

United States Bankruptcy Court, Southern District of Alabama
Quarterly Bankruptcy Section Meeting, February 7, 2023

1. Herman Padgett, Section Chair
2. Judges Oldshue and Callaway
 - Proposed local rule changes (see attached) – last call for comments
 - Ask permission to not attend a hearing – don't just assume you don't need to show up. Contact chambers the day before with case numbers if you have ≤ 2 cases at motion docket and want to participate by phone
 - Judge Oldshue's chapter 13 confirmation time change to 3:00 p.m. starting April 13
 - Status conference to be set when petitions filed by a personal representative (sample order attached)
 - Motions for discharge in chapter 13 when one debtor is deceased – please file one non-LBF motion for both
 - Service on officers or registered agents – Rule 7004(i) has been loosened to allow use of title, but don't just put a person's name without a title
 - Reminder re BR 7004(e) – must serve AP summons within 7 days; be sure to file return of service into record
 - Possible wage withholding/TFS administrative order (see attached)
 - Filing of proof of claim by debtors – must be done within 30 days of bar date per BR 3004; debtor cannot withdraw the claim (only creditor can per Rule 3006), must object if trying to get rid of claim
 - Case filing numbers (chart attached)
3. Andrea Redmon, Clerk of Court
 - Chief Deputy Clerk announcement
 - Filing fee still due when case is dismissed because filed within injunction period
4. Mark Zimlich, Bankruptcy Administrator
5. Chris Conte, Chapter 13 Trustee
 - National Data Center
 - New form for withdrawal of objection to confirmation in cases filed 10/1/22 or later (no AMP provision) (attached)
 - Updated fillable final plan summary on website
6. Keith Jones, AUSA
 - New student loan dischargeability procedures (materials attached)
7. Consumer and business committees – Stephen Klimjack and Danielle Mashburn-Myrick
8. Open the floor
9. Next meeting Tuesday, May 16, 2023 – jury assembly room, second floor of Federal Courthouse, with Microsoft Teams component

Local Bankruptcy Rule 1009-1

AMENDMENTS TO PETITIONS, LISTS, SCHEDULES, AND STATEMENTS

(a) If the debtor amends any schedule to add creditors after the clerk of court has issued the notice of bankruptcy case, the debtor must serve the notice of bankruptcy case and the amended schedule on each newly-scheduled creditor and file a certificate of service reflecting that service. Pursuant to Bankruptcy Rule 1009(a), no motion to amend is required. The addition of a creditor constitutes a representation by the debtor and debtor's counsel that the creditor's claim arose prepetition.

(b) An amended petition, list, schedule, or statement shall be accompanied by a cumulative statement of amendment which describes each specific amendment which is being made and those which have been previously made. Each amended document shall be refiled in its entirety unless otherwise authorized by the court.

Local Bankruptcy Rule 1019-1

CONVERSION FROM CHAPTER 13 TO CHAPTER 7

If a chapter 13 case is converted to chapter 7, the chapter 13 trustee shall file a final report and account within 30 days after all outstanding checks issued by the chapter 13 trustee in that case have cleared.

Local Bankruptcy Rule 2004-1

EXAMINATION OF DEBTOR AND OTHERS

(a) Rule not applicable in adversary proceedings and contested matters. This rule applies only to examinations conducted pursuant to Bankruptcy Rule 2004. The rules governing discovery in adversary proceedings and contested matters are set forth in Part VII of the Federal Rules of Bankruptcy Procedure.

(b) Manner of setting examination. A motion or court order is not necessary to authorize an examination pursuant Bankruptcy Rule 2004 or to require production of documents or electronically stored information at the examination. Examinations shall be scheduled upon notice filed with the court and served on the trustee, the debtor, the debtor's attorney, and the party to be examined.

(c) Reasonable notice. The attendance of the examinee and the production of documents or electronically stored information may not be required less than 21 days after service of the notice, except by agreement of the parties or order of the court. To the extent that a request for production of documents or electronically stored information under this rule may be construed as a request under Bankruptcy Rule 7034, the time to respond is shortened to 21 days. The notice of examination may provide for the production of documents or electronically stored information

in advance of the examination, but in no event shall the production of documents or electronically stored information be required less than 21 days from service of the notice of examination, unless otherwise agreed to by the parties or ordered by the court.

(d) Who may attend. Any party in interest who wishes to attend an examination scheduled under this rule may do so by filing and serving a cross-notice of examination at least 14 days in advance of the scheduled examination.

(e) Motion for protective order. An interested party may file, at least 7 days before the date of the proposed examination or production of documents or electronically stored information, a motion for protective order stating the reasons for prohibiting, limiting, or rescheduling the examination or production of documents or electronically stored information. A motion for protective order shall be filed with a request for expedited hearing. The examination and/or production of documents or electronically stored information shall be stayed until the court rules on the motion. If the court schedules a hearing on a motion for protective order, the parties shall meet and confer prior to the hearing in an effort to resolve the issues presented in the motion.

(f) Subpoena. No subpoena is necessary to compel the attendance of, or the production of documents or electronically stored information by, the debtor at an examination of the debtor. A subpoena is necessary to compel the attendance of, or production of documents or electronically stored information by, a witness other than the debtor. The provisions of Federal Rule of Civil Procedure 45 apply to subpoenas issued under this rule.

Local Bankruptcy Rule 2016-1

COMPENSATION OF PROFESSIONALS FROM RETAINERS

If a professional whose compensation is subject to approval under Bankruptcy Code § 330 has accepted a retainer from any source for future services in a bankruptcy case in this court, the professional must obtain court approval before making any draw against the retainer funds.

Local Bankruptcy Rule 2016-2

SEPARATE PRE- AND POSTPETITION LEGAL SERVICES CONTRACTS IN CHAPTER 7 CASES

The debtor and the debtor's counsel may agree to separate prepetition and postpetition contracts for legal services in a chapter 7 bankruptcy case. The contracts shall be in writing and comply with Alabama Rules of Professional Conduct 1.1 and 1.2, Bankruptcy Code §§ 526-28, and any other applicable standards. The prepetition agreement must allow the debtor at least 10 days postpetition to decide whether to enter into a postpetition legal services contract and must provide that the debtor's counsel will remain as counsel of record until allowed to withdraw. The postpetition contract must cover all remaining aspects of the case except for adversary

proceedings. All compensation paid or agreed to be paid must be disclosed pursuant to Bankruptcy Code § 329(a) and Bankruptcy Rule 2016(b). Pursuant to Bankruptcy Rule 1006(b)(3), no attorney's fees shall be paid or accepted postpetition until the filing fee has been paid in full.

If the debtor's counsel has not agreed to postpetition representation and the debtor fails to enter into an agreement for postpetition legal services, the court may allow the attorney to withdraw from the representation of the debtor upon the attorney's motion with service on the debtor, trustee, and bankruptcy administrator. Motions to withdraw may be considered on an expedited basis without being set for hearing.

Local Bankruptcy Rule 3010-1

CHAPTER 13 DIVIDENDS

If unsecured claims have been paid pursuant to the terms of a confirmed plan, the chapter 13 trustee may increase the monthly disbursements on secured claims.

Local Bankruptcy Rule 3015-1

REQUIRED LOCAL FORM FOR CHAPTER 13 PLANS

Pursuant to Bankruptcy Rule 3015.1, this district has adopted a local form for chapter 13 plans which is available on the court's website. Use of the applicable local plan form is required in chapter 13 cases.

Local Bankruptcy Rule 3015-2

CHAPTER 13 CONFIRMATION PROCEDURES

(a) § 341 meeting and confirmation hearing. The debtor is required to appear for examination at the § 341 meeting of creditors. Confirmation hearings will be scheduled and held after the expiration of the non-governmental claims bar date. The debtor and the debtor's counsel are not required to appear at the scheduled confirmation hearing if there are no unresolved objections to confirmation.

(b) Service of original plan. If the debtor files a plan at the same time of the filing of the petition and creditor matrix, the clerk of court will serve the plan with the notice of a commencement of a chapter 13 case on the creditor matrix. The debtor is responsible for any additional service required by Bankruptcy Rules 3012(b) and 7004. Otherwise, pursuant to Bankruptcy Rule 3015(d) the debtor shall serve the plan on all creditors when it is filed with the court.

(c) Preconfirmation modification of a plan. The modification of treatment for a secured, priority, or nondischargeable debt that is already addressed in the original plan can be handled with an agreed withdrawal of objection to confirmation and/or joint motion for valuation which is not required to be served on other creditors. The modified treatment must be reflected in the final plan summary as set out below.

However, ~~either~~ preconfirmation plan modifications ~~(1) to add or delete a secured, priority or nondischargeable debt or (2) modify the treatment of a secured, priority, or nondischargeable debt other than by agreement~~ must be made by an amended plan ~~form, which.~~ The debtor must ~~be served by~~ serve the ~~debtor~~ amended plan on all creditors as listed on the most recent creditor matrix. The debtor is also responsible for any additional service required by Bankruptcy Rules 3012(b) and 7004. The ~~preconfirmation plan modifications which require an~~ debtor is not required to sign the amended plan ~~form include but are not limited to: if signed by the debtor's counsel.~~

~~(1) — Adding or deleting a secured, priority, or nondischargeable debt;~~

~~(2) — Modifying the treatment of a secured, priority, or nondischargeable debt other than by consent; or~~

~~(3) — Modifying the plan payment or term of the plan.~~

~~The debtor is not required to sign the amended plan if signed by the debtor's counsel.~~

~~If a chapter 13 debtor files an amended plan before confirmation, any objections previously filed to any prior plan are deemed denied without prejudice as moot, except those of secured creditors whose treatment has not changed as provided by Bankruptcy Code § 1323(c). Objections to the plan as last amended must be filed at least seven days prior to the confirmation hearing date as provided by Bankruptcy Rule 3015(f).~~

(d) Final plan summary. Within 14 days of the chapter 13 trustee's recommendation of confirmation, the debtor shall file a final plan summary, using the form provided on the court's website, which shall include all changes made to the debtor's plan since it was originally filed. Failure to timely file the final plan summary may result in dismissal of the case or reduction of attorney's fees. The final plan summary will be a private filing event in CM/ECF.

(e) Confirmation order. After the final plan summary has been filed, the chapter 13 trustee shall prepare and submit to the court a proposed order confirming the terms of the debtor's plan. Upon its entry, the clerk of court shall serve the confirmation order on all creditors. The confirmation order will include a summary of the plan terms and the percentage distribution to be paid on unsecured claims. The confirmation order will also include a negative notice provision that a creditor with an allowed unsecured claim may file an objection to the treatment of unsecured claims within 21 days of the entry of the order. The court will schedule a hearing on any timely-filed objection to the confirmation order. The chapter 13 trustee shall begin disbursements pursuant to the plan upon entry of the confirmation order.

(f) Postconfirmation modifications to plans. A motion to modify a confirmed plan must be specific as to the proposed modification. The debtor is not required to sign the motion to modify, and no amended plan is required. ~~The motion~~All motions to modify a confirmed plan must be served upon the debtor(s), trustee (unless filed by the trustee), ~~the debtor,~~ and counsel for debtor(s) (unless filed by that counsel). ~~The motion must also be served on any~~ creditor whose treatment is proposed to be modified (using the notice address on the creditor's most recent proof of claim). A proposed modification which would ~~change~~reduce the percentage distribution on unsecured claims must also be served on all creditors ~~as listed on that~~ have filed a proof of claim by using the most recent creditor mailing matrix available in CM/ECF. However, a debtor's motion to modify seeking to change the term of the plan or temporarily suspend plan payments is not required to

be served on creditors other than the chapter 13 trustee if it does not otherwise seek to modify the treatment of claims.

If the motion is granted, the chapter 13 trustee shall prepare and submit to the court a proposed order approving modification of the terms of the debtor's plan, which the clerk of court shall serve on all creditors upon its entry. The order approving the modification shall include a summary of the plan terms as modified and the percentage distribution to be paid on unsecured claims. An exception to the above is that the court may issue a separate order regarding any temporary plan payment suspension.

(g) When service on all creditors as listed on the most recent creditor matrix is required, the certificate of service must show what and how creditors were served either by listing them or by referencing and attaching a copy of the applicable creditor matrix. A bare recitation that "all creditors" or "all creditors on the matrix" were served is insufficient.

Local Bankruptcy Rule 3022-1

CLOSING INDIVIDUAL CHAPTER 11 CASES

(a) After confirmation of a chapter 11 case filed by an individual, the clerk of court shall administratively close the case upon the recommendation of the bankruptcy administrator.

(b) Upon application by the debtor with certification that all plan payments have been made, the debtor may move to reopen the case and request entry of an order of discharge. Because the closing is required by local rule at least in part for the court's administrative convenience, no filing fee will be required.

Local Bankruptcy Rule 4001-1

MOTIONS FOR RELIEF FROM THE AUTOMATIC STAY

(a) Upon the filing of a motion for relief from the automatic stay imposed by Bankruptcy Code § 362 or from the co-debtor stay imposed by Bankruptcy Code § 1301, the preliminary hearing shall be consolidated with the final hearing unless directed otherwise by the court. The movant shall serve the motion upon the following parties with an appropriate certificate of service: the debtor, the debtor's counsel, any co-debtor, the chapter 11 debtor-in-possession, the trustee, any committee appointed in the case, the bankruptcy administrator (if a chapter 11, 12, or 9 proceeding), and such other parties as the court may direct.

(b) All motions for relief from the automatic stay or the co-debtor stay shall state with particularity the grounds for the motion. The moving party shall attach to the motion or to an affidavit submitted in support of the motion copies of any documents in support of its claim that it has an interest in the debtor's property. Mortgages on real property shall show the recording information. If the movant does not intend to present testimony at the hearing, the motion must

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE: _____)
)
) Case No. 23-_____
)
 Debtor(s).)

ORDER SETTING STATUS CONFERENCE

Date: 3/1/2023

Time: 8:30 A.M.

Location: Courtroom 2 West, John Archibald Campbell U.S. Courthouse, 113 Saint Joseph Street, Mobile, AL 36602-3606

It appears to the court that the petition in this case was filed on behalf of debtor(s) by someone else (“the filing party”) acting in a representative capacity. The court will hold a status conference at the time and place listed above to discuss the case and whether the court should take any steps under Bankruptcy Rule 1004.1 to protect the debtor(s). The filing party, counsel for debtor(s), and (if practicable) the debtor(s) must attend the status conference. At least three business days before the status conference, the filing party must file a copy of any document (such as a power of attorney or court appointment) authorizing him or her to act on behalf of the debtor(s) and a declaration under penalty of perjury containing the following information:

- a. The reason for filing the bankruptcy petition;
- b. The filing party’s name, address, and relationship to the debtor(s);
- c. The reasons why the debtor(s) is unable to file the petition himself or herself or is otherwise unable to manage his or her financial affairs;

d. The fee, if any, that the filing party would charge the debtor(s) for serving as his or her representative;

e. Whether the filing party has any current or potential future interest in the financial affairs of the debtor(s); and

f. Whether any of the debts of debtor(s) were incurred for the benefit of the filing party.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA**

IN RE:)
)
Notice of Requirement for Wage) Administrative Order No. _____
Withholding or TFS)
)

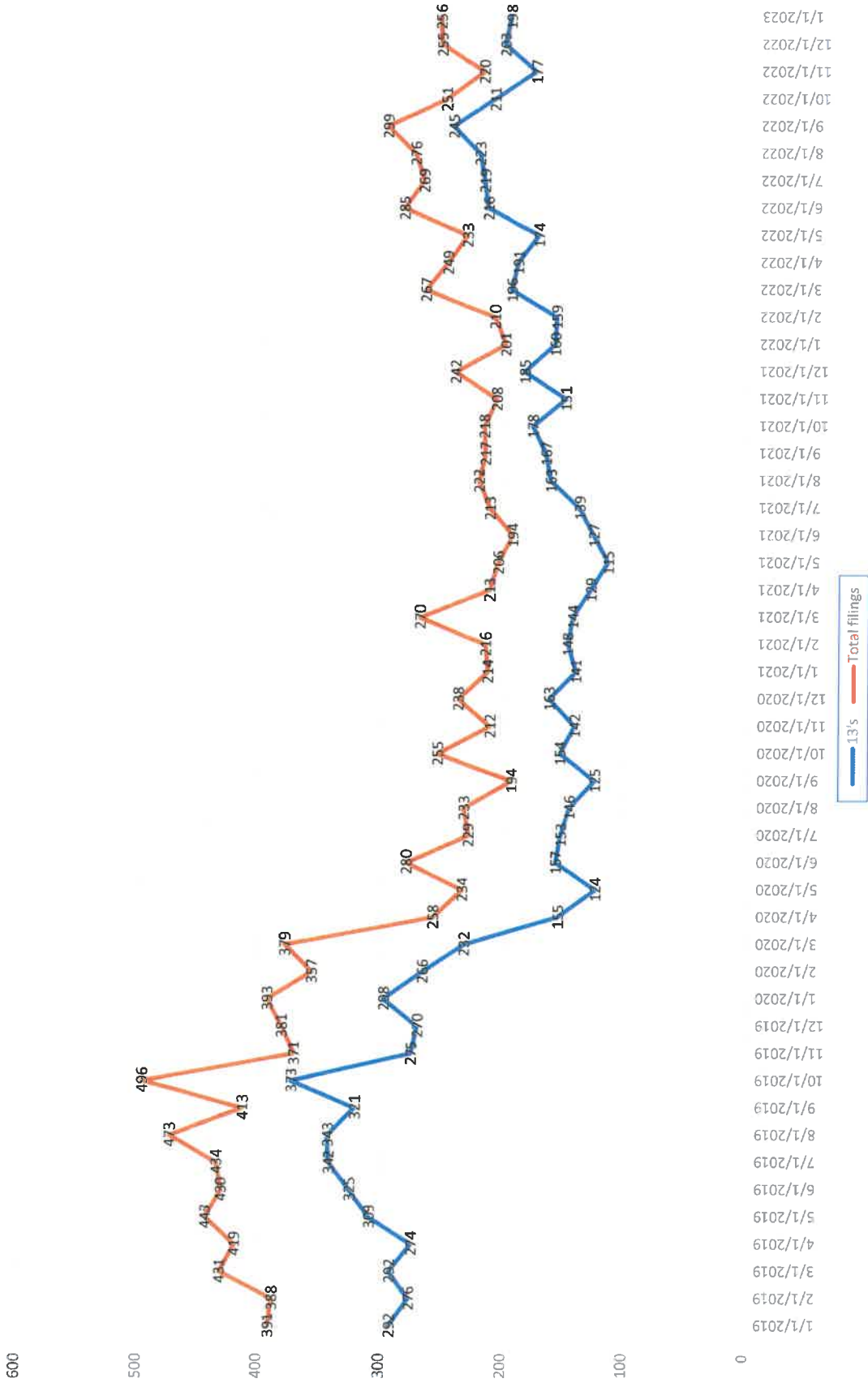
**NOTICE OF REQUIREMENT FOR WAGE WITHHOLDING OR TFS FOR
PAYMENTS IN CHAPTER 13 CASES**

Effective for all cases filed after _____, 2023, debtors shall, at the time they file their Chapter 13 Plan either (a) file a request for their employer to withhold wages in an amount equal to their monthly plan payment and remit said wages to the Chapter 13 Trustee, or (b) set up automatic payments through TFS to be made in an amount equal to the monthly plan payment. Debtors may arrange for payments to be made on a weekly or bi-weekly basis, rather than monthly if they so desire.

If a debtor does not wish to be subjected to wage withholding or sign up for TFS, then a Motion must be submitted along with the filing of the Chapter 13 Plan setting forth the reason the debtor should be exempted from these requirements and setting forth the method of payment proposed by the debtor.

So ORDERED this the ____ day of _____, 2023.

Monthly bankruptcy filings in the Southern District of Alabama since January 2019



November 17, 2022

**GUIDANCE FOR DEPARTMENT ATTORNEYS REGARDING STUDENT LOAN
BANKRUPTCY LITIGATION**

I. Introduction

This memorandum provides guidance (Guidance) to Department of Justice (Department) attorneys regarding requests to discharge student loans in bankruptcy cases. Developed in coordination with the Department of Education (Education), this Guidance will enhance consistency and equity in the handling of these cases. In accordance with existing case law and Education policy, the Guidance advises Department attorneys to stipulate to the facts demonstrating that a debt would impose an undue hardship and recommend to the court that a debtor's student loan be discharged if three conditions are satisfied: (1) the debtor presently lacks an ability to repay the loan; (2) the debtor's inability to pay the loan is likely to persist in the future; and (3) the debtor has acted in good faith in the past in attempting to repay the loan.

To assist the Department attorney in evaluating each of these factors, a debtor will typically be asked to provide relevant information to the government by completing an attestation form (Attestation). The Attestation requests information about the debtor's income and expenses to enable the Department attorney to evaluate the debtor's present ability to pay. The Attestation also seeks information that will help the Department attorney evaluate the other two factors. In the following sections, this Guidance provides more detail about the Attestation that a debtor will be asked to complete, and how the information provided in the Attestation will be considered by the Department attorney. In Appendix A, this Guidance provides a sample attestation form. In addition, in Appendix B, this Guidance provides a concrete example of how a debtor's request for discharge of a student loan will be evaluated.

II. Objectives of the Guidance and Education's Role in Supporting Discharge Cases

In cases where a debtor seeks the discharge of a student loan in bankruptcy, the Department shares with Education the responsibility to represent the interests of the United States in accord with existing law and in the interests of justice. This responsibility includes recommending that a bankruptcy court grant full or partial discharge of student loan debts in appropriate cases. To fulfill that responsibility, Department attorneys should stipulate to facts necessary to demonstrate undue hardship and recommend discharge where the debtor provides information in the Attestation (or otherwise during the adversary proceeding) that satisfies the elements of the analysis below. Some debtors have been deterred from seeking discharge of student loans in bankruptcy due to the historically low probability of success and due to the mistaken belief that student loans are ineligible for discharge. Other student loan borrowers have been dissuaded from seeking relief due to the cost and intrusiveness entailed in pursuing an

adversary proceeding. This Guidance is intended to redress these concerns so that discharges are sought and received when warranted by the facts and law. In addition, Department attorneys are expected to consult proactively with Education to evaluate the specific circumstances of each case.

In collaborating in the preparation of this Guidance, the Department and Education have sought to promote three goals in particular:

1. To set clear, transparent, and consistent expectations for discharge that debtors understand regardless of representation;
2. To reduce debtors' burdens in pursuing an adversary proceeding by simplifying the fact-gathering process. This includes use of an Attestation, and where feasible, information provided through prior submissions to the bankruptcy court and available student loan servicing records;
3. Where the facts support it, to increase the number of cases where the government stipulates to the facts demonstrating a debt would impose an undue hardship and recommends to the court that a debtor's student loans be discharged.

Education is committed to supporting Department attorneys handling these cases. Department attorneys should expect that, for each adversary proceeding, Education will provide to the Department attorney a record of the debtor's account history, loan details, and—where available—educational history, which the Department attorney will share with the debtor. This information will be provided with the Education litigation report.

The Department attorney is expected to consult with Education in each case; consultation includes sharing the completed Attestation and conferring on an appropriate course of action. In its initial litigation report, Education will advise on matters including whether it has data relating to the presumptions in this Guidance regarding assessment of future circumstances and whether it considers the debtor made good faith efforts to repay their student loans. This process will ensure the final decision is informed by Education's experience administering student loans and its role as creditor. Once the Department attorney reaches a recommendation in accordance with this Guidance, the Department attorney shall submit their recommendation or approval, as appropriate, along with Education's recommendation, under the standard procedures applicable in that attorney's component.

III. Applicable Law

Under Section 523(a)(8) of the Bankruptcy Code, certain student loans may not be discharged in bankruptcy unless the bankruptcy court determines that payment of the loan “would impose an undue hardship on the debtor and the debtor’s dependents.” 11 U.S.C. § 523(a)(8); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 278 (2010) (“the bankruptcy court must make an independent determination of undue hardship . . . even if the creditor fails to object or appear in the adversary proceeding.”).¹ This inquiry is undertaken through a formal adversary proceeding in the bankruptcy court. *United Student Aid Funds*, 559 U.S. at 263-64; Fed. R. Bankr. P. 7001(6). The parties in that proceeding may stipulate to the existence of certain facts and recommend that the bankruptcy court find, based on such facts, that repayment of the student loan would cause the debtor an undue hardship.

The most common framework for assessing undue hardship is the so-called *Brunner* test, emanating from *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987). To discharge a student loan under the *Brunner* test, a bankruptcy court must find that the debtor has established that (1) the debtor cannot presently maintain a minimal standard of living if required to repay the student loan, (2) circumstances exist that indicate the debtor’s financial situation is likely to persist into the future for a significant portion of the loan repayment period, and (3) the debtor has made good faith efforts in the past to repay the student loan. *Id.* at 396.

Other courts have employed a “totality of circumstances” test (Totality Test) to determine whether repayment of student loan debt would cause an undue hardship. *See, e.g., In re Long*, 322 F.3d 549, 553 (8th Cir. 2003). The Totality Test looks to: (1) the debtor’s past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor’s and their dependents’ reasonably necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. *Id.*

This Guidance applies in both *Brunner* and Totality Test jurisdictions. Courts have recognized the *Brunner* and Totality Tests “consider similar information—the debtor’s current and prospective financial situation in relation to the educational debt and the debtor’s efforts at repayment.” *In re Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); *see also In re Jespersen*, 571

¹ Section 523(a)(8) requires the debtor to demonstrate an undue hardship to discharge nearly all federal student loans, excluding Health Education Assistance Loans, as well as private education loans that meet the definition of qualified education loans under the Internal Revenue Code. *See* 26 U.S.C. § 221(d)(1).

F.3d 775, 779 (8th Cir. 2009).² Both tests require assessment of the debtor’s income and reasonable expenses to determine whether the debtor has the present and future ability to maintain a “minimal standard of living” while making student loan payments. *See, e.g., In re Hurst*, 553 B.R. 133, 137 (B.A.P. 8th Cir. 2017) (“[I]f the debtor’s reasonable financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged.”) (citing *In re Jespersen*, 571 F.3d at 779). Finally, both tests direct the court to review the debtor’s past efforts at repayment. *In re Polleys*, 356 F.3d at 1309; *see also In re Bronsdon*, 435 B.R. 791, 797 (B.A.P. 1st Cir. 2010).

IV. Discussion of the Applicable Factors

As explained above, consideration of student loan debt discharge requires an evaluation of a debtor’s present, future, and past financial circumstances. This Guidance offers a framework for Department attorneys to apply each of these factors.

With respect to the first factor, the Guidance relies upon the Internal Revenue Service Collection Financial Standards (the IRS Standards) to assess whether a debtor can presently maintain a “minimal standard of living” if required to repay student loan debt. In particular, the Department attorney is advised to use the IRS Standards to evaluate a debtor’s expenses, and then to compare those expenses to the debtor’s income, to determine whether the debtor has a present ability to pay the loan.

With respect to the second factor, the Guidance uses presumptions for determining whether inability to repay is likely to persist in the future. The Guidance recognizes, however, that even in the absence of such presumptions a debtor may be able to establish that their inability to pay will continue in the future.

With respect to the third factor, the Guidance identifies certain objective criteria that evidence a borrower’s good faith. In addition, the Guidance discusses how to evaluate a debtor’s

² The Eighth Circuit has described the Totality Test as “less restrictive” than the *Brunner* framework, *In re Long*, 322 F.3d at 554, but it has also recognized that the distinction between the standards “may not be that significant.” *Jespersen*, 571 F.3d at 779 n.1, 782. *See, e.g., In re Long*, 322 F.3d at 554-55 (“Simply put, if the debtor’s reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged. Certainly, this determination will require a special consideration of the debtor’s present employment and financial situation—including assets, expenses, and earnings—along with the prospect of future changes—positive or adverse—in the debtor’s financial position”); *see also Jespersen*, 571 F.3d at 782 (the totality approach also requires consideration of “evidence of a less than good faith effort to repay . . . student loan debts”). The Guidance does not supersede applicable case law in the circuits. Department attorneys should advance the principles and goals described in this Guidance consistent with that case law.

payment history and decision to participate in an income-driven repayment plan, and clarifies that neither of these factors are dispositive evidence where other evidence of good faith exists.

Finally, the Guidance also provides direction to Department attorneys regarding the treatment of a debtor's assets and the availability of partial discharge.

The Attestation provided with this Guidance will assist in the assembly of the information needed to assess these factors.³ Department attorneys are expected to review completed Attestations in consultation with Education.

A. Assessment of Present Circumstances

The first factor relevant to whether a student loan debtor can meet the statutory undue hardship standard requires the debtor to prove an inability to presently maintain "a minimal standard of living" while making student loan payments. To address this factor, the Department attorney should complete two steps. First, the Department attorney should use the IRS Standards to determine the debtor's "allowable" expenses. Second, the attorney should compare those allowable expenses to the debtor's income to determine whether the debtor has income after expenses with which to make student loan payments. If the debtor's allowable expenses exceed their gross income, this element of the analysis is satisfied. If the debtor's financial circumstances changed since filing the initial bankruptcy petition, the Department attorney can look to the debtor's actual financial circumstances when making an undue hardship determination. *Cf. In re Walker* 650 F.3d 1227, 1232 (8th Cir. 2011).

1. Assessment of the Debtor's Expenses

The Attestation solicits expense information from debtors in categories corresponding to the IRS Standards, particularly the portions of the IRS Standards described as "National and Local Standards" and "Other Necessary Expenses."⁴ The IRS Standards are a useful guide to assess a debtor's expenses for purposes of the "minimal standard of living" inquiry. Use of these standards will ensure more consistent and equitable treatment of debtors seeking discharge. The IRS has established and updated the IRS Standards to determine appropriate collection actions where taxpayers have outstanding unpaid tax obligations. The IRS Standards evaluate what

³ As discussed in more detail below, the Attestation requires a debtor to present information relevant to the Department attorney's analysis in an efficient, organized manner. If the debtor's satisfaction of the requirements for discharge are clearly demonstrated by the complaint or other facts available outside the Attestation, then upon verification of those facts, a Department attorney may recommend discharge without requiring that the debtor complete the Attestation.

⁴ Links to the IRS Standards are found at <https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards>.

expenses are “necessary to provide for a taxpayer’s health and welfare[.]”⁵ or, as described in the IRS Collection Manual, “the *minimum* a taxpayer and family needs to live.”⁶ Courts have recognized the IRS Standards as useful objective criteria in assessing “undue hardship” under Section 523(a)(8). *See, e.g., In re O’Hearn*, 339 F.3d 559, 565 (7th Cir. 2003); *In re Cota*, 298 B.R. 408, 415 (Bankr. D. Ariz. 2003). The IRS Standards list certain expenses (the National and Local Standards) for which they provide a recommended maximum allowance, but also recognize other potential expenses (Other Necessary Expenses) that are potentially necessary for an individual’s health and welfare.

Allowance of Expenses in National Standard Categories: The IRS National Standards consist of tables of allowable expense amounts in the following categories: food; housekeeping supplies; apparel and services; personal care products and services; and miscellaneous. Where the debtor’s expenses are below the amount allowed under the IRS National Standards, no further inquiry into the debtor’s actual expense amount is needed and the debtor is allowed the full National Standards amount. If a debtor’s reported expenses exceed the IRS National Standard amount, a debtor’s reasonable explanation for why particular actual expenses exceed the standard should be considered carefully by the Department attorney, in consultation with Education, and may be accepted if allowing the additional expenses is warranted by the debtor’s circumstances and would comport with a “minimal standard of living.”⁷

Allowance of Expenses in Local Standards Categories: The Local Standards provide expense standards for the categories of housing, utilities, and transportation. Unlike the expenses in the National Standards category, for the Local Standards categories, the Department attorney should limit the debtor to their *actual* expenses. To the extent such expenses do not exceed the amount prescribed in the Local Standards for the debtor’s location and household size, Department attorneys should consider the debtor’s actual expenses in these categories to be consistent with a minimal standard of living and treat such amount as allowed. If the debtor’s actual expense exceeds the Local Standards amount, Department attorneys should generally limit the debtor’s allowable expense to the standard amount. However, as with those expenses categorized as National Standards expenses, the Department attorney should, in consultation

⁵ IRS, *Collection Financial Standards*, <https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards>.

⁶ IRS, Internal Revenue Manual: Part 5.15.1.8 (July 24, 2019), https://www.irs.gov/irm/part5/irm_05-015-001#idm139862108264304 (emphasis added).

⁷ The decision whether to allow expenses in excess of the National and Local Standards will necessarily be fact-intensive, but allowable excess expenses could, for example, include specific health-related costs, costs for special dietary needs, unique commuting requirements, or other needs of the debtor or dependents.

with Education, carefully consider and accept a debtor's reasonable explanation for the need for the additional expenses.

Allowance of Other Necessary Expenses: The IRS Standards recognize "Other Necessary Expenses" in addition to the National and Local Standards expenses. The Attestation requests that debtors list expenses in these "Other Necessary Expense" categories. For example, the IRS Standards allow expenses for alimony and child support payments if they are court-ordered and actually being paid, as well as for baby-sitting, day care, nursery and preschool costs where reasonable and necessary. These Other Necessary Expenses are consistent with a "minimal standard of living," so long as they are necessary and reasonable in amount.⁸

Allowance for Reasonable Expenses Not Incurred: In addition to the comparison of expenses and income described above, Department attorneys should also recognize there may be circumstances in which a debtor's actual expenditures fall below the expenses required to maintain a minimal standard of living and to meet basic needs. For example, a debtor may be living in housing that the debtor is not paying for (e.g., the debtor is staying with a family member) or living in substandard or overcrowded housing but should not be required to remain there indefinitely. Likewise, a debtor may be forgoing spending on childcare, dependent care, technology, or healthcare that would otherwise be expenses one would reasonably expect to maintain a minimal living standard. A simple comparison of present expenses and income could unduly assess the debtor's financial situation against a standard that is below a minimal standard of living. In such circumstances, it would be inappropriate to conclude a debtor possesses income with which to make student loan payments and ignore the debtor's actual living standard. To address these situations, the Attestation provides an opportunity for a debtor to identify and explain expenses the debtor would incur if able to address needs that are unmet or insufficiently provided for. The Department attorney should use those projected expenses in assessing the debtor's present and future financial circumstances. Unless the amount of the projected expenses exceeds the Local Standards, it is not necessary to probe the debtor's calculation.

Appendix B includes specific examples of the recommended analysis of expenses.⁹

⁸ The Department attorney may consult the IRS Standards themselves to assist in determining whether these expenses are necessary to a debtor's minimal standard of living.

⁹ The Attestation process is intended to be distinct from the bankruptcy "means test," which is used to determine a debtor's eligibility for Chapter 7 relief. Although the means test also uses the IRS Standards as part of its calculation of a debtor's household disposable income for the purpose of establishing bankruptcy eligibility, courts have recognized that the means test is not a test of a "minimal standard of living." See *In re Miller*, 409 B.R. 299, 319–320 (Bankr. E.D. Pa. 2009) (means test not appropriate to determine whether the "undue hardship" standard is met) (citing *In re Savage*, 311 B.R. 835, 840 n.7 (1st Cir. B.A.P. 2004). Moreover, the means test calculation differs from the Attestation in specific ways, including that (1) the means test (unlike

2. *Comparison of Expenses with the Debtor's Gross Income*

After determining the debtor's allowable household expenses using the National and Local Standards and Other Necessary Expenses, the Department attorney should compare the debtor's expenses to the debtor's household gross income. Gross income includes income from employment of the debtor and other household members, as well as unemployment benefits, Social Security benefits and other income sources. Debtors normally provide this information in the Schedule I filing. Where debtors filed this form less than 18 months prior to the adversary proceeding, the debtor may use the information on Schedule I to complete the Attestation. Where Schedule I was filed more than 18 months prior to the adversary proceeding or the debtor's circumstances have changed, the Attestation directs the debtor to provide the new income information.

Using the expense and income information provided in the Attestation, the Department attorney should determine whether the debtor possesses income with which to make student loan payments. If the debtor's allowable expenses exceed the debtor's income, the minimal standard of living requirement is satisfied and the debtor may be eligible for a student loan discharge, subject to consideration of the additional factors below. If, however, after considering the analysis described above, the debtor has sufficient discretionary income to make full student loan payments as required under their loan agreement, the debtor has not satisfied the test for undue hardship.¹⁰ Where a debtor's income allows for payment toward the student loan debt but in an amount insufficient to cover the required monthly student loan payment, the Department attorney

the Attestation) is required only for "consumer" debtors whose income exceeds a state "median," and (2) in practice, the means test often allows expenses regardless of their necessity to the debtor's basic or minimal standard of living, such as payments on multiple vehicles or for real property other than the debtor's residence.

¹⁰ Department attorneys are expected to consult with Education to determine the monthly repayment amount. Generally, where permitted in a given jurisdiction, the Department attorney should use the monthly payment amount due under a "standard" repayment plan for the student loan in question when determining whether the debtor has the ability to make payments. The standard repayment amount is the payment amount required to pay the student loan within the remaining term of the loan, as determined by Education. *See* 34 C.F.R. § 685.208. Where the account includes unpaid interest, Department attorneys should take care to ensure that the monthly payment amount would be sufficient to pay the loan obligation in full. Except as required by controlling law, the Department attorney should not use the monthly payment amount available through income-driven repayment plan options as the comparator. Finally, where a student loan has been accelerated, whether based on a debtor's payment default or otherwise, the Department attorney should, following consultation with Education, determine the standard repayment amount either prior to default or as calculated if the loan were removed from default status.

should consider the potential for a partial discharge (discussed more fully in Section IV.E. below).

B. Assessment of Future Circumstances

The second factor for discharge is whether the debtor's current inability to repay the debt while maintaining a minimal standard of living will likely persist for a significant portion of the repayment period. This showing is required in both *Brunner Test* and *Totality Test* jurisdictions. See *In re Thomas*, 931 F.3d 449, 452 (5th Cir. 2019); *In re Long*, 322 F.3d at 554.

A presumption that a debtor's inability to repay debt will persist is to be applied in certain circumstances, including: (1) the debtor is age 65 or older; (2) the debtor has a disability or chronic injury impacting their income potential;¹¹ (3) the debtor has been unemployed for at least five of the last ten years; (4) the debtor has failed to obtain the degree for which the loan was procured; and (5) the loan has been in payment status other than 'in-school' for at least ten years.¹² The Attestation is designed to identify any such circumstances, and it advises the debtor to disclose all of the circumstances applicable to their situation and not rely exclusively on a single presumptive basis for claiming a continuing inability to repay.

The presumptions identified in this Guidance are rebuttable. Although circumstances supporting rebuttal of a presumption will likely be uncommon, the Department attorney need not apply a particular presumption if the debtor's attestation nonetheless indicates a likely future ability to pay. Such a rebuttal must be based on concrete factual circumstances. Mere conjecture about the borrower's future ability is not enough. For example, the presumption in favor of a

¹¹ The debtor may, but is not required to, submit information from a treating physician indicating that the debtor suffers from a disability or chronic injury impacting their income potential, and when provided, that information should be considered carefully. The presumption may be applied even in the absence of a formal medical opinion.

Education offers Total and Permanent Disability (TPD) discharge for qualifying borrowers with certain severe disabilities. Because TPD discharge has its own requirements, the existence of that potential administrative relief generally should not foreclose the debtor from showing a future inability to pay. If, in the view of the Department attorney, the debtor may qualify for TPD discharge, the attorney can provide information to the debtor about the program. Finally, Education's denial of a TPD discharge request is not dispositive of the future circumstances analysis: a prior denial for TPD discharge only implies that Education determined the borrower is likely to have some ability to earn income at the time of the application based on the information provided and evaluation criteria in place, but does not otherwise suggest that the debtor's income is sufficient to service student loan debt or that future circumstances are likely to change.

¹² In the case of consolidation loans, the length of time the debtor has been in repayment includes periods in repayment on the original underlying loans.

debtor who failed to obtain a degree may be rebutted by evidence that the debtor has received employment offers with salaries significantly higher than their current income. In sum, a presumption may be rebutted by evidence that a debtor's future financial circumstances render them able to pay their outstanding debt.

The presumptions identified above are not the sole bases upon which a future inability to pay may be found. A debtor may attest to any facts the debtor believes are relevant to future inability to pay, and the Department attorney should review the Attestation to determine whether the facts presented by the debtor satisfy the standards for proof of likely persistence of inability to pay. A Department attorney may find, for example, that a debtor's financial circumstances are unlikely to improve in the future where the debtor has a significant history of unemployment, even if the debtor's unemployment does not meet the criteria for a presumption. A stipulation may also be appropriate, even absent a particular presumption, where the institution that granted the debtor's degree has closed, and that closure has inhibited a debtor's future earning capacity.¹³ Education has indicated that closure of a school after completion of the debtor's degree may affect a debtor's future ability to pay where the debtor incurs reputational harm from such closure or where the debtor's lack of access to records hampers employment efforts.¹⁴

C. Assessment of Good Faith

Whether a debtor has demonstrated good faith with regard to repayment of student loan debt depends upon the debtor's actions relative to their loan obligation.¹⁵ Good faith may be demonstrated in numerous ways and the good faith inquiry "should not be used as a means for courts" or Department attorneys "to impose their own values on a debtor's life choices." *Polleys*, 356 F.3d at 1310. A debt should not be discharged if the debtor has "willfully contrive[d] a hardship in order to discharge student loans," *id.*, abused the student loan system, *In re Coco*, 335 Fed. App'x 224, 228-29 (3rd Cir. 2009), for example, by committing fraud in connection with obtaining the loans, or otherwise demonstrated a lack of interest in repaying the debt, *id.*

¹³ Education offers a loan discharge for students attending a school that closed while the borrower was in attendance or shortly after withdrawal. As with a TPD discharge, the availability of this administrative relief should have limited influence on the analysis discussed in this Guidance. Debtors may not receive the "closed-school" discharge for a range of reasons that do not implicate their financial status.

¹⁴ The presumptions discussed in this Guidance are intended to direct a Department attorney's assessment of the debtor's situation and do not shift any burden of proof in undue hardship litigation. Before the court in the adversary proceeding, the debtor retains the burden of proof on all elements of the undue hardship claim.

¹⁵ In discussing good faith, this Guidance intends to encompass satisfaction of both Prong Three of the *Brunner* test and good faith as considered under the Totality Test in evaluating the debtor's past efforts at repayment.

Where the debtor has taken at least one of the following steps and in the absence of countervailing circumstances as discussed below, the steps demonstrate good faith. We would normally expect the Department attorney to be able to determine the presence of any countervailing circumstances based on the information contained in the Attestation and provided by Education or that is publicly available.

Evidence of good faith: The following steps evidence good faith:

- making a payment;
- applying for a deferment or forbearance (other than in-school or grace period deferments);
- applying for an IDR plan;
- applying for a federal consolidation loan;
- responding to outreach from a servicer or collector;
- engaging meaningfully with Education or their loan servicer, regarding payment options, forbearance and deferment options, or loan consolidation; or
- engaging meaningfully with a third party they believed would assist them in managing their student loan debt.

The good faith standard also assesses criteria such as “the debtor’s efforts to obtain employment, maximize income and minimize expenses.” *In re Mosko*, 515 F.3d 319, 324 (4th Cir. 2008) (citing *In re O’Hearn*, 339 F.3d at 564); *see, e.g., In re Jespersen*, 571 F.3d at 780. A debtor’s handling of finances in a manner that suggests responsible management of their debts, including student loan debts, also suggests good faith. A debtor has minimized expenses if their expenses fall within the IRS Standards as discussed in this Guidance.¹⁶ Good faith can be satisfied where debtors’ personal or family obligations significantly reduce their employment opportunities or increase their expenses.” Issues concerning employment, income, and expenses are case-specific and may be highly dependent on a debtor’s family, community, and individual circumstances. Debtors may provide an explanation of those circumstances, and the Department attorney should weigh the explanation in consultation with Education.

Actual payment history and IDR enrollment: Department attorneys should consider the following two issues that frequently arise and deserve additional attention: a debtor’s actual payment history and a debtor’s enrollment or non-enrollment in an IDR. Department of Education studies have shown that the servicing of student loan debt has been plagued at times

¹⁶ By contrast, a debtor whose expenses exceed the IRS Standards should not be foreclosed from showing they have minimized expenses, and the Department attorney and Education should carefully assess any explanations debtors may provide for exceeding the standard expenses.

by administrative errors and dissemination of confusing and inaccurate information, and that these issues may have affected debtors' responses to their loan obligations. In addition, the Consumer Financial Protection Bureau has found that debtors have been wrongfully denied IDRPs and that monthly payments have been inaccurately calculated. *See* Consumer Financial Protection Bureau, *Supervisory Highlights* Fall 2022, Summer 2021, and Fall. The Bureau has also found that servicers falsely but affirmatively represented to borrowers that loans were never dischargeable in bankruptcy. *See* Consumer Financial Protection Bureau, *Supervisory Highlights*, Fall 2014 & Fall 2015. These problems have also given rise to a lack of trust by debtors in the repayment process. As a result, the good faith inquiry should not disqualify debtors who may not have meaningfully engaged with the repayment process due to possible misinformation, wrongful IDRPs determinations, or a lack of adequate information or guidance. When considering a debtor's attempts to engage with their student loan, attorneys should look at the entire life of the loan rather than merely considering the recent history.

Department attorneys should consider payment history within the broader context of the debtor's financial means and personal circumstances. Where other evidence of good faith exists, including evidence that the debtor lacked financial means to pay or that the debtor made meaningful contact with Education or the servicer to explore repayment options, the failure to repay (or inconsistent or limited repayment) does not indicate a lack of good faith. In some circumstances, the Department of Education may not have records or have incomplete records about a debtor. The absence of ED data should not reduce the weight of the borrower's evidence.¹⁷

Department attorneys should also exercise caution in assessing IDRPs enrollment. IDRPs are intended to provide a means through which debtors may respond to difficult financial circumstances, and the model Attestation asks a debtor to identify if they enrolled in an IDRPs and to offer an explanation if they did not. Where a debtor participated in an IDRPs, this factor is evidence of good faith.¹⁸

¹⁷ Between March 2020 and December 2022, borrowers were placed into an automatic COVID-related forbearance. The vast majority of borrowers remained in that forbearance for the duration of the period because it included a zero percent interest rate and eligibility toward IDRPs and PSLF forgiveness. Due to this extended period, many debtors may not have taken any action toward their loans. This period of inactivity is not evidence of bad faith and actions taken prior to March 2020 should not be discounted because they are not recent.

¹⁸ *See, e.g., In re Tingling*, 990 F.3d 304, 309 (2d Cir. 2021); *In re Krieger*, 713 F.3d 882, 884 (7th Cir. 2013); *In re Coco*, 2009 WL 1426757, at *228–229; *In re Mosko*, 515 F.3d at 323; *In re Barrett*, 487 F.3d 353, 363–64 (6th Cir. 2007); *In re Mosley*, 494 F.3d 1320, 1327 (11th Cir. 2007); *In re Jespersen*, 571 F.3d at 782–83; *In re Nys*, 446 F.3d 938, 947 (9th Cir. 2007); *In re Alderete*, 412 F.3d 1200, 1206 (10th Cir. 2005); *In re Bronsdon*, 435 B.R. at 802.

However, where a debtor has not enrolled in an IDRPs, the Department attorney should give significant weight to the fact that, as noted, Education has found widespread problems with IDRPs servicing. In particular, Education has advised that IDRPs have not always been administered in ways that have been effective for, or accessible to, student loan debtors. In some cases, borrowers may not have been aware of their IDRPs options. At times, servicers failed to inform borrowers about these options in favor of other repayment plans or nonpayment options like forbearance. Likewise, many schools have failed to advise prospective borrowers about IDRPs, despite being legally obligated to do so. *See* 20 U.S.C. § 1092(d). Thus, non-enrollment alone does not show a lack of good faith.

Where a debtor did not enroll in an IDRPs, the Department attorney is expected to look first to the debtor's Attestation response and to accept any reasonable explanation or evidence supporting the debtor's non-enrollment in an IDRPs. Acceptable explanations or evidence could include, for example:

- that the debtor was denied access to, or diverted or discouraged from using, an IDRPs, and instead relied on an option like forbearance or deferment;
- that the debtor was provided inaccurate, incomprehensible, or incomplete information about the merits of an IDRPs;
- that the debtor had a plausible belief that an IDRPs would not have meaningfully improved their financial situation;
- that the debtor was unaware, after reasonable engagement, of the option of an IDRPs and its benefits; or
- where permitted under controlling case law, that the debtor was concerned with the potential tax consequences of loan forgiveness at the conclusion of an IDRPs.

Where these explanations are based in part on contact or attempted contact with Education, servicers, or trusted third parties, they evidence good faith.

If a debtor provides an explanation that lacks sufficient detail or is not otherwise acceptable (or fails to provide any explanation), the debtor may still demonstrate good faith through other actions such as making payments, responding to outreach from a servicer or collector, enrolling in deferment or forbearance, making contact with Education or their servicer about their loan, or otherwise taking professional or financial steps that indicate a good-faith attempt to meet their loan obligations. In sum, we would expect Department attorneys not to oppose discharge for lack of good faith where there is a basis to conclude that the debtor's IDRPs non-enrollment was not a willful attempt to avoid repayment.

D. Consideration of a Debtor's Assets

A debtor's assets must also be considered in the undue hardship analysis. Department attorneys, however, should not give dispositive weight to the existence of assets that are not easily converted to cash or are otherwise critical to the debtor's well-being, and should be cautious in concluding that the existence of real property or other financial assets demonstrates a lack of undue hardship.¹⁹

The Attestation facilitates this inquiry by seeking information regarding the debtor's assets. It may be appropriate to suggest that a debtor consider liquidating an asset where the asset is unnecessary to the debtor's and dependents' support and welfare. Residential real property and funds in retirement accounts are often exempt from collection under federal or state exemption laws. Although the exempt status of property may not be dispositive of whether that property is necessary for a minimal standard of living, the Department attorney should be careful in considering such property in the undue hardship analysis. *In re Marcotte*, 455 B.R. 460, 471 (Bankr. D.S.C. 2011).²⁰ The Department recognizes that liquidating a primary residence or retirement account is an extreme measure and therefore requests to liquidate those assets should be exceptionally rare.

E. Partial Discharge.

Where appropriate and permissible under governing case law, Department attorneys may recognize the availability of partial discharge. Partial discharge occurs where the bankruptcy

¹⁹ The debtors' assets may be liquidated by a bankruptcy trustee to fund payments to creditors of the estate. Such property, if liquidated by the trustee, would not be available for the payment of student loan debt and thus should not be considered.

²⁰ The question of how exempt property should be considered under the "undue hardship" analysis has generated disagreement among courts. Generally, courts find that "the exempt character of an asset does not necessarily preempt its relevance to a hardship evaluation." *In re Armesto*, 298 B.R. 45, 48 (Bankr. W.D.N.Y. 2003); *see also In re Nys*, 446 F.3d at 947 (recognizing courts must consider availability of assets "whether or not exempt, which could be used to pay the loan"); *In re Gleason*, 2017 Bankr. LEXIS 3455, at *14 (Bankr. N.D.N.Y. Oct. 6, 2017) (allowing consideration of IRA or 401K account, regardless of exemption status). Other courts, however, have noted the necessity to weigh the policies underlying certain exemptions, for example, the homestead exemption in the debtor's residence, before considering such assets in assessing undue hardship. *Schatz v. Access Grp., Inc. (In re Schatz)*, 602 B.R. 411, 427-28 (1st Cir. B.A.P. 2019) (reversing bankruptcy court's treatment of exempt equity in homestead as dispositive of a lack of undue hardship). Notably, the *Schatz* opinion states that the bankruptcy court failed to make any finding whether the equity in the debtor's home could be liquidated without imposing an undue hardship on the debtor. *Id.* at 428.

court discharges a portion of the outstanding student loan debt while requiring payment of the remainder.²¹

Department attorneys may consider recommending partial discharge based upon a determination that the debtor has the ability to make some payments on the loan while maintaining a minimal standard of living, but an inability to make the full standard monthly repayment due. A partial discharge should not result in a remaining (undischarged) balance larger than what a debtor's discretionary income (as determined under the Prong One analysis) permits them to pay off in monthly payments over the remaining loan term. In practice, a full discharge is appropriate for debtors whose expenses are equal to or greater than their income where they meet the other elements of the analysis. Partial discharge may also be available to a debtor who is able to liquidate assets to pay a portion of the debt but remains unable to pay the remainder while maintaining a minimal standard of living. *See In re Stevenson*, 463 B.R. 586, 598-99 (Bankr. D. Mass. 2011); *In re Clavell*, 611 B.R. 504, 531-32 (Bankr. S.D.N.Y. 2020).

V. Procedures

Although the process for soliciting and reviewing the Attestation may vary from case to case, Department attorneys should generally observe the following procedures in soliciting Attestations.

A. **Submission of the Attestation**

Upon a debtor's commencement of an adversary proceeding seeking discharge pursuant to 11 U.S.C. § 523(a)(8), the Department attorney should provide a debtor the opportunity to complete and submit the Attestation. The Department attorney is encouraged to contact the debtor or debtor's counsel as soon as practicable after service of process in an adversary

²¹ Section 523(a)(8) is silent with respect to whether bankruptcy courts may discharge part of a student loan based on undue hardship. The concept, however, has been recognized by several courts of appeals. *See generally In re Miller*, 377 F.3d 616, 622 (6th Cir. 2004); *In re Saxman*, 325 F.3d 1168, 1173-1174 (9th Cir. 2003); *In re Alderete*, 412 F.3d at 1207; *In re Cox*, 338 F.3d 1238, 1243 (11th Cir. 2003). In most jurisdictions where no circuit level authority exists, lower courts have permitted partial discharges. *See, e.g., In re Rumer*, 469 B.R. 553, 564 n.12 (Bankr. M.D. Pa. 2012) (recognizing majority rule is to allow partial discharges); *In re Gill*, 326 B.R. 611, 644 (Bankr. E.D. Va. 2005) (recognizing lower courts have generally allowed partial discharges); *but see, e.g., In re Conway*, 495 B.R. 416, 423 (B.A.P. 8th Cir. 2013) (explaining that the general rule prevents discharging parts of individual loans). Prior to any partial discharge, a debtor must have established all elements necessary for an undue hardship determination. *See In re Saxman*, 325 F.3d at 1175; *Hemar Ins. Co. of Am. v. Cox (In re Cox)*, 338 F.3d 1238, 1243 (11th Cir. 2003).

proceeding, advising the debtor of the opportunity to submit the Attestation for review by the United States. Any Attestation should be submitted by a debtor under oath by signing under penalty of perjury pursuant to 28 U.S.C. § 1746. The Attestation requests that a debtor provide documents corroborating the debtor's stated income (tax returns, or where appropriate, paystubs or other documents proving income). The Department attorney may seek additional evidence where necessary to support representations in the Attestation.

Education will provide debtors' account history and loan details to the Department and that information will be provided to the debtor with the Attestation form.

B. Time for Attestation

Ideally, the Department attorney would solicit the Attestation from the debtor at the outset of the case to permit early consideration whether to stipulate to facts relevant to undue hardship. The Department attorney is not required to impose any strict time limit for the Attestation.

C. Bankruptcy Court Authority

The Department attorney should advise debtors that although the United States may stipulate to facts relevant to undue hardship and recommend to the bankruptcy court that a finding of undue hardship is appropriate, the United States' position is not binding on the bankruptcy court, which will render its own determination whether a debtor has met the standard for an undue hardship discharge. Department attorneys and debtors should cooperate to file appropriate documents to enable the court to consider whether to issue an order to discharge student loan debt based upon undue hardship.

VI. Conclusion

The goal of this Guidance is to provide Department attorneys with a consistent and practical approach for handling student loan discharge litigation. Because of the fact-specific nature of such litigation, questions may arise about how the Guidance should be applied in particular cases. For assistance in interpreting and implementing the Guidance, Department attorneys are invited to contact the Commercial Litigation Branch, Corporate/Financial Litigation Section of the Civil Division.²²

²² This memorandum applies only to future bankruptcy proceedings, as well as (wherever practical) matters pending as of the date of this Guidance. This Guidance is an internal Department of Justice policy directed at Department components and employees. Accordingly, it is not intended to and does not create any rights, substantive or procedural, enforceable at law by any party in any matter.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALABAMA
_____ DIVISION

<p>In re:</p> <p>[DEBTOR],</p> <p style="text-align: center;">Debtor.</p> <hr/>	<p>Case No. _____</p>
<p>[DEBTOR],</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>United States Department of Education, [et al.],</p> <p style="text-align: center;">Defendant[s].</p>	<p>Adv. Proc. No. _____</p>

**ATTESTATION OF [NAME]
IN SUPPORT OF REQUEST FOR STIPULATION
CONCEDING DISCHARGEABILITY OF STUDENT LOANS**

I, [NAME], make this Attestation in support of my claim that excepting the student loans described herein from discharge would cause an “undue hardship” to myself and my dependents within the meaning of 11 U.S.C. §523(a)(8). In support of this Attestation, I state the following under penalty of perjury:

I. PERSONAL INFORMATION

1. I am over the age of eighteen and am competent to make this Attestation.
2. I reside at _____ [address], in _____ County, [State].
3. My household includes the following persons (including myself):
_____ [full name] _____ [age] _____ [self]

_____ [full name] _____ [age] _____ [relationship]

_____ [full name] _____ [age] _____ [relationship]

Questions four through nine request information related to your outstanding student loan debt and your educational history. The Department of Education will furnish this information to the Assistant United States Attorney (“AUSA”) handling your case, and it should be provided to you. If you agree that the information provided to you regarding your student loan debt and educational history is accurate, you may simply confirm that you agree, and these questions do not need to be completed. If you have not received the information from the Department of Education or the AUSA at the time you are completing this form, or if the information is not accurate, you may answer these questions based upon your own knowledge. If you have more than one student loan which you are seeking to discharge in this adversary proceeding, please confirm that the AUSA has complete and accurate information for each loan or provide that information for each loan.

4. I confirm that the student loan information and educational history provided to me and attached to this Attestation is correct: YES / NO [If you answered “NO,” you must answer questions five through nine].

5. The outstanding balance of the student loan[s] I am seeking to discharge in this adversary proceeding is \$ _____.

6. The current monthly payment on such loan[s] is _____. The loan[s] are scheduled to be repaid in _____ [month and year] [OR] My student loan[s] went into default in _____ [month and year].

7. I incurred the student loan[s] I am seeking to discharge while attending _____, where I was pursuing a _____ degree with a specialization in _____.

8. In _____ [month and year], I completed my course of study and received a _____ degree [OR] In _____ [month and year], I left my course of study and did not receive a degree.

9. I am currently employed as a _____. My employer's name and address is _____ [OR] _____ I am not currently employed.

II. CURRENT INCOME AND EXPENSES

10. I do not have the ability to make payments on my student loans while maintaining a minimal standard of living for myself and my household. I submit the following information to demonstrate this:

A. Household Gross Income

11. My current monthly household *gross* income from all sources is \$ _____.¹

This amount includes the following monthly amounts:

- _____ my *gross* income from employment (if any)
- _____ my unemployment benefits
- _____ my Social Security Benefits
- _____ my _____
- _____ my _____
- _____ my _____
- _____ *gross* income from employment of other members of household
- _____ unemployment benefits received by other members of household
- _____ Social Security benefits received by other members of household
- _____ other income from any source received by other members of household

12. The current monthly household gross income stated above (select which applies):

¹ "Gross income" means your income before any payroll deductions (for taxes, Social Security, health insurance, etc.) or deductions from other sources of income. You may have included information about your gross income on documents previously filed in your bankruptcy case, including Form B-106I, Schedule I – Your Income (Schedule I). If you filed your Schedule I within the past 18 months and the income information on those documents has not changed, you may refer to that document for the income information provided here. If you filed Schedule I more than 18 months prior to this Attestation, or your income has changed, you should provide your new income information

_____ Includes a monthly average of the gross income shown on the most recent tax return[s] filed for myself and other members of my household, which are attached, and the amounts stated on such tax returns have not changed materially since the tax year of such returns; OR

_____ Represents an average amount calculated from the most recent two months of gross income stated on four (4) consecutive paystubs from my current employment, which are attached; OR

_____ My current monthly household gross income is not accurately reflected on either recent tax returns or paystubs from current employment, and I have submitted instead the following documents verifying current gross household income from employment of household members:

13. In addition, I have submitted _____ verifying the sources of income other than income from employment, as such income is not shown on [most recent tax return[s] or paystubs].

B. Monthly Expenses

14. My current monthly household expenses do not exceed the amounts listed below based on the number of people in my household for the following categories [indicate “yes” if your expenses do not exceed the referenced amounts]:

(a) Living Expenses²

- | | | |
|------|---|----------|
| i. | Food
\$431 (one person)
\$779 (two persons)
\$903 (three persons)
\$1028 (four persons) | YES / NO |
| ii. | Housekeeping supplies
\$40 (one person)
\$82 (two persons)
\$74 (three persons)
\$85 (four persons) | YES / NO |
| iii. | Apparel & Services
\$99 (one person)
\$161 (two persons)
\$206 (three persons)
\$279 (four persons) | YES / NO |
| iv. | Personal care products and services
(non-medical)
\$45 (one person)
\$82 (two persons)
\$78 (three persons)
\$96 (four persons) | YES / NO |
| v. | Uninsured medical costs
\$75 (per individual under 65)
\$153 (per individual over 65) | YES / NO |
| vi. | Miscellaneous expenses
not included elsewhere on this Attestation:
\$170 (one person)
\$306 (two persons)
\$349 (three persons)
\$412 (four persons) | YES / NO |

² The living expenses listed in Questions 14 and 15 have been adopted from the Internal Revenue Service Collection Financial Standards “National Standards” and “Local Standards” for the year in which this form is issued. This form is updated annually to reflect changes to these expenses.

(b) Households Greater Than Four Persons

If your household consists of more than four people, please provide your *total* expenses for the categories in Question 14(a): \$ _____

[If you filed a Form 122A-2 Chapter 7 Means Test or 122C-2 Calculation of Disposable Income in your bankruptcy case, you may refer to lines 6 and 7 of those forms for information.]³

(c) Excess Expenses

If your current monthly household expenses exceed the amounts listed above for any of the categories in Question 13(a) and you would like the AUSA to consider such additional expenses as necessary, you may list those expenses and explain the need for such expenses here.

15. My current monthly household expenses in the following categories are as follows:

(a) Payroll Deductions

- i. Taxes, Medicare and Social Security \$ _____
[You may refer to line 16 of the Means Test or Schedule I, line 5]
- ii. Contributions to retirement accounts \$ _____
[You may refer to line 17 of the Means Test or Schedule I, line 5]

Are these contributions required
as a condition of your employment? YES / NO
- iii. Union dues \$ _____
[You may refer to line 17 of the Means Test or Schedule I, line 5]

³ Forms 122A-2 and 122C-2 are referred to collectively here as the “Means Test.” If you filed a Means Test in your bankruptcy case, you may refer to it for information requested here and in other expense categories below. If you did not file a Means Test, you may refer to your Schedule I and Form B-106J – Your Expenses (Schedule J) in the bankruptcy case, which may also list information relevant to these categories. You should only use information from these documents if your expenses have not changed since you filed them.

- iv. Life insurance \$ _____
 [You may refer to line 18 of the Means Test or Schedule I, line 5]
 Are the payments for a term policy covering your life? YES / NO
- v. Court-ordered alimony and child support \$ _____
 [You may refer to line 19 of the Means Test or Schedule I, line 5]
- vi. Health insurance \$ _____
 [You may refer to line 25 of the Means Test or Schedule I, line 5]
 Does the policy cover any persons other than yourself and your family members? YES / NO
- vii. Other payroll deductions
 _____ \$ _____
 _____ \$ _____
 _____ \$ _____

(b) Housing Costs⁴

- i. Mortgage or rent payments \$ _____
- ii. Property taxes (if paid separately) \$ _____
- iii. Homeowners' or renters' insurance (if paid separately) \$ _____
- iv. Home maintenance and repair (average last 12 months' amounts) \$ _____
- v. Utilities (include monthly gas, electric water, heating oil, garbage collection, residential telephone service, cell phone service, cable television, and internet service) \$ _____

⁴ You should list the expenses you actually pay in Housing Costs and Transportation Costs categories. If these expenses have not changed since you filed your Schedule J, you may refer to the expenses listed there, including housing expenses (generally on lines 4 through 6 of Schedule J) and transportation expenses (generally on lines 12, 15c, and 17).

(c) Transportation Costs

- i. Vehicle payments (itemize per vehicle) \$ _____
- ii. Monthly average costs of operating vehicles (including gas, routine maintenance, monthly insurance cost) \$ _____
- iii. Public transportation costs \$ _____

(d) Other Necessary Expenses

- i. Court-ordered alimony and child support payments (if not deducted from pay) \$ _____
[You may refer to line 19, Form 122A-2 or 122C-2 or Schedule J, line 18]
- ii. Babysitting, day care, nursery and preschool costs \$ _____
[You may refer to line 21, Form 122A-2 or 122C-2 or Schedule J, line 8]⁵

Explain the circumstances making it necessary for you to expend this amount:

- iii. Health insurance (if not deducted from pay) \$ _____
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Does the policy cover any persons other than yourself and your family members? YES / NO

- iv. Life insurance (if not deducted from pay) \$ _____
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Are the payments for a term policy covering your life? YES / NO

⁵ Line 8 of Schedule J allows listing of expenses for “childcare and children’s education costs.” You should not list any educational expenses for your children here, aside from necessary nursery or preschool costs.

v. Dependent care (for elderly or disabled family members) \$ _____

[You may refer to line 26 of the Means Test or Schedule J, line 19]

Explain the circumstances making it necessary for you to expend this amount:

vi. Payments on delinquent federal, state or local tax debt \$ _____
[You may refer to line 35 of the Means Test or Schedule J, line 17]

Are these payments being made pursuant to an agreement with the taxing authority? YES / NO

vii. Payments on other student loans \$ _____
I am not seeking to discharge

viii. Other expenses I believe necessary for a minimal standard of living. \$ _____

Explain the circumstances making it necessary for you to expend this amount:

16. After deducting the foregoing monthly expenses from my household gross income, I have _____ [no, or amount] remaining income.

17. In addition to the foregoing expenses, I anticipate I will incur additional monthly expenses in the future for my, and my dependents', basic needs that are currently not met.⁶ These include the following:

III. FUTURE INABILITY TO REPAY STUDENT LOANS

18. For the following reasons, it should be presumed that my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

_____ I am over the age of 65.

_____ The student loans I am seeking to discharge have been in repayment status for at least 10 years (excluding any period during which I was enrolled as a student).

_____ I did not complete the education for which I incurred the student loan[s].

_____ I have a permanent disability or chronic injury which renders me unable to work or limits my ability to work.

Describe the disability or injury and its effects on your ability to work, and indicate whether you receive any governmental benefits attributable to this disability or injury:

⁶ If you have forgone expenses for any basic needs and anticipate that you will incur such expenses in the future, you may list them here and explain the circumstances making it necessary for you to incur such expenses

_____ I have been unemployed for at least five of the past ten years.

Please explain your efforts to obtain employment.

19. For the following additional reasons, my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

_____ I incurred student loans I am seeking to discharge in pursuit of a degree I was unable to complete for reasons other than the closure of the educational institution.

Describe your reasons for being unable to complete the degree:

_____ I am not currently employed.

_____ I am currently employed, but I am unable to obtain employment in the field for which I am educated or have received specialized training.

Describe reasons for inability to obtain such employment, and indicate if you have ever been able to obtain such employment:

_____ I am currently employed, but my income is insufficient to pay my loans and unlikely to increase to an amount necessary to make substantial payments on the student loans I am seeking to discharge.

Please explain why you believe this is so:

_____ Other circumstances exist making it unlikely I will be able to make payments for a significant part of the repayment period.

Explain these circumstances:

IV. PRIOR EFFORTS TO REPAY LOANS

20. I have made good faith efforts to repay the student loans at issue in this proceeding, including the following efforts:

21. Since receiving the student loans at issue, I have made a total of \$ _____ in payments on the loans, including the following:

_____ regular monthly payments of \$ _____ each.

_____ additional payments, including \$ _____, \$ _____, \$ _____.

22. I have received _____ forbearances or deferments, for a period totaling _____ months.

23. I have attempted to contact the company that services or collects on my student loans or the Department of Education at least _____ times.

24. I have sought to enroll in one or more “Income Deferred Repayment Programs” or similar repayment programs offered by the Department of Education, including the following:

Description of efforts:

25. [If you did not enroll in such a program]. I have not enrolled in an “Income Deferred Repayment Program” or similar repayment program offered by the Department of Education for the following reasons:

26. Describe any other facts indicating you have acted in good faith in the past in attempting to repay the loan, including efforts to obtain employment, maximize your income, or minimize your expenses:

V. CURRENT ASSETS

27. I own the following parcels of real estate:

Address: _____

Owners:⁷ _____

Fair market value: _____

Total balance of mortgages
and other liens. _____

28. I own the following motor vehicles:

Make and model: _____

Fair market value: _____

Total balance of vehicle
loans and other liens _____

29. I hold a total of \$ _____ in retirement assets, held in 401k,
IRA and similar retirement accounts.

30. I own the following interests in a corporation, limited liability company,
partnership, or other entity:

⁷ List by name all owners of record (self and spouse, for example).

Name of entity	State incorporated ⁸	Type ⁹ and percentage ownership interest
_____	_____	_____
_____	_____	_____
_____	_____	_____

31. I currently am anticipating receiving a tax refund totaling \$ _____.

VI. ADDITIONAL CIRCUMSTANCES

32. I submit the following circumstances as additional support for my effort to discharge my student loans as an “undue hardship” under 11 U.S.C. §523(a)(8):

⁸ The state, if any, in which the entity is incorporated. Partnerships, joint ventures, and some other business entities might not be incorporated.

⁹ For example, shares, membership interest, partnership interest.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Signature

Name:

Date: