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PRESENTED TO

DEPARTMENT OF EDUCATION
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PUBLIC COMMENT

Why proposed changes to regulations for Public Service Loan Forgiveness Program should be rejected

The U.S. Program of the International Center for Not-for-Profit Law (ICNL) submits these comments in response to the Notice of Proposed Rulemaking (NPRM) from the Education Department on proposed amendments to the implementing regulations for the Public Service Loan Forgiveness (PSLF) program.

These proposed regulations should be rejected because:

1. **The proposed regulations are in conflict with statute**. The College Cost Reduction and Access Act makes the public service loan forgiveness program available to any borrower who has been "employed in a public service job" for the duration designated in the Act. The Act defines "public service job" to include an "organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under 501(a) of such Code". (*see* Public Law 110-84, Sec. 401) In conflict with this clear statutory definition, in its proposed regulations the Department seeks to define "qualifying employer" in the regulations to exclude "organizations that engage in activities that have a substantial illegal purpose". The statute nowhere provides authority to the Department to effectively create this alternative definition to what is a covered "public service job". If this regulatory change were adopted, a court could strike it down as being in conflict with and unauthorized under the College Cost Reduction Access Act. *See* 5 U.S. Code §706 (A reviewing court under the Administrative Procedure Act shall "hold unlawful and set aside agency action, findings, and conclusions found to

be . . . in excess of statutory jurisdiction, authority, or limitations"); *Loper Bright Enterprises v. Raimondo* 603 U.S 369 (2024) ("Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.").

2. **The proposed regulations are unnecessary**. The Department claims that it used the IRS's illegality doctrine "as a basis" for excluding organizations from the PSLF program that engage in activities with a "substantial illegal purpose." However, it is unclear why the Department needs to be empowered to exclude these nonprofits from the PSLF when the IRS, under the illegality doctrine, is already empowered to strip nonprofits of their tax-exempt status if they have an illegal purpose or engage in substantial illegal activity. Nonprofits that lose their tax-exempt status would then be ineligible to be a "public service job" under the PSLF program. If the goal of the proposed regulations is to ensure that nonprofits that engage in serious illegal activity are not eligible employers under the PSLF program, this is already addressed by the IRS's illegality doctrine. Further, the Department of Education lacks the same substantive expertise as the IRS to gather facts related to or apply this doctrine.

3. **The proposed comments have an arbitrary and potentially politicized definition of "substantial illegal purpose"**. While the Department claims it uses the IRS's illegality doctrine as the basis for its proposed regulation, the process it proposes is actually quite different and more prone to politicization. The Department's proposed regulations define "substantial illegal purpose" to include just six categories of activities, including "aiding or abetting violations" of immigration laws; "supporting terrorism"; or engaging in a pattern of violating state laws (which is further defined to only include a subset of crimes such as disorderly conduct or obstruction of highways).

   This proposal for defining "substantial illegal purpose" is markedly different than the IRS's illegality doctrine. As will be discussed in the next point, it is unclear if all the listed activities in the Education Department's proposed definition of "substantial illegal purpose" are actually illegal or how they will be interpreted by the Secretary. Further, in defining "substantial illegal purpose" the Department seemingly

arbitrarily lists just six categories of activities. As such, "substantial illegal purpose" could easily become a term subject to the whims of whatever administration is in power to target nonprofits and other entities with which it disagrees.

4. **The proposed regulations have an unconstitutionally vague and overbroad definition of "substantial illegal purpose"**. The proposal defines "substantial illegal purpose" to include a number of activities where it is unclear if the activity is actually illegal or what the potential reach of the prohibition might be. Consider the listed prohibited activity of "supporting terrorism". While the regulation uses 18 U.S.C. 2331 to define "terrorism", nowhere is the vague word of "supporting" defined in this statute or in the proposed regulations. Nor is there a *mens rea* requirement in the proposed regulations for the prohibition on "supporting terrorism." As such, it is unclear what activity or expression may or may not be covered by the proposed regulation, creating a vague and potentially overbroad prohibition that could include protected First Amendment expression.

5. **The rights savings provisions in the proposed regulation fails to address its constitutional infirmities**. In the NPRM the Department explicitly recognizes concerns expressed during earlier consultations that the Secretary "would use authority under this proposed standard to target free speech." In response, the department added (h)(2) to the proposed regulations that would bar the Secretary from "determin[ing] an employer has a substantial illegal purpose based upon the employer or its employees exercising their First Amendment protected rights, or any other rights protected under the Constitution."

   Yet, this savings provision fails to address the constitutional infirmities in the proposed regulation. As the Supreme Court noted in *United States v. Stevens*, 559 U.S. 460 (2010) when discussing a savings provision in legislation at issue in that case, "We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." Even with such a savings provision, the underlying statute would still be unconstitutionally overbroad and vague and have a chilling impact on expressive activities.

In Executive Order 14149 ("Restoring Freedom of Speech and Ending Federal Censorship") President Trump affirmed that it is federal government policy that "that no Federal Government officer, employee, or agent engages in or facilitates any conduct that would unconstitutionally abridge the free speech of any American citizen". As currently written this proposed regulation would infringe Americans' free speech rights as it is overbroad and vague, chilling constitutionally protected speech. The inclusion of (h)(2) fails to address these concerns.

6. **The proposed comments have insufficient due process protections.** Under the proposed regulation, a nonprofit's employees will no longer be eligible for the PSLF program if "The Secretary determines by a preponderance of the evidence, and after notice and opportunity to respond, that a qualifying employer has engaged on or after July 1, 2026, in activities that have a substantial illegal purpose." This proposed process provides unilateral authority to the Secretary to suspend a nonprofit from being a qualifying employer without appeal first to any neutral arbitrator. It also does not require the Secretary to provide the evidence to the nonprofit upon which they are basing their decision. In effect, it provides the Secretary vast discretion to unilaterally decide what nonprofits may be in violation of the proposed regulation without having to provide evidence or first have the case decided by an impartial decisionmaker. As such, this proposed process fails to meet due process protections guaranteed under the Constitution. *See Goldberg v. Kelly*, 397 U.S. 254 (1970)

In sum, the proposed regulation would create an unnecessary process for suspending certain employers from the PSLF program that is in conflict with the College Cost Reduction and Access Act. It creates clear First Amendment and due process concerns, while risking politicization of the implementation of the Program. As a result, it will likely create confusion over which employers would qualify for the PSLF program either now or in the future, leading many to not enter the nonprofit sector or pursue other public sector jobs out of concern that their loans may not be eligible for loan forgiveness. This proposal should be rejected.

For more information about these comments contact Nick Robinson at nrobinson@icnl.org