

Navigating the New Student Loan Discharge Process: Overview and Additional Resources

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On November 17, 2022, the Department of Justice (DOJ), in cooperation with the Department of Education (DOE), announced a new process under which DOJ attorneys will evaluate student loan discharge actions filed in bankruptcy proceedings. The stated purpose of the new process is to increase transparency and consistency of the process and outcomes, reduce barriers that have prevented debtors from seeking discharge of student loans in the past, and, where the facts allow, increase the number of cases where the government is able to recommend to the court that debtors receive a discharge of their student loans.

The new process will apply to all “DOE-held” federal loans. This will include all Direct Loans, and those FFELP (Federal Family Education Loan Program) and Perkins loans that are held by the government. Private student loans are not subject to the process described here. Practitioners should ascertain the type of loans at issue before filing the underlying bankruptcy, whenever possible. The process is available in bankruptcy cases that were open as of November 17, 2022, had a student loan adversary proceeding in process on that date, or were filed after that date.

The legal standard and basic process for seeking discharge is unchanged. Within the debtor’s bankruptcy, an adversary proceeding must be initiated by the filing of a complaint to determine dischargeability of debt under Section 523(a)(8). The complaint and summons must be served in a manner consistent with Federal Rule of Bankruptcy Procedure (FRBP) 7004. No filing fee should be required, per FRBP 4007(b).

When DOE-held student loans are the subject of the adversary proceeding, debtor’s counsel should promptly establish communication with the Assistant United States Attorney (AUSA) assigned to defend the case on behalf of the government. The settlement evaluation process described here will be triggered by the debtor submitting a completed [attestation form](#).

The attestation form generally tracks the three *Brunner* prongs for evaluating hardship by examining present financial circumstances, future circumstances, and past good faith effort to pay the loans. The most exhaustive inquiry involves the debtor’s current financial circumstances. [Detailed instructions for completing the attestation](#) have been issued by the DOJ. Debtor’s counsel should carefully review and follow these instructions, to ensure that the attestation can be speedily reviewed, and that the AUSA is given data that he or she can rely on in advancing a recommendation regarding discharge.

The present circumstances analysis considers all household income (including income not counted in Schedule I), minus withholdings, against defined IRS standards and other specific expenditures. The debtor may list reasonable expenses that have not yet been incurred, such as when the debtor is living in substandard or shared housing and will need an increased housing expenditure to obtain adequate housing. If the debtor is currently going without necessary expenditures, the AUSA is directed not to assert that funds the debtor will reasonably need to spend on living expenses should instead be directed to student loan payments.

The “future circumstances” and “past good faith” inquiries are more straightforward. The attestation form offers a number of bases which will trigger a presumption that the debtor lacks the future ability to repay the loan, including if the debtor is 65 years of age or older, or has a disability which limits the ability to earn income. It also describes specific facts which evidence a debtor’s past good faith in seeking to repay the loans.

While the debtor must list and describe valuable assets such as real estate, vehicles, and retirement accounts, the published guidance states that “dispositive weight should not be given to the existence of assets that are not easily converted to cash, or [are] otherwise critical to the debtor’s well being.”

After the completed attestation form is submitted, the AUSA will review it and may request additional information to supplement or verify the debtor’s statements. After this review, the AUSA will forward a recommendation to the DOE, and the agencies are directed to work together to determine whether discharge is indicated based on the responses provided in the debtor’s attestation. While awaiting a determination regarding dischargeability, the parties should file a joint request to suspend pre-trial deadlines and the trial date, to accommodate the review. If discharge is indicated, the government will participate in entry of a stipulated judgment that the federal student loans at issue are dischargeable.

A debtor’s likelihood of success should be reasonably apparent before the complaint is ever filed since the basis for case evaluation is set forth in the publicly available attestation. Debtor’s counsel is encouraged to confirm loan eligibility and perform ability-to-pay calculations before initiating the adversary proceeding.

Resources:

- Attestation form in fillable .pdf format: <https://www.justice.gov/civil/page/file/1552666/download>
- DOJ narrative guidance: <https://www.justice.gov/civil/page/file/1552681/download>
- Article, “New Process to Discharge Student Loans in Bankruptcy,” J. Rao 12/12/2022 (shared with permission): <https://library.nclc.org/article/new-process-discharge-student-loans-bankruptcy#content-5>