

Just in Time for Halloween: The Return of the Borrower Defense Rule of 2016

October 19, 2018

Potential Implications for *Every* Title IV Institution

The many-headed Obama-era Borrower Defense to Repayment Rule is back, thanks to a September 17 [federal court order](#) that overturned Secretary DeVos' action suspending implementation of the existing rule, followed by the October 16 final [order](#) denying California Association of Private Postsecondary Schools' request for injunctive relief. And, because the department now says it does not expect to publish its long-awaited BDTR rule replacement by November 1, it appears the original – and much debated – 2016 Rule is now in effect, and it will remain so until at least July 2020. More on why that is the case below. For more on the 2016 Rule itself, see our [previous posts](#).

What the reincarnation of the 2016 Rule actually means as a practical matter has caused more than the usual amount of head scratching in higher education circles. In early comments after the recent decision, ED has effectively said “watch this space” for guidance but has offered little in the way of concrete information or instructions for institutions. What is important to remember is that, consistent with the statutory language in the Higher Education Act, much of the 2016 Rule affects **every** college and university that participates in the Title IV programs, *regardless* of whether they are for- or nonprofit or public.

Of course, nothing is forever. ED has reaffirmed its commitment to major revisions to the BDTR Rule as part of its regulatory relief agenda, and indeed ED did propose a replacement rule this summer that is substantially different from the 2016 version. But, ED has also acknowledged that it cannot properly consider the tens of thousands of comments it received about its proposal in time to publish a final rule by November 1, meaning that, under the “master calendar” created under the HEA, ED may not put a new and final rule into effect until July 2020. While the federal court has directed ED to enforce the Obama-era rule, it is not clear how ED will do so, especially since erecting the 2016 Rule's complex structure to resolve claims will require a significant allocation of personnel and resources, both of which are in short supply, with headquarters budget reductions and ED staffing 10-15% down in the last year alone.

Also bear in mind that nothing in Washington exists in a vacuum: there is the group of Democratic attorneys general and consumer law groups that, having succeeded in their lawsuit to reinvigorate the 2016 Rule, will be eager to go back into court to compel enforcement if they detect – as they likely will – reticence on the part of ED to move aggressively to reopen that process.

As a reminder, it is a serious mistake to think of the 2016 Rule as just applying to BDTR, as it covers many critical areas far removed from the original Borrower Defense provision in the HEA, which is just 81 words long. While the borrower defense and loan discharge provisions at the heart of this regulatory package are certainly important, they actually require a great deal of administrative work to set up the complex systems needed to process claims, consider conflicting evidence and render not-so-simple decisions on tens or hundreds of thousands of claims. Other parts of this rule, most of which affect all institutions, are likely to have a more immediate impact, starting with a number of radically different financial responsibility (and resultant letter of credit) provisions.

Cooley published a detailed [overview](#) of the 2016 rule, including both the BDTR claims process and the financial trigger provisions. We encourage you to review the article as a refresher on all the details; however, as a reminder, the rule includes:

- Mandatory and discretionary triggering events that, depending on the trigger, may spur ED to perform a mid-year financial responsibility calculation to measure the impact of such event or threatened event and consider requiring the institution to post a letter of credit.
- Prohibiting institutions from including required arbitration provisions and class action waivers in their enrollment agreements or related documents. Similarly, the rule prohibits the use of class action waivers in these documents. Note that these restrictions are now in effect, so Cooley is advising institutions to suspend the use of pre-dispute arbitration and class action waiver provisions immediately.
- There is one provision that only applies to for-profit schools: ED must publish their loan repayment rates, in addition to the cohort default rates applicable to all institutions.

Even if it takes months for ED to set up an administrative system to process borrower defense and loan discharge claims, these other provisions could have a profound and immediate impact on hundreds of institutions. Accordingly, it will be particularly important to track ED's announcements and steps in the coming months as it implements the 2016 Rule.

If you need a refresher on the procedural twists and turns that led to this unusual situation, read on. The BDTR Rule was published in the final months of the Obama Administration and was scheduled to take effect on July 1, 2017. With the confirmation of Education Secretary Betsy DeVos, ED initiated a "regulatory reset" that led to two delays in the effective date of the rule to allow time for a new negotiated rulemaking on the subject, leading the department to issue its proposed rule this summer. During this period, CAPPS sued ED over the potential harm the rule would inflict on member schools. Meanwhile, a group of Democratic attorneys general filed a separate lawsuit, claiming that the delays were in violation of the Administrative Procedures Act. In an order published on September 17, 2018, the federal district court in DC ruled in favor of the AGs, concluding that ED's delays were arbitrary and capricious. The judge also allowed ED an additional 30 days to return to court to justify the delays but, interestingly, ED declined to take up the offer. Meanwhile, CAPPS filed its own request to halt implementation of the 2016 BDTR Rule, which led – finally – to the court's decision to deny the CAPPS request and require the rule to again take effect on October 16. Thus far, we are not aware of any discussion of a further appeal in the courts.

Cooley has been following the saga of the BDTR Rule since it first attracted the attention of the Obama administration in 2015. Follow CooleyED for analysis of this evolving regulatory drama.

Kate Lee Carey focuses on the legal, accreditation, administrative and regulatory aspects of regionally and nationally accredited higher education institutions and companies that provide services to the education industry.

Jonathon Glass specializes in higher education law, with concentrated emphasis on the institutional eligibility and financial responsibility requirements for institutions to participate in the Title IV federal student aid programs.

Mike Goldstein has been a pioneer in the development of new and more effective and efficient approaches to education in general and eLearning in particular through the creation of innovative approaches to combining the resources and interests of the various sectors of the education, technology, financial and governmental communities.

Vince Sampson focuses on helping clients predict, navigate and understand the increasingly complex involvement of federal agencies and Congress.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our [AI Principles](#), may be considered Attorney Advertising and is subject to our [legal notices](#). Copyright © 2026