Proposals to Extend CARES Act Provisions to Federal Student Loans Not Held by the Department of Education: Frequently Asked Questions

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SUMMARY

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In response to the coronavirus disease 2019 (COVID-19) pandemic, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act; P.L. 116-136) provides several types of benefits to borrowers of select federal student loans. Perhaps most notably, the CARES Act specifies that through September 30, 2020, interest shall not accrue, payments shall be suspended, and involuntary collection of defaulted loans shall be suspended on loans made under the Direct Loan program, as well as on loans made under the Federal Family Education Loan (FFEL) program that "are held by the Department of Education." The Department of Education (ED) subsequently extended these benefits to loans made under the Perkins Loan program that are held by ED. Federal student loans that are not eligible for these benefits include FFEL program loans held by commercial lenders and guaranty agencies (hereinafter, *commercially held FFEL program loans*) and Perkins Loan program loans held by institutions of higher education (hereinafter, *institutionally held Perkins Loans*).

This report addresses frequently asked questions related to commercially held FFEL program loans and institutionally held Perkins Loans and issues Congress might examine should it consider extending loan benefits similar to those provided under the CARES Act to borrowers of such loans. Primary topics examined include the following:

- key differences between ED-held and commercially held FFEL program loans, and key differences between ED-held and institutionally held Perkins Loans;
- whether Congress could require holders of commercially held FFEL program loans and institutionally held Perkins Loans to extend CARES Act benefits to borrowers; and
- how holders and borrowers of commercially held FFEL program loans and institutionally held Perkins Loans might be affected should Congress require loan holders to extend CARES Act benefits to borrowers.

For additional information on student loan repayment flexibilities and debt relief provisions that may be available to borrowers facing financial difficulties resulting from the pandemic, see CRS Report R46314, *Federal Student Loan Debt Relief in the Context of COVID-19*.

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On March 27, 2020, in response to the coronavirus disease 2019 (COVID-19) pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act, P.L. 116-136). Section 3513 of the act provides several types of loan benefits to borrowers of select federal student loans. Perhaps most notably, the CARES Act specifies that through September 30, 2020, interest shall not accrue, payments shall be suspended, and involuntary collection (e.g., wage garnishment, offset of federal income tax refunds) on defaulted loans shall be suspended on loans made under the Direct Loan program, as well as on loans made under the Federal Family Education Loan (FFEL) program that "are held by the Department of Education."[1] The Department of Education (ED) subsequently extended these benefits to loans made under the Perkins Loan program that are held by ED.[2] Federal student loans that are not eligible for these benefits include FFEL program loans held by commercial lenders and guaranty agencies (hereinafter, *commercially held FFEL program loans*) and Perkins Loan program loans held by institutions of higher education (hereinafter, *institutionally held Perkins Loans*).[3]

Congress has shown interest in extending student loan benefits provided under the CARES Act to borrowers of commercially held FFEL program loans and institutionally held Perkins Loans.[4] This report addresses frequently asked questions (FAQs) related to commercially held FFEL program loans and institutionally held Perkins Loans and issues Congress might examine should it consider extending loan benefits similar to those provided under the CARES Act to borrowers of such loans.

Federal Family Education Loan Program

What is the difference between ED-held and commercially held FFEL program loans?

The FFEL program is a federal student loan program, authorized under Title IV-B of the Higher Education Act of 1965 (HEA; P.L. 89-329, as amended), under which student loans were made to students and their families to help them finance postsecondary education expenses. While authority to make new loans under the program was terminated on July 1, 2010,[5] borrowers of outstanding FFEL program loans remain responsible for making their loan payments.

1 The CARES Act applies to loans made under HEA Title IV, Part D and Part B. Part D authorizes the Direct Loan program. Part B authorizes the FFEL program and previously authorized other federal student loan programs, such as the Guaranteed Student Loan (GSL) program. FFEL program loans were those most recently made available to borrowers under Part B and are the majority of outstanding Part B loans. Part B loans other than FFEL program loans are not addressed in this report.

2 ED also extended these benefits to defaulted Health Education Assistance Loan (HEAL) program loans. HEAL program loans were made by the Department of Health and Human Services (HHS) and were last made available to students in 1999. The Consolidated Appropriations Act, 2014 (P.L. 113-76) transferred administration of the program to ED. Between March 13, 2020, and September 30, 2020, the interest rate for defaulted HEAL program loans is set to 0% and collections activities for those loans are suspended. Office of Federal Student Aid, "Coronavirus and Forbearance Info for Students, Borrowers, and Parents," https://studentaid.gov/announcements-events/coronavirus (accessed June 5, 2020). HEAL program loans will not be further addressed in this report.

3 For additional information on the federal student loan debt relief afforded to borrowers in response to COVID-19, see CRS Report R46314, *Federal Student Loan Debt Relief in the Context of COVID-19*.

4 *See, e.g.*, The Heroes Act, H.R. 6800 (116th Congress).

5 SAFRA Act, Title II-A of the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152).

Under the FFEL program, private sector and state-based lenders originated loans funded with nonfederal capital.[6] The federal government guarantees lenders against loss due to borrower default; death; permanent disability; or, in limited instances, bankruptcy. Private sector and state-based lenders retain ownership of the loans and perform loan servicing functions such as billing borrowers, collecting loan payments, and initiating collections work on defaulted loans. State and nonprofit guaranty agencies (GAs) receive federal funds to play the lead role in administering many aspects of the FFEL program related to the loan guarantee, including taking possession of defaulted loans to initiate collections work and reimbursing lenders when loans are placed in default. In general, loan terms and conditions are prescribed in statute.

There are several circumstances under which a FFEL program loan may be transferred to ED (discussed below). Upon transfer, FFEL program loan terms and conditions for the borrowers generally remain the same (they may vary slightly in specified instances),[7] but ownership and responsibility for loan administration changes from lenders or GAs to ED (via its contracted loan servicers and private collection agencies).

Under what circumstances may FFEL program loans be transferred to ED?

When an FFEL borrower defaults, the holder of the loan (which may be the original lender or a subsequent purchaser of the loan) files an insurance claim with the guaranty agency (discussed below). Upon payment of the insurance claim by the GA, the holder assigns the defaulted loan to the GA, which in turn files a claim with ED for a reinsurance payment.[8] Upon receipt of a reinsurance claim payment on a defaulted loan, the GA assumes responsibility for attempting to collect on the loan. However, at any time the Secretary of Education may require a GA to assign a defaulted loan to ED for collections (known as subrogation) as a means of protecting the "Federal fiscal interest" in the debt.[9] Regulatory provisions specify certain circumstances requiring mandatory subrogation, including aged accounts and defaulted loans of federal employees.[10] In most instances, after four years GAs assign to ED defaulted FFEL program loans not in repayment.[11] ED becomes the owner of a defaulted FFEL program loan and becomes responsible for servicing and collecting on it (via contracted third parties) after the loan is assigned to it.

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[6] For additional information on FFEL program loans and the administration of the federal loan guarantee, see CRS Report RL33674, *The Administration of the Federal Family Education Loan and William D. Ford Direct Loan Programs: Background and Provisions* (archived, available to congressional clients upon request).

[7] CARES Act student loan relief provisions are one instance in which FFEL program loan terms and conditions may vary depending on whether ED or a lender or GA holds the loans. As another example, if a FFEL program loan borrower received a borrower defense to repayment discharge of their ED-held FFEL program loans, he or she may be reimbursed for payments previously made to ED while ED held the loan. However, payments previously made to a private holder of an FFEL program loan prior to being transferred to ED may not be reimbursed. Rather, borrowers would need to pursue reimbursement directly from the previous private FFEL holder. For additional information, see CRS Report R44737, *The Closure of Institutions of Higher Education: Student Options, Borrower Relief, and Other Implications*.

[8] Similarly, when a borrower of a guaranteed loan is eligible for loan discharge, the loan holder files an insurance claim with the GA, and upon payment of the insurance claim by the GA, the GA in turn files a claim with ED for a reinsurance payment. However, in general, loans eligible for discharge are not assigned to the GA.

[9] 20 U.S.C. § 1078(c)(8).

[10] 34 C.F.R. § 682.409.

[11] U.S. Department of Education, Office of Federal Student Aid, *FY2019 Annual Report*, p. 122.

Second, in May 2008, in response to concerns about the continued availability of FFEL program loans due to several FFEL program lenders curtailing or ceasing participation in the program, the Ensuring Continued Access to Student Loans Act of 2008 (ECASLA; P.L. 110-227) granted ED the temporary authority to purchase loans made under the FFEL program. In October 2008, P.L. 110-350 extended this authority through July 1, 2010. After ED purchased loans made under the FFEL program, ownership and control of loan servicing and collection were transferred to it.[12]

Finally, GAs are required to sell rehabilitated loans[13] to commercial lenders when practicable. Beginning on July 1, 2014, GAs have been required to assign rehabilitated FFEL program loans to ED if they are unable to sell the loans to a commercial lender.[14]

As of December 31, 2019, approximately 11.8 million borrowers owed about $257.2 billion in FFEL program debt.[15] Of that, ED held approximately $87.7 billion, representing debt for between 3.3 million and 6 million borrowers,[16] and private lenders and GAs held $169.3 billion, representing debt for between 6.0 million and 7.2 million borrowers.[17]

What are guaranty agencies and how might they be affected by extending relief to borrowers?

GAs are state-based or private, nonprofit organizations that entered into agreements with ED[18] to administer the federal insurance that protects FFEL program lenders against loss stemming from borrower default; death; permanent disability; or, in limited instances, bankruptcy.[19] As noted above, when a borrower of a guaranteed loan defaults on a loan, the holder of the loan files an insurance claim with the GA. Upon payment of the insurance claim by the GA, the holder assigns the defaulted loan to the GA, which in turn files a claim with ED for a reinsurance payment.[20] GAs are also responsible for handling initial collections work on defaulted loans and for administering other aspects of the program, such as providing default aversion assistance to

[12] For additional information on ECASLA, see CRS Report RL34452, *The Ensuring Continued Access to Student Loans Act of 2008*.

[13] *Loan rehabilitation* is the process by which a borrower may bring a loan out of default by making nine monthly payments on a defaulted loan within 20 days of the due date during a period of 10 consecutive months. 20 U.S.C. § 1078-6(a)(1)(A).

[14] 20 U.S.C. § 1078-6(a)(1)(A)(ii).

[15] U.S. Department of Education, Office of Federal Student Aid, Federal Student Aid Data Center, "Federal Student Aid Portfolio Summary," https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls.

[16] Approximately 3.17 million borrowers have FFEL program loans placed with ED-contracted loan servicers, and approximately 2.9 million borrowers have FFEL program loans placed with the ED-contracted Default Management System. An individual may have FFEL program loans placed with both ED-contracted loan servicers and the Default Management System; thus, the unduplicated count of FFEL program borrowers with loans held by ED is unknown. U.S. Department of Education, Office of Federal Student Aid, Federal Student Aid Data Center, "Location of Federal Family Education Loan Program Loans," https://studentaid.gov/sites/default/files/fsawg/datacenter/library/LocationofFFELPLoans.xls.

[17] Approximately 6 million borrowers have FFEL program loans held by commercial lenders, and approximately 1.2 million borrowers have FFEL program loans held by GAs. An individual borrower may have FFEL program loans held by a commercial lender and a GA; thus, the unduplicated count of FFEL program borrowers with loans that are not held by ED is unknown. U.S. Department of Education, Office of Federal Student Aid, Federal Student Aid Data Center, "Location of Federal Family Education Loan Program Loans," https://studentaid.gov/sites/default/files/fsawg/datacenter/library/LocationofFFELPLoans.xls.

[18] 20 U.S.C. § 1078(b) and (c).

[19] 20 U.S.C. §§ 1078(c) and 1087; 34 C.F.R. Part 682, Subpart D.

[20] 34 C.F.R. § 682.404.

lenders upon their request after a loan has been delinquent for at least 60 days.[21] Similarly, when a borrower of a guaranteed loan is eligible for loan discharge, the loan holder files an insurance claim with the GA, and upon payment of the insurance claim by the GA, the GA in turn files a claim with ED for a reinsurance payment. However, in general, loans eligible for discharge are not assigned to the GA.

If benefits provided to borrowers under the CARES Act were extended to borrowers of commercially held FFEL program loans, GA activities may be affected. With loan payments suspended, borrowers presumably would not become newly delinquent or in default on their loans. As a result, GAs may experience a decrease in the volume of insurance claims or default aversion cases submitted by lenders. If involuntary collection activities were suspended, GAs may experience a decrease in the volume of collections made on defaulted loans. Such decreases in collections volume could potentially affect GA payment streams, as discussed below.

What are the different payment streams to lenders and guaranty agencies of commercially held FFEL program loans?

Payment Streams to Lenders

Commercial lenders of FFEL program loans receive revenue from a number of different payment streams. Lenders receive monthly payments of principal and interest due on loans from borrowers (or quarterly payments of interest due from the federal government during borrowers' in-school periods, grace periods, and deferment periods in the case of Subsidized [FFEL program] Stafford loans[22]). Lender yields are determined by rate-setting formulas that are statutorily established in the HEA and that vary depending on when the loan was originally disbursed. Maximum borrower interest rates[23] (also known as *applicable interest rates*)[24] are also determined by statute and vary depending on when the loan was originally disbursed.[25] When the borrower interest rate is below the market-indexed lender rate, the federal government pays the lender a special allowance equal to the difference.[26] This *special allowance payment* (SAP) is determined and paid quarterly.

Payment Streams to Guaranty Agencies

GAs receive a separate set of payment streams, some of which come from the federal government and some of which come from borrowers. While some revenue streams associated with the origination of new FFEL program loans were curtailed in 2010 when the authority to make new FFEL program loans was eliminated,[27] there are several remaining revenue streams tied to outstanding FFEL program loans.

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[21] 20 U.S.C. § 1078(l).

[22] 34 C.F.R. § 682.304.

[23] At the lender's discretion, actual interest rates paid by borrowers may be less than the maximum rate specified in statute. 20 U.S.C. § 1077a(n).

[24] Regulations define *applicable interest rate* as "the maximum annual interest rate that a lender may charge under the [Higher Education] Act on a loan." 34 C.F.R. § 682.200(b).

[25] 20 U.S.C. § 1077a.

[26] 20 U.S.C. § 1087-1. For loans made on or after April 1, 2006, lenders must rebate excess interest payments to the federal government when the borrower rate exceeds the lender rate (20 U.S.C. § 1087-1(b)(2)(I)(v)).

[27] For instance, loan processing and issuance fees, default fees, and insurance premiums were authorized upfront fees collected near the time of disbursement, but no new FFEL program loans have been disbursed since June 30, 2010.

On a quarterly basis, the federal government pays GAs an *account maintenance fee* equal to 0.06% of the original principal amount of outstanding loans for which insurance was issued.[28] GAs may also receive a *default aversion fee* as an incentive to work with borrowers to bring delinquent loans into current status. The federal government pays GAs a default aversion fee equal to 1% of unpaid principal and accrued interest on a loan for which a default claim is not paid within 300 days after the loan is 60 days delinquent.[29]

When a loan has gone into default, and a GA has paid a lender's insurance claim, the GA then files a claim with the federal government for a reinsurance payment. Reinsurance payments are based on a federally determined rate and deposited in the guarantor's Federal Fund—its locally held federal reserves.[30] While reinsurance payments cover the majority of the cost of the lender's insurance claim and certain administrative costs, the reinsurance rate drops if the guarantor has default claims that are high compared to the loans in repayment.[31]

In addition to reinsurance payments made by the federal government, GAs may also seek collection payments on defaulted loans assigned to them. GAs are authorized to retain the complement of the reinsurance rate[32] plus 16% of any collection payments made to them.[33] GAs are also authorized to charge borrowers collection fees[34] and retain a percentage of the proceeds from the sale of a rehabilitated loan.[35]

Would extending CARES Act benefits to commercially held FFEL program loans affect any of these payments?

Payment Streams to Lenders

Extending CARES Act benefits to commercially held FFEL program loans may affect some of the payments described above. For lenders, temporarily suspending interest accrual and suspending payments for borrowers would mean forgoing monthly payments of principal and interest. Depending on the specific policy implemented, SAPs, to which loan holders have a statutorily specified contractual right,[36] may be affected. For example, if Congress specified that the applicable interest rate used to calculate SAPs during the period of interest suspension would be 0%, SAPs would increase relative to their amounts when SAPs are calculated using the HEA-specified maximum borrower rate, and forgone interest revenue could potentially be made up on a quarterly basis by those increased special allowance payments. If, by contract, Congress specified that SAPs would continue to be calculated using applicable interest rates currently specified in the HEA, they would not change and therefore would not make up for the forgone interest revenue.

[28] 20 U.S.C. § 1087h(b).

[29] 20 U.S.C. § 1078(l). A default aversion fee may only be paid on a loan once.

[30] 20 U.S.C. § 1072a(c).

[31] 20 U.S.C. § 1078(c).

[32] For example, if the reinsurance rate were 95%, the complement would be 5%.

[33] 20 U.S.C. § 1078(c)(6)(A)(i)(II).

[34] 20 U.S.C. § 1078(c)(6).

[35] 20 U.S.C. §1078-6(a)(1)(D)(i)(II).

[36] 20 U.S.C. § 1087-1(b)(3).

Payment Streams to Guaranty Agencies

For GAs, account maintenance fees would be uninterrupted, but because of suspended payments for borrowers, revenue derived from default aversion or collection activities may decline. With loan payments suspended, borrowers presumably would not become newly delinquent or default on their loans; thus, default aversion fees and collection payments would not be paid to GAs. However, depending on the specific policy implemented, GAs may be able to receive revenue derived from loans that were already delinquent or in default status. For instance, because the CARES Act specifies that suspended payments should be counted toward loan rehabilitation payments, it is possible that some loans assigned to GAs will become fully rehabilitated during the period of suspended payments and eligible for resale, resulting in revenue for the GAs.

Could Congress require commercial holders of FFEL program loans to extend relief to borrowers?[37]

As noted above, applying Section 3513 to commercially held FFEL program loans could cause lenders to lose income they would ordinarily expect to receive under the terms of their loan contracts with borrowers, and could likewise cause GAs to lose income they would ordinarily expect to receive under their agreements with ED if specified contingencies occur.[38] Legislative proposals to apply those provisions to commercially held FFEL program loans might therefore implicate the U.S. Constitution's Takings Clause, which prohibits the federal government from taking private property[39] for public use unless it pays the owner "just compensation"[40]—that is, unless the government places the owner "in the same position monetarily as he would have occupied if his property had not been taken."[41] "Just compensation" usually means the market value of the property taken.[42]

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[37] CRS Legislative Attorneys Kevin M. Lewis and Sean M. Stiff prepared the legal analysis in this subsection of the report.

[38] As discussed above, if Congress passed a statute applying Section 3513's interest accrual suspension provisions to commercially held FFEL program loans, that law might also contain language increasing the SAPs to which loan holders are statutorily and contractually entitled. *See infra* "Payment Streams to Lenders." That increase could offset some of the income that holders might otherwise lose under Section 3513, which could in turn affect the Takings Clause analysis discussed in this section. *See infra* "Economic Impact" and "The Amount of Compensation."

[39] Courts have held that the Takings Clause applies when the federal government takes property from a state or municipal entity just as it applies when the federal government attempts to take property from a private owner. *See, e.g.*, United States v. 50 Acres of Land, 469 U.S. 24, 31 (1984) ("The text of the Fifth Amendment certainly does not mandate a more favorable rule of compensation for public condemnees than for private parties.... When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property. Therefore, it is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States. Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees."). Thus, the principles described in this section would apply to commercially held FFEL program loans held by state-based lenders and state-based GAs just as they would apply to private lenders and nonprofit GAs.

[40] *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[41] Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74 (1973) (quoting United States v. Reynolds, 397 U.S. 14, 16 (1970)).

[42] *See, e.g.*, *50 Acres*, 469 U.S. at 29 ("The Court has repeatedly held that just compensation normally is to be measured by 'the market value of the property at the time of the taking contemporaneously paid in money' ... Deviation from this measure of just compensation has been required only 'when market value has been too difficult to find, or when its application would result in manifest injustice to the owner or public.'") (quoting Olson v. United States, 292 U.S. 246, 255 (1934); United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950)).

Although courts have recognized that contractual rights can constitute property rights that implicate the Takings Clause,[43] not all governmental regulations that affect a party's contractual rights trigger a constitutional obligation to pay the affected parties just compensation.[44] Courts generally consider three factors (called the "*Penn Central* factors")[45] when determining whether a law affecting a party's contractual interests constitutes a "regulatory taking"—i.e., a taking caused by regulating the use of private property rather than by directly appropriating it—that requires just compensation:[46]

1. "[t]he economic impact of the regulation on the claimant";
2. "the extent to which the regulation has interfered with distinct investment-backed expectations"; and
3. "the character of the governmental action."[47]

Applying the *Penn Central* factors is a fact-specific inquiry.[48] Thus, as explained below, CRS cannot conclusively predict how a court would apply these factors if Congress applied the CARES Act's interest, payment, and involuntary collection suspension provisions to commercially held FFEL program loans without compensating lenders and GAs for their lost income streams.

Economic Impact

Assessing the "economic impact" of a putative regulatory taking is a fact-intensive determination. Although courts generally require the party challenging the regulation to prove a "serious financial loss" to recover just compensation,[49] existing judicial precedent does not establish bright-line rules for determining which financial losses are "serious" enough to require just compensation.[50] Still, if applying the CARES Act's interest, payment, and involuntary collection suspension provisions to commercially held FFEL program loans would cause holders to lose only a small percentage of their expected income streams, a court might well hold that the infringement on those holders' contractual rights was insufficiently "serious" to require just compensation.[51]

[43] *See, e.g.*, U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.").

[44] *See, e.g.*, Penn. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

[45] *See, e.g.*, Bridge Aina Le'a, LLC v. State of Hawaii Land Use Comm'n, 950 F.3d 610, 625 (9th Cir. 2020).

[46] See, e.g., CRS Legal Sidebar LSB10434, *COVID-19 Response: Constitutional Protections for Private Property* (discussing regulatory takings).

[47] *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[48] *See, e.g.*, Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31-32 (2012) ("[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking . . . . [M]ost takings claims turn on situation-specific factual inquiries.").

[49] *See, e.g.*, Cienega Gardens v. United States, 503 F.3d 1266, 1340 (Fed. Cir. 2007) (quoting Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994)).

[50] *See, e.g.*, *id*. ("There is not ... 'an automatic numerical barrier preventing compensation, as a matter of law, in cases involving a smaller percentage diminution in value.'") (quoting Yancey v. United States, 915 F.2d 1534, 1539, 1541 (Fed. Cir. 1990)); Walcek v. United States, 49 Fed. Cl. 248, 271 (2001) ("[C]ourts have often struggled with the dichotomy between compensable 'partial takings' and noncompensable 'mere diminutions' .... ").

[51] *See, e.g.*, *Walcek*, 49 Fed. Cl. at 271 ("[T]his court has ... relied on diminutions well in excess of 85 percent before finding a regulatory taking.").

Courts also consider whether the challenged regulation is permanent or temporary when evaluating the regulation's economic impact.[52] Although a regulation that only applies for a short period is less likely to constitute a taking than one that applies for longer,[53] even temporary takings of private property sometimes require the government to pay the owner just compensation.[54] Thus, it is difficult to confidently predict whether Section 3513's temporary nature would relieve the federal government of the obligation to compensate lenders and GAs if Congress applied Section 3513 to commercially held FFEL program loans.

Investment-Backed Expectations

When assessing whether a regulation impermissibly interferes with an entity's "distinct investment-backed expectations," some courts consider the following:

- "whether the plaintiff operated in a 'highly regulated industry'";
- "whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property"; and
- "whether the plaintiff could have 'reasonably anticipated' the possibility of such regulation in light of the 'regulatory environment' at the time of purchase."[55]

It is uncertain how a court might apply those factors in the context of commercially held FFEL program loans.[56] On one hand, the fact that the federal government extensively regulates the FFEL program[57] could suggest that applying Section 3513 of the CARES Act to commercially held FFEL program loans would not effect a compensable regulatory taking.[58] On the other hand, FFEL lenders likely could not have "reasonably anticipated" when they originated their loans that the COVID-19 pandemic would spur Congress to freeze their income streams in the future.[59]

The investment-backed expectations analysis may vary depending on whether the entity bringing the Takings Clause challenge is a lender or a GA. A lender who issued a loan expecting a particular income stream associated with loan interest accrual might have stronger investment-

[52] *See, e.g.*, *Cienega Gardens*, 503 F.3d at 1279 ("[T]he court must carefully consider the duration of the restriction under the economic impact prong.").

[53] *See, e.g.*, *id*. at 1277 ("[E]xisting takings law requires consideration of the duration of the legislation as part of the takings analysis."); Hankinson v. U.S. Dep't of Hous. & Urban Dev., No. 10-193, 2010 WL 3364116, at *3 (E.D. Pa. Aug. 24, 2010) ("Analyzing temporary regulatory takings claims includes consideration of ... the duration of the restriction.").

[54] *See, e.g.*, Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 32 (2012) ("[T]akings temporary in duration can be compensable.").

[55] *See, e.g.*, Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (quoting Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1348 (Fed. Cir. 2001) (en banc)).

[56] *Cf., e.g.*, Philip Morris, Inc. v. Reilly, 312 F.3d 24, 36 (1st Cir. 2002) ("Despite the importance of reasonable investment-backed expectations under the *Penn Central* framework, the courts have struggled to adequately define this term.").

[57] *See, e.g.*, Chae v. SLM Corp., 593 F.3d 936, 944 (9th Cir. 2010) ("[T]he FFELP sets the maximum interest rate that a lender may charge, depending on the type of loan and the date when it was taken out.") (citing 20 U.S.C. § 1077a).

[58] *Cf.* Educ. Assistance Corp. v. Cavazos, 902 F.2d 617, 626-27 (8th Cir. 1990) (concluding that a GA had "no ownership interest in its reserve fund" under a predecessor to the FFEL program because of "the extensive federal regulation" of that fund).

[59] *Cf. Appolo Fuels*, 381 F.3d at 1349 (quoting Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1348 (Fed. Cir. 2001) (en banc)).

backed expectations than a GA whose ability to collect income on a FFEL program loan varies depending on the loan's status.

Character of the Governmental Action

As for the "character of the governmental action" prong of the *Penn Central* framework, the Supreme Court has explained that "[a] 'taking' can more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[60] The fact that applying Section 3513 of the CARES Act to commercially held FFEL program loans would be more like the latter type of interference with private property than the former might therefore weigh against a finding that doing so would effect a compensable regulatory taking.[61]

The Amount of Compensation

If Congress wishes to mitigate some of the uncertainty surrounding whether applying Section 3513 of the CARES Act to commercially held FFEL program loans would violate the Takings Clause—or, if Congress prefers that loan holders receive some compensation for their lost income streams—it could pay lenders and GAs to compensate them for the losses they sustain.[62] Congress could structure compensation in several ways. As one example, Congress might direct ED to make payments during the suspension period to a holder of a commercially held FFEL program loan,[63] specify that payment amounts are available only as provided in an appropriation,[64] and provide that appropriation.

Whether or not Congress provides payments to lenders or GAs, through changes in the HEA or otherwise, it is possible that lenders, GAs, or both, could sue, claiming that the federal government has taken their private property without providing the just compensation due under the Constitution.[65] A litigant could potentially file such a lawsuit under the Tucker Act, which grants the U.S. Court of Federal Claims "jurisdiction to render judgment upon any claim against the United States founded ... upon the Constitution."[66] The Supreme Court has explained that this phrase includes a federal takings claim.[67] As noted above, paying the owner the property's market value is usually sufficient to satisfy the just compensation requirement when the government takes property for public use.[68] That said, if a court found it too difficult to calculate the market

[60] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (internal citations omitted).

[61] *Cf. id*.

[62] *See, e.g.*, Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74 (1973) (quoting United States v. Reynolds, 397 U.S. 14, 16 (1970)) (explaining that the just compensation requirement places the owner "in the same position monetarily as he would have occupied if his property had not been taken").

[63] *Cf.* 20 U.S.C. § 1078(a)(3)(i)(II) & (b)(1)(M) (specifying the periods during which "interest shall accrue on and be paid by the Secretary" for commercially held FFEL loans).

[64] According to the U.S. Court of Appeals for the Federal Circuit, language of this type limits the federal government's liability under a statutory benefits program to the amount appropriated by Congress. *See* Prairie Cnty. v. United States, 782 F.3d 685, 689 (Fed. Cir. 2015) (reaffirming prior precedent explaining how Congress may limit the government's obligation to make payments under a statutory benefits program).

[65] If Congress provides suspension-period compensation, the litigant might claim that Congress's action falls short of the just compensation amount required under the Fifth Amendment.

[66] 28 U.S.C. § 1491(a)(1).

[67] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019).

[68] *See, e.g.*, United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984) ("The Court has repeatedly held that just

value of the affected payment streams, or if the court determined that paying that owner the prevailing market value would be manifestly unjust, it might require the government to pay lenders and GAs a different amount.[69] Through a statute commonly referred to as the "Judgment Fund," Congress has appropriated, on a permanent basis, "necessary amounts" to pay such judgments.[70]

Could extending CARES Act benefits to commercially held FFEL program loans hurt the industry or result in any job loss?

Extending CARES Act benefits to commercially held FFEL program loans could potentially affect the industry beyond the forgone revenue streams described in the previous section. For lenders, suspending payments for borrowers would mean not only pausing interest payments but also pausing the repayment of principal. Diminished cash flow may hinder a loan holder's ability to cover its payment obligations, such as bonds it has issued to investors in the course of securitization. More generally, a pause in principal repayments may incur an opportunity cost for lenders, as reduced liquidity could preclude other profitable business activities.

For both lenders and GAs, extending CARES Act benefits to commercially held FFEL program loans could affect the amount of borrower-driven work requiring labor hours. For instance, loan holders may experience an increase in demand for customer support as borrowers seek to navigate the new benefits provided by the policy. Additionally, loan holders and GAs would need to act to suspend automatic payments, such as from borrowers, their employers, or other sources. On the other hand, if borrowers were not required to make any payments for a period of time, certain business functions, such as loan rehabilitations and collection activities, may experience a decrease in activity. These potential impacts on the industry could have implications for the number of jobs required.

How would extending CARES Act benefits to commercially held FFEL program loans affect borrowers?

While CARES Act provisions do not apply to commercially held FFEL program loans, ED has issued guidance stating that FFEL program lenders may extend CARES Act-type loan benefits to their FFEL borrowers. Among other benefits, ED has stated lenders may provide to borrowers of commercially held FFEL program loans "the same zero percent interest and cessation of payments" options and default collection flexibilities similar to those currently available to ED-held federal student loan borrowers via the CARES Act.[71]

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compensation normally is to be measured by 'the market value of the property at the time of the taking contemporaneously paid in money.'") (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

[69] *See, e.g.*, *id*. ("Deviation from this measure of just compensation has been required … 'when market value has been too difficult to find, or when its application would result in manifest injustice to the owner or public.'") (quoting United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950)).

[70] *See* 31 U.S.C. § 1304(a)(1) (appropriating "necessary amounts" "to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law" where (among other things) payment "is not otherwise provided for").

[71] U.S. Department of Education, Office of Postsecondary Education, Electronic Announcement, "UPDATED Guidance for interruptions of study related to Coronavirus (COVID-19)," April 3, 2020, https://ifap.ed.gov/electronic-announcements/040320UPDATEDGuidanceInterruptStudyRelCOVID19.

Extending CARES Act benefits to borrowers with commercially held FFEL program loans would enable them to access new benefits that may not otherwise be available because their lenders have not opted to extend such benefits to them. However, there may be considerations regarding how extending CARES Act provisions to commercially held FFEL program loans may interact with loan benefits otherwise made available to borrowers by their lenders.

Some borrowers have already received relief through voluntary actions taken by the commercial holders of their loans. For instance, several states and the District of Columbia have entered into voluntary agreements with commercial student loan holders to postpone payments for three months, report loans favorably to the credit bureaus, help borrowers enroll in income-driven repayment plans,[72] and suspend collection lawsuits.[73] Notably, interest continues to accrue during the period of suspended payments in the voluntary agreements. Extending CARES Act benefits to commercially held FFEL program loans would ensure that all borrowers have a minimum level of temporary benefits, but it would not necessarily preclude loan holders from voluntarily providing additional relief at their discretion.

Perkins Loan Program

What is the difference between ED-held and institutionally held Perkins Loans?

The Perkins Loan program is a federal student loan program, authorized under Title IV-E of the HEA, under which institutions of higher education (IHEs) and the federal government capitalized revolving loan funds to make low-interest loans to students with exceptional financial need.[74] While authority to make new loans under the program was terminated on September 30, 2017, borrowers of outstanding Perkins Loans remain responsible for making their loan payments.

Under the Perkins Loan program, IHEs capitalized their revolving Perkins Loan funds with a combination of federal capital contributions (FCCs) and matching institutional capital contributions (ICCs). The required proportion of ICCs to FCCs has varied over time. Most recently, ICCs were required to equal one-third of the FCC.[75] After making loans, IHEs recapitalized their loan funds by depositing the principal and interest repaid by borrowers, as well as any other charges or earnings associated with the operation of the program. IHEs retain control of the loans and perform loan servicing functions such as billing borrowers, collecting loan payments, and initiating collection work on defaulted loans. Because IHEs have contributed ICCs to enable them to make Perkins Loans, they have a financial interest in the amount of interest and principal paid on the loans. In general, Perkins Loan terms and conditions are prescribed in statute.[76]

[72] Of the several federal income-driven repayment plans, FFEL program loans are only eligible for the Income-Based Repayment plans. 20 U.S.C. § 1098e.

[73] Danielle Douglas-Gabriel, "D.C. joins states in getting student loan companies to provide relief amid pandemic," *Washington Post*, May 5, 2020, https://www.washingtonpost.com/education/2020/05/04/dc-joins-states-getting-student-loan-companies-provide-relief-amid-pandemic/.

[74] For additional information on the Perkins Loan program, see CRS Report RL31618, *Campus-Based Student Financial Aid Programs Under the Higher Education Act*.

[75] 20 U.S.C. § 1087cc(a)(2)(B).

[76] 20 U.S.C. § 1087dd.

There are several circumstances under which a Perkins Loan may be transferred to ED. (Upon transfer, Perkins Loan terms and conditions remain the same, but ownership and responsibility for loan administration changes from IHEs to ED.) If an IHE chooses not to service and collect a Perkins Loan, it assigns the loan to ED at any time.[77] Also, an IHE is required to assign a Perkins Loan to ED if the loan is in default and additional criteria are met[78] or if the borrower becomes eligible to have his or her loan discharged (e.g., due to the borrower becoming totally and permanently disabled).[79] Finally, an IHE must assign all of its outstanding Perkins Loans to ED when its participation in the Perkins Loans program ends.[80]

For award year 2018-2019 (July 1, 2018-June 30, 2019), approximately 2.0 million borrowers owed approximately $5.7 billion in Perkins Loans. Of that, ED held nearly $1 billion, representing debt for approximately 375,000 borrowers, and IHEs held about $4.7 billion, representing debt for approximately 1.6 million borrowers.[81]

Would extending CARES Act benefits to institutionally held Perkins Loans affect an IHE's expected payment stream, and if so, would they need to be reimbursed for any losses?[82]

Applying the CARES Act's interest, payment, and involuntary collection suspension provisions to institutionally held Perkins Loans could cause IHEs to collect less revenue than they would have otherwise. Amending federal law to apply those provisions to institutionally held Perkins Loans could therefore implicate the Takings Clause in a manner similar to that described above in the sections on commercially held FFEL program loans. Should Congress decide to provide a measure of compensation to IHEs to account for the interruption of interest and principal payments during the suspension period, it might authorize ED to make payments to IHEs and provide an appropriation to fund the payments. Whether or not Congress provides compensation, IHEs could potentially raise a takings claim in the U.S. Court of Federal Claims. If an IHE prevailed on its claim, the Judgment Fund would likely be available to satisfy the resulting court judgment directing payment to the IHE.

[77] 20 U.S.C. § 1087cc(a)(5).

[78] Regulations specify that an IHE may assign a defaulted loan to ED despite due diligence in attempting to collect on the loan. Regulations also specify that an IHE shall, at the request of the Secretary, assign a Perkins Loan to ED if, among other criteria, the loan has been in default for at least seven years and payment on the loan has not been recovered in the preceding 12 months. 34 C.F.R. §§ 674.8(d) and 674.50. ED requires IHEs to assign to it Perkins Loans that have been in default for at least two years and where the IHE "knowingly failed to maintain an acceptable collection record." U.S. Department of Education, Office of Federal Student Aid, *2019-2020 Federal Student Aid Handbook*, vol. 6, p. 201.

[79] 34 C.F.R. § 674.61(b)(3).

[80] 34 C.F.R. §§ 674.5(a)(2)(ii) and 674.17.

[81] CRS communication with U.S. Department of Education, Office of Legislative and Congressional Affairs, May 22 2020.

[82] CRS Legislative Attorneys Kevin M. Lewis and Sean M. Stiff prepared the legal analysis in this subsection of the report.

How would extending CARES Act benefits to institutionally held Perkins Loans affect borrowers?

While CARES Act provisions do not specifically apply to institutionally held Perkins Loans, ED has issued guidance stating that IHEs may extend CARES Act-type loan benefits to Perkins Loan borrowers. Among others benefits, ED has stated IHEs may provide to borrowers of institutionally held Perkins Loans "the same zero percent interest and cessation of payments" benefits and default collection flexibilities similar to those currently available to ED-held federal student loan borrowers via the CARES Act.[83] At least some IHEs have chosen to do so.[84]

Extending CARES Act-type benefits to borrowers with institutionally held Perkins Loans would enable them to access new benefits that may not otherwise be available because their IHEs have not opted to extend such benefits to them. However, there may be considerations regarding how extending CARES Act provisions to institutionally held Perkins Loans may interact with loan benefits otherwise made available to borrowers by their IHEs. For example, IHEs are authorized to establish incentive repayment programs to encourage Perkins Loan repayment.[85] A requirement to provide institutionally held Perkins Loan borrowers with CARES Act-type benefits may interact with those incentive repayment program provisions.

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[83] U.S. Department of Education, Office of Postsecondary Education, Electronic Announcement, "UPDATED Guidance for interruptions of study related to Coronavirus (COVID-19)," April 3, 2020, https://ifap.ed.gov/electronic-announcements/040320UPDATEDGuidanceInterruptStudyRelCOVID19.

[84] Danielle Douglas-Gabriel, "University of California offers Perkins Loan borrowers relief. Will other colleges follow?", *The Washington Post*, April 20, 2020.

[85] 34 C.F.R. § 674.33(f).