young people who were brought to this country as children and know this country as home."<sup>121</sup> Applicants were unable to rely on the

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116. *Id.*

117. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

118. *Kalen*, *supra* note 109, at 702 (citing *Barnhart v. Walton*, 535 U.S. 212, 217–18 (2002)).

119. *See Heckler v. Cmty. Health Servs., Inc.*, 467 U.S. 51, 58–59 (1984) (denying collection of overpayments pursuant to an oral statement delivered by intermediary of the agency); *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (holding that a claims manual of the Social Security Administration had no legal force and did not bind officials). *But see* *U.S.A. Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 714–15 (1996) (holding that the ED's university Handbook was binding upon agency in approving payment of benefits under loan cancellation program).

120. *See* U.S. CITIZENSHIP AND IMMIGRANT SERVS., U.S. DEP'T OF HOMELAND SEC., OMB NO. 1615-0124, INSTRUCTIONS FOR CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2013).

121. *See* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., & John Morton, Dir., U.S. Immigration & Customs Enforcement 1 (June 15, 2012); *see also* Janet Napolitano, *The Truth About Young Immigrants and DACA*, N.Y. TIMES (Nov. 30, 2016), <https://www.nytimes.com/2016/11/30/opinion/the-truth-about-young-immigrants-and-daca.html> (relaying her personal experience as Secretary and the implementation difficulties due to the limited authority of the executive branch to

communication in court because it was a nonbinding general statement of policy.<sup>122</sup> Moreover, the statement merely allowed immigration officials to enforce immigration laws at their discretion, provided those decisions were within their legal authority.<sup>123</sup> Because the statement was necessarily inconsistent with the President's policy goal, the immigration officials' exercise of discretion was considered outside their legal authority.<sup>124</sup>

Policy statements such as DACA, which are implemented with an eye toward maintaining discretion, are unenforceable, unreviewable agency actions.<sup>125</sup> It is possible DACA claimants could have tried to argue that the policy was "practically binding, and thus [rose] to the level of a substantive, legislative rule;"<sup>126</sup> however, DHS explicitly declared the policy "may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter."<sup>127</sup> This was precisely the issue in *Appalachian Power Co. v. EPA*,<sup>128</sup> where the agency's policy statement ordering states to comply with programs under the Clean Air Act precluded "enforcement actions on the policies or interpretations formulated in the document."<sup>129</sup>

A recently filed American Bar Association (ABA) complaint against the ED is another noteworthy example of a debatable characterization of agency communications.<sup>130</sup> Just as the Environmental Protection Agency (EPA) argued in *Appalachian Power Co.*, the ED now alleges it is merely acting pursuant

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work within the existing legal framework).

122. See Jessica Arco, *A DREAM Turned Nightmare: The Unintended Consequences of the Obama Administration's Deferred Action for Childhood Arrivals Policy*, 82 GEO. WASH. L. REV. 493, 497, 510 (2014).

123. *Id.* at 509.

124. *Id.* at 510–11; *cf.* *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020–22, 1026–28 (D.C. Cir. 2000) (holding that the Environmental Protection Agency (EPA) treated the policies in the document as "binding" for all intents and purposes).

125. Arco, *supra* note 122, at 511–12.

126. *Id.* See generally Andersen, *supra* note 68, 606–08 (identifying ways in which a claimant can argue that a policy has a legal practical impact on the parties, such as examining how the agency treats the rule).

127. Arco, *supra* note 122, at 510–11.

128. 208 F.3d at 1022 (noting that agency action, to be considered final, must mark the consummation of the agency's decisionmaking process and be an action by which rights or obligations have been determined or from which legal consequences will follow).

129. *Id.* at 1020–22 (holding that the EPA policy statement was a procedurally invalid legislative rule and for all practical purposes "binding").

130. Complaint, *ABA v. U.S. Dep't of Educ.* (D.D.C. filed Dec. 20, 2016).

to its authority under the Higher Education Act.<sup>131</sup> However, the ABA alleges that the ED attempted to misuse its power to circumvent the clear language contained in its own rule without acknowledging that it changed its position or offering an explanation.<sup>132</sup> The scope of judicial remedies against the ED depends upon how the regulation and injury are characterized.

Any person wishing to vindicate a legally cognizable grievance against agency actions, findings, and conclusions that are “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law” may do so under the APA.<sup>133</sup> Whereas “pure” questions of law will almost always be decided independent of the factual bases upon which the claim is brought,<sup>134</sup> ambiguity in the statute is likely to prompt deference under the second prong of *Chevron*.<sup>135</sup> Despite the amount of deference owed to federal agencies given their levels of expertise in construing statutory ambiguities, final agency actions may also be challenged in federal court under the APA.<sup>136</sup> When an agency declares that benefits are not legal entitlements and can be terminated at any time, parties who have detrimentally relied on an agency’s assurances or communications are put in a compromising position.<sup>137</sup> Those compromised parties—such as the individuals who have detrimentally relied on the PLSF program—have the right to challenge the agency’s rule in court.<sup>138</sup>

### B. Estoppel

Challenging agency communications is admittedly difficult given the def-

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131. See Defendant’s Answer at 11–12, *ABA v. U.S. Dep’t of Educ.*, (D.D.C. filed Mar. 23, 2017).

132. See Complaint at 2, 6, *ABA v. U.S. Dep’t of Educ.* (D.D.C. filed Dec. 20, 2016); see also Press Release, *ABA sues Department of Education Sues Over Retroactive Denials to Lawyers Under Public Service Loan Forgiveness*, (Dec. 20, 2016) (on file at [https://www.americanbar.org/news/abanews/aba-news-archives/2016/12/aba\\_files\\_lawsuitag.html](https://www.americanbar.org/news/abanews/aba-news-archives/2016/12/aba_files_lawsuitag.html)) (discussing the lawsuit).

133. 5 U.S.C. § 706(2)(A) (2012); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 879 (1990).

134. See Andersen, *supra* note 68, at 604 (noting that “pure” questions of law are generally not accorded deference, but rather are decided “independently, citing *Marbury v. Madison*, § 706 of the APA, or step one of the *Chevron* formula”).

135. See *id.*; 467 U.S. 837, 843 (1984).

136. 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 178–79 (1997) (finding that agency opinions that have significant, direct legal consequences are reviewable under the Administrative Procedure Act).

137. Morgan, *supra* note 8, at 24.

138. 5 U.S.C. §§ 702, 704, 706.

erence generally owed to agency action; however, individuals can seek injunctive relief through estoppel as an alternative.<sup>139</sup> For example, in *Immigration & Naturalization Service v. St. Cyr*,<sup>140</sup> the U.S. Supreme Court allowed a permanent resident alien to challenge the applicability of new immigration laws in a removal proceeding.<sup>141</sup> Even though the statute provided for discretionary relief, the Court opined that “reasonable reliance on the continued availability of discretionary relief”<sup>142</sup> warrants *actual* relief “not [as] a matter of right under any circumstances, but rather is in all cases a matter of grace.”<sup>143</sup> In contexts other than what was at issue in *St. Cyr*, detrimental reliance requires that claimants prove something more than mere negligence or recklessness;<sup>144</sup> rather, he or she must demonstrate the agency engaged in affirmative misconduct.<sup>145</sup>

In a recent lawsuit against the ED, employees of the ABA relied on a letter from a PSLF program servicer confirming that its employer qualified and that it was eligible to make payments for the PSLF program before the ED enumerated qualifying employers in 2016.<sup>146</sup> Moreover, the ABA alleged

139. See POPPER ET AL., *supra* note 63, at 895 (pointing out that estoppel is appropriate where a person receives incorrect information from an agency official, in which case he or she is justified in challenging whether the initial inaccurate information the agency provided is legally binding).

140. 533 U.S. 289 (2001).

141. *Id.* at 316, 345 (instructing courts to consider (1) whether Congress has expressly addressed the question at issue; and (2) if not, whether the agency’s interpretation is arbitrary or capricious).

142. *Id.* at 291.

143. *Id.* at 308 (citing *Jay v. Boyd*, 351 U.S. 345, 353–54 (1956)); *accord* *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (finding the Executive’s failure to exercise discretion authorized a deportable alien to challenge his inaction in federal court).

144. See *Arco*, *supra* note 122, at 520 (explaining that the affirmative misconduct requirement serves to limit the liability of government agents who are negligent in order to “defray endless liability concerns”).

145. See, e.g., *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 64–66 (1984) (declining to apply the doctrine of estoppel against an agency on account of an agent’s negligence); *Fredricks v. Comm’r of Internal Revenue*, 126 F.3d 433, 451 (3d Cir. 1997) (declining to apply the doctrine against the Internal Revenue Service (IRS)); see also Angela D. Morrison, *Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers*, 11 HARV. L. & POL’Y REV. 295, 328 (2017) (“[W]hen the government is a party, the individual seeking estoppel must demonstrate affirmative misconduct.”) (internal quotation marks omitted); *Raven-Hansen*, *supra* note 61, at 43 (criticizing “affirmative misconduct” as a measure of reliance because it “not only deflects attention . . . from [balancing opposing interests], but disingenuously mischaracterizes the facts in the usual estoppel case, which rarely involve ‘misconduct’ in any accepted sense of the word”).

146. See Complaint at 2–3, *ABA v. U.S. Dep’t. of Educ.* (D.D.C. filed Dec. 20, 2016).

that it met the definition of a “public service organization.”<sup>147</sup> In its complaint, the organization alleged that “public interest law service” fits neatly within the scope of the organization’s mission.<sup>148</sup> However, despite this understanding, the ED denied the employees’ employment certification form and refused to grant certification to the ABA as a qualifying employer.<sup>149</sup> Moreover, the ED asserted that the service letter was never a reflection of “final agency action on the borrower’s qualifications” for the program.<sup>150</sup>

Agency deference and estoppel are merely examples of various means by which an individual could potentially challenge ED communication that cause him or her to detrimentally rely on that promise. Key differences exist between the aforementioned cases and the situation in which public service applicants find themselves. Notably, applicants are encouraged to apply for certification by the Secretary of Education even if they have already received eligibility approval from their loan servicer.<sup>151</sup> For many borrowers, the idea that approval letters from the ED have no legal meaning is the difference between their livelihood and bankruptcy.<sup>152</sup> The issue concerns not only student borrowers, but also anyone who has signed up for a forgiveness program that is left to wonder if the government or agency will ultimately hold up its end of the bargain.<sup>153</sup> The controversy begs the broader question of whether borrowers can or should expect the ED to live up to the promises it makes when it expresses itself through actions.<sup>154</sup>

#### IV. THE PARAMETERS OF TRUST: A PRIORITIZATION SYSTEM

Although the ED retracted its threat to completely eliminate the PSLF program, the issue is far from moot.<sup>155</sup> The sheer volume of information the ED released regarding eligibility requirements and certification for the PSLF

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147. *Id.* at 11.

148. *Id.* at 11–12.

149. *See* Defendant’s Answer at 6, *ABA v. U.S. Dep’t of Educ.* (D.D.C. filed Mar. 23, 2017).

150. *See* Stacey Cowley, *Student Loan Forgiveness Program Approval Letters May Be Invalid, Education Dept. Says*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/business/student-loan-forgiveness-program-lawsuit.html>.

151. *See id.*; *Public Service Loan Forgiveness*, *supra* note 5.

152. *See* Cowley, *supra* note 150.

153. *Id.*

154. *Id.*

155. *See* Borrower Eligibility Amendment to PSLF, 81 Fed. Reg. 75,926, 76,086 (delayed indefinitely at 82 Fed. Reg. 27,621) (proposing borrower eligibility requirements that would affect available Direct Loans for graduate programs); Student Loan Lower Interest Rate and Lower Monthly Payment Refinancing Act of 2017, H.R. 2725, 115th Cong. (2017) (introducing a cap on loan cancellation at \$75,000).

program has generated considerable confusion among borrowers.<sup>156</sup> ED's threatened elimination of the program particularly harms borrowers who have detrimentally relied on its availability in obtaining federal loans.<sup>157</sup> Although the ED will allow borrowers who took out loans after October 1, 2007, to apply for forgiveness pursuant to the terms of the original program, some of those individuals have been told they do not work for a qualifying employer,<sup>158</sup> and others are not yet in a position to apply for eligibility.<sup>159</sup>

With a broader understanding of the reliability of federal agency communication in mind, it becomes necessary to consider the available options the ED should pursue to reassure the public of its position regarding the PSLF program. This should both prevent unnecessary litigation and restore the public's confidence in the agency's ability to follow through on its promises. By issuing guidance, the ED can resolve the confusion surrounding eligibility requirements for the PSLF program to avoid future challenges to the program. Moreover, by offering hardship exceptions to applicants that have detrimentally relied on the program, borrowers pursue a career in the public sector without the fear of unmanageable monthly payments, consistent with Congress' intent in creating the PSLF program.

#### A. Guidance

Regardless of the fate of the PROSPER Act, the ED should issue guidance to clarify what is being changed, specifically for the benefit of individuals who have taken out student loans expecting that they would be eligible for loan forgiveness. Assuming the clarification creates reasonable guidance, this would command deference and promote uniformity with or without the

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156. See Cowley, *supra* note 150; see also Ashlee Kieler, *When Education Department Said Your Student Loans Would Be Forgiven, It May Not Have Meant It*, CONSUMERIST (May 10, 2017), <https://consumerist.com/2017/03/31/when-education-dept-said-your-student-loan-would-be-forgiven-it-may-not-have-meant-it/> (giving advice to borrowers aiming for PSLF who are unsure of their eligibility under the proposed changes).

157. See Kieler, *supra* note 17.

158. See Complaint at 30, *ABA v. U.S. Dep't of Educ.* (D.D.C. filed Dec. 20, 2016); Cowley, *supra* note 150 (describing a Veterans of America lawyer who received an ED notification that his initial application for employment certification "had initially been approved in error"). The only available standard employed to determine qualifying employers is in the definitions of "public interest law" and "public service organization" contained in the statute. *Id.*; see also 20 U.S.C. § 1087e(m) (2012).

159. See Cowley, *supra* note 150 (stating that individuals who obtained loans after October 2007 but have not yet graduated from their respective institutions and entered a career in the public service are unable to apply for employment certification until they begin to work for a qualifying employer).

reauthorization.<sup>160</sup> Interpretive rules are also much cheaper than alternative options, such as deciding eligibility on a case-by-case basis.<sup>161</sup>

Interpretive rules may be changed without following notice-and-comment rulemaking procedures.<sup>162</sup> Thus, the ED should clarify its decisionmaking process regarding the PSLF program, particularly with respect to which employers are considered qualifying public interest organizations. Aside from one outlier—the District of Columbia—jurisdictions agree that once a court has classified an agency interpretation as either legislative or nonlegislative, it cannot be significantly revised without notice-and-comment rulemaking.<sup>163</sup> New interpretations are in no way disfavored by reviewing courts, and the ED will not have an extra burden of justification to disprove borrowers' eligibility criteria.<sup>164</sup> An interpretive rule will likewise provide better transparency regarding any ambiguity in the statute, thereby ensuring fair treatment.<sup>165</sup>

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160. See Hale Melnick, *Guidance Documents and Rules: Increasing Executive Accountability in the Regulatory World*, 44 B.C. ENVTL. AFF. L. REV. 357, 361–63 (2017); see also *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (highlighting that interpretations in guidance documents are only entitled to deference to the extent that they have the “power to persuade”).

161. See Kalen, *supra* note 109, at 659–60 (“Indeed, the ability to provide the public with easy access to information through the internet has transformed the way administrative agencies operate.”).

162. See 5 U.S.C. § 553(a)–(b) (2012) (granting agencies the authority to issue legislative rules without formal or informal rulemaking procedures when “good cause” or certain other exceptions are present). Compare *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (opining that a rule interpreting the agency’s own regulations is “controlling unless ‘plainly erroneous or inconsistent with the regulation’”), with *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010) (holding that an interpretive rule is not exempt from notice-and-comment processes if it “cannot fairly be seen as interpreting a statute or regulation”). See generally Melnick, *supra* note 160, at 386–88 (advocating for an alternative model of judicial review of guidance documents based on executive review).

163. See Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183, 1244 (2016).

164. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 538 (2009) (refusing to require FCC to prove more than what was necessary to adopt a policy in the first place after the agency changed its policy); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (upholding agency’s ability to change its own interpretation of a rule even when prior judicial interpretations are contradictory, provided the statute is ambiguous); see also *Archer-Daniels-Midland Co. v. United States*, 37 F.3d 321, 324 (7th Cir. 1994) (holding that courts may give guidance documents more weight because the agencies are delegated authority by Congress and possess expertise).

165. See *Mining Energy Inc. v. Dir. of Workers’ Comp. Programs*, 391 F.3d 571, 575 n.3 (4th Cir. 2004) (“[A] regulation that clarifies a statute’s ambiguous use of a term, or explains how a provision operates, should be characterized as ‘interpretive.’”).



Nevertheless, although issuing guidance may offer the ED a somewhat cleaner solution, the drawbacks of issuing an interpretive rule are chaotic. Notably, an interpretive rule will not address all borrowers' concerns, nor provide the most reassuring solution for those troubled by the Department's lack of reliability. Moreover, because the ED has transmitted information through a number of sources—including, importantly, the nine Loan Servicers originally under contract—it will not be easy to reconcile all of the inconsistencies in a way that is not arbitrary, capricious, or manifestly contrary to the statute.<sup>166</sup> For example, the legislative history of the PSLF program reveals that commenters explicitly raised concerns regarding the risk that Congress could eliminate the program without ensuring that borrowers who were on track to receive the benefit were protected.<sup>167</sup> Ironically, the ED's response in the final rule maintained that Congress has never eliminated or reduced a benefit under the Higher Education Act before.<sup>168</sup> In the final rule, the ED chose not to incorporate a more detailed description of the eligibility requirements or application procedures, nor did it choose to do so in any subsequent amendment.<sup>169</sup>

A court is unlikely to apply *Chevron* deference to the agency's recent interpretations of the PSLF program's eligibility requirements because they lack the force and effect of law and have been characterized by the ED itself as nonbinding.<sup>170</sup> However, because agencies are permitted to re-interpret ambiguous statutory language through rulemaking, the ED will likely argue that it should be granted flexibility under *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.<sup>171</sup> If this were the case, the agency need only "adequately explain the reasons for a reversal of policy."<sup>172</sup>

The agency could have avoided the issue by guaranteeing ultimate loan

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166. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

167. See Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. 63,232, 63,241–42 (Oct. 23, 2008) (codified at 34 C.F.R. pts. 674, 682, & 685) (discussing the ED's decision not to include a stipulation in the Direct Loan master promissory notes that would refer to the program and provide borrowers with a contractual right to receive the benefit if Congress decided to eliminate the program in the future).

168. *Id.*

169. See *supra* Part II (discussing the legislative history of the PSLF program).

170. See *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (holding that "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron* style deference"); see also Kalen, *supra* note 109, at 703–04 (noting that informal interpretations of statutory language are generally only entitled to "respect" deference under *Skidmore*).

171. 545 U.S. 967, 997–1003 (2005).

172. *Id.* at 980–82.

forgiveness through voluntary self-estoppel.<sup>173</sup> For example, the Food and Drug Administration (FDA) classifies the preambles to proposed and final rules as advisory opinions until they are revoked or modified.<sup>174</sup> Each portion of the rulemaking file for every FDA rule thus gives potential injured claimants rise to a legal remedy.<sup>175</sup> The ED will need to address a range of different claims from individuals who have received incorrect information or retroactive notice of disqualification. Similarly, those who have a demonstrated commitment to entering a qualifying job but are not yet able to make payments may also raise colorable objections to the elimination of the program. Because the ED cannot adequately resolve these various claims without compounding the risk of subsequent challenges, an interpretive rule is a less favorable option than are independent determinations.

### *B. Hardship Exceptions*

“Regulatory beneficiaries,” or individuals who benefit indirectly from agencies following through with what they promise,<sup>176</sup> are less likely to view decisions made through the issuance of guidance documents as legitimate.<sup>177</sup> Without having access to the courts or being offered the opportunity to participate in rulemaking, these individuals may see guidance documents as untrustworthy.<sup>178</sup> Individuals who have relied on the availability of the PSLF program, applied for the benefits, and received inconsistent information or retroactive disqualification will similarly see the agency’s actions as untrustworthy, and should be able to challenge the agency action.<sup>179</sup> It is counterintuitive and contrary to the principles underlying good governance that an agency can secure *Skidmore* deference,<sup>180</sup> thereby avoiding this type of challenge, merely by having a senior official sign off on guidance, while also

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173. See JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING § 2:11 (2017) (explaining that voluntary self-estoppel is an exception to *Merrill's* estoppel barrier).

174. See *id.*

175. See 21 C.F.R. § 10.85 (2016).

176. See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 414 (2007) (stating the concerns of regulatory beneficiaries that lack any focus or direct relationship with the agency issuing guidance documents).

177. *Id.* at 420.

178. *Id.* at 420–26, 433.

179. See *supra* Part III (discussing the principles of detrimental reliance and estoppel as bases for challenging agency action); see also Morgan, *supra* note 8, at 24–25 (noting that the threatened elimination of the PSLF program implicates policy considerations of fairness, estoppel, and government accountability).

180. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that agency rulings, interpretations, and opinions are entitled to “respect” depending upon the thoroughness of

avoiding judicial review by ensuring that a senior official refrains from signing off on guidance.<sup>181</sup> Nevertheless, this is exactly the position the ED finds itself in again, even after the litigation in *De La Mota*.<sup>182</sup> Even the Consumer Finance Protection Bureau recommended targeting administrability concerns by assuring applicants and current payees that they are not lost in the numbers.<sup>183</sup> Therefore, the most prudent course of action the ED can pursue is to grant hardship exceptions to borrowers based on the totality of the circumstances of the applicant.<sup>184</sup>

The PSLF program only requires that borrowers work for a public service organization, document their qualifying payments for 10 years, and apply for forgiveness at the end of the term.<sup>185</sup> Moreover, the borrowers who submitted and received approved employment certification forms did so voluntarily.<sup>186</sup> The program was further pushed into university manuals, handbooks, and private letters that interpreted the policy and applied it to individual situations.<sup>187</sup> Accordingly, the public is justified in relying on these forms of agency communications; therefore, the public is likely to have a reasonably strong case for proving they are entitled to relief.<sup>188</sup>

Someone who has received employment certification from the Secretary

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the evidence in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade).

181. See POPPER ET AL., *supra* note 63, at 243.

182. See *supra* Part III(b) (discussing *De La Mota v. U.S. Dep't of Educ.*, 412 F.3d 71 (2d Cir. 2005)).

183. See CONSUMER FIN. PROT. BUREAU, *supra* note 7, at 45 (recommending that policy-makers consider being more flexible when it comes to borrowers who have received inaccurate information provided by a loan servicer that the agency obligated them to retain).

184. See Alfred C. Aman, Jr., *Informal Agency Actions and U.S. Administrative Law—Informal Procedure in a Global Era*, 42 AM. J. COMP. L. SUPP. 665, 678 (1994) (“The applicant will agree to conditions he knows will guarantee the successful and speedy grant of his application. The agency will seek conditions that assure it that the applicant merits its standards and advances its policies.”).

185. See *Public Service Loan Forgiveness*, *supra* note 5.

186. See 20 U.S.C. § 1087e(m) (2012).

187. See *Social Media*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/overview/focus/social-media.html> (last visited Jan. 27, 2018) (describing the various channels through which the PSLF program's information is disseminated); see also Emily Cauble, *Detrimental Reliance on IRS Guidance*, 2015 WIS. L. REV. 421, 422–23 (2015) (warning that some forms of IRS guidance—such as a private letter that requires a filing fee—are more likely to be considered “formal” than advice that is received over the phone).

188. See Floyd D. Shimomura, *Federal Misrepresentation: Protecting the Reliance Interest*, 60 TUL. L. REV. 596, 597 (1986) (noting that federal misrepresentation “involves the communication of incorrect information by the government to an individual, thereby inducing the individual to change his position for the worse”).

of Education should emphasize the reasonableness of their reliance on the PSLF program and downplay the need to prove affirmative misconduct.<sup>189</sup> Notably, the approval letters unequivocally reject eligibility, and were issued pursuant to the loan forgiveness statute.<sup>190</sup> Because the program's eligibility requirements were promulgated as formal rules subject to notice-and-comment rulemaking procedures, the idea that the public would rely on the program in choosing a school or taking out loans is entirely justifiable.<sup>191</sup> However, because the ED requires that the Secretary of Education retains the ultimate discretion with respect to who is eligible for loan forgiveness, the agency is also able to maintain that the employment certification forms are merely opinion letters without the force or effect of law.<sup>192</sup>

The ED should grant certain hardship exceptions for persons who have relied substantially on the PSLF program. Each determination should be individualized to account for the applicants' factual circumstances. For example, if an applicant is enrolled at a university and has demonstrated a commitment to pursuing a career in the public sector, this should be taken into account in whether that person is eligible to make payments once he or she has graduated. This type of thoroughness will mitigate against a finding of arbitrariness and will be consistent with *Skidmore*.<sup>193</sup>

#### CONCLUSION

The PSLF program has received considerable criticism from its inception.<sup>194</sup> Its ultimate modification is hardly shocking in light of the operational

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189. *Cf.* *Fredericks v. Comm'r of Internal Revenue*, 126 F.3d 433, 436 (3d Cir. 1997) (requiring proof of affirmative misconduct in taxpayer suit against IRS alleging violation of a consent agreement).

190. *See* U.S. DEP'T OF EDUC., PUBLIC SERVICE LOAN FORGIVENESS (PSLF): EMPLOYMENT CERTIFICATION FORM (ECF) 4–5, <https://studentaid.ed.gov/sa/sites/default/files/public-service-employment-certification-form.pdf> (last visited Jan. 27, 2018).

191. *See* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. 63,232, 63,256–57 (Oct. 23, 2008) (codified at 34 C.F.R. pts. 674, 682, & 685).

192. *Cf.* Defendant's Answer at 10–12, *ABA v. U.S. Dept. of Educ.* (D.D.C. filed Mar. 23, 2017).

193. *See* *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (opining that nonlegislative rules often reflect experience and sound judgment).

194. *See* Shannon Achimalbe, *The Ten-Year Public Service Loan Forgiveness Program Is Abusive and Should Be Eliminated*, ABOVE THE LAW (May 24, 2017, 10:02 AM), <http://abovethelaw.com/2017/05/the-ten-year-public-service-loan-forgiveness-program-is-abusive-and-should-be-eliminated/?rf=1> (discussing the pitfalls of the PSLF program, including widespread inefficiency).

and structural challenges it has experienced.<sup>195</sup> Regardless of whether the changes proposed in the PROSPER Act are ultimately passed, individuals who have relied on the PSLF program deserve reassurance. As the regulations stand, those who have already made payments and received confirmation of their approval in the PSLF program will receive the benefit.<sup>196</sup> But those who are not yet employed in a public service job or who were under the impression that they were working for an eligible employer will not receive the PSLF program's benefits.<sup>197</sup> By clarifying what the agency intends to change regarding eligibility, verification, and application, the ED will avoid litigation arising out of claims from individual borrowers. Moreover, ad hoc determinations of eligibility for those who have received misinformation regarding their own eligibility or the general requirements for the PSLF program are equally necessary.

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195. See, e.g., David A. Stein, *CFBP Reports and Acts on Complaints about Student Loan Servicer Handling of Public Service Loan Forgiveness Program*, NAT'L L. REV. (June 23, 2017), <https://www.natlawreview.com/article/cfpb-reports-and-acts-complaints-about-student-loan-servicer-handling-public-service> (detailing complaints in the Consumer Finance Protection Bureau report, including informational inaccuracy, deceptive or negligent enrollment information, unclear requirements for enrollment in non-qualifying plans).

196. See *Public Service Loan Forgiveness*, *supra* note 5 (explaining that eligible applicants the Secretary of Education deems have met the requirements will still receive repayment).

197. See *id.*