

Department of Education Pushes Back Effective Date of Borrower Defense Rule – Again

October 27, 2017

The Borrower Defense to Repayment (BDTR) Rule, which applies to **all** higher education institutions participating in the Federal Student Aid program – whether public, private nonprofit or for-profit – has been the subject of intense debate since it was first proposed in the summer of 2015. While most constituencies supported the concept of creating an understandable and efficient procedure for protecting student loan borrowers who had been defrauded by illegal actions of their institutions, the rule that emerged created an exceptionally complex adjudication process for the evaluation of claims that many believe lacked essential elements of fairness and due process. It also goes far beyond the negotiation's immediate purpose by forbidding arbitration agreements and adding unrelated new financial responsibility triggers that could threaten the viability of institutions of all kinds.

The “new” BDTR Rule was published in its present form last November 1, with an anticipated July 1, 2017 effective date. Then, in mid-June of this year, the department [announced](#) an “indefinite delay” in the implementation of the rule due to a lawsuit brought by the California Association for Private Postsecondary Schools (CAPPS) challenging elements of the rule. In a second [notice](#) on the same day, ED announced that, in addition to the legal challenge, ED's own internal analysis indicated that the rule needed “further work,” and a new Negotiated Rulemaking panel would be convened to draft a new version.

Last week brought two new notices, the [first](#) rescinding the department's earlier indefinite delay of the effective date for BDTR, replacing it with a new effective date of July 1, 2018 and the [second](#) extending the delay to July 1, 2019. The reason articulated by the department for the first delay was to align the new effective date with ED's master calendar; the justification for the second delay is to allow the BDTR negotiated rulemaking process to be completed before requiring schools to comply. Unlike the first notice, the second provides a 30-day [comment period](#) to allow the public to provide input regarding this extension. As noted above, the BDTR Rule is being renegotiated through the required negotiated rulemaking process, with a first negotiating session scheduled for November 13-15, 2017. The panel members nominated to participate in the rulemaking were also [just announced](#). In addition to the BDTR Rule, ED is also renegotiating the Gainful Employment Rule and has requested input on a broad range of other regulations that are subject to review through the same process.

The now-postponed rule is also the subject of multiple lawsuits – including the CAPPS suit noted above and another from a coalition of state attorneys general who argue that the department does not have the authority to delay the effective date of an existing regulation. It also argues that by not implementing the rule, ED is amending the regulation without required rulemaking, notice and comment periods in violation of the Administrative Procedures Act.

The department has indicated in the notices that it will continue to process borrower claims under the existing 1995 regulation until replaced by a new rule.

Cooley will continue to closely follow the negotiated rulemaking process and the status of the BDTR Rule and related litigation and will published additional alerts as warranted. Visit ed.cooley.com for the latest updates.

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