Cooley

At Long Last…ED Issues Guidance Regarding Implementation of the 2016 Borrower Defense to Repayment Rules

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Following a court ruling in September 2018 making the delayed Obama-era Borrower Defense to Repayment regulations immediately effective, the Department of Education has been promising guidance to institutions so they (and potentially affected past and present students) could understand ED's expectations for compliance. After six months, that guidance was finally issued on March 15 via an electronic announcement available at ifap.ed.gov.

For those who have forgotten the broad and complex BDTR rule of 2016, we encourage you to review Cooley's November 2016 blog post, which provides a detailed analysis of the now-effective 2016 rule. The rule is complicated but can be broken into four main parts: the basis and process for the resolution of BDTR claims, the financial responsibility triggers, the pre-dispute arbitration and class action waiver bans, and required disclosures. It should be noted that only the first component, providing through regulation the basis for a student to assert a claim for relief from repayment of his or her federal loan, and the process for securing that relief, was required by the statutory BDTR provision. The remaining provisions were added by the previous administration in response to broader concerns respecting institutional compliance and performance. Note also that the BDTR rules apply with limited exception to all institutions participating in the Title IV student financial aid programs. (The financial responsibility triggers only apply to for-profit and independent institutions, since a public institution that is backed by the Full Faith and Credit of a state is automatically financially responsible. And the repayment rate disclosure requirement applies only to for-profit institutions.)

BDTR Claims

With its March 15, 2019 guidance, ED indicated it will begin applying the 2016 BDTR claim standards to all claims asserted by borrowers for loans disbursed after July 1, 2017. A borrower who seeks a loan discharge under the BDTR rules will need to establish the existence of one of the following bases in support of that claim:

- A decision of a court or administrative tribunal in favor of the student (whether as a plaintiff, member of a class or covered party in a proceeding brought by a government agency against the school) in a contested proceeding.
- Evidence that his or her school has breached a contractual obligation to the student, which is generally the enrollment agreement, either in its express or implied terms, but may also include other documents such as program brochures and catalogs that make up the entire contract with a student.
- Evidence of a "substantial misrepresentation" by the school or any of its representatives regarding the nature of the educational program offered, the nature of the school's financial charges or the employability of graduates upon which the borrower reasonably relied to his or her detriment. The department expanded its current definition of misrepresentation to encompass any statement that has the likelihood or tendency to "mislead under the circumstances" and further expanded this concept to include any statement that omits information that makes the statement false, erroneous or misleading, including such statements made unintentionally. ED also clarified that the borrower must demonstrate actual and reasonable reliance on the misrepresentation and that reliance was to the borrower's detriment.

Addressed without much detail or fanfare in the announcement, ED indicated that it will utilize the process for gathering information from students and institutions and process claims as prescribed in the 2016 rule and the January 19, 2017 procedural amendments that added the BDTR process to Subpart G (Fine, Limitation, Suspension and Termination Proceedings). This process includes the department granting loan discharge relief to a student based on the student's claim, followed at the department's discretion, by an action to recoup the cost of the discharge from the institution.

Financial Responsibility Triggers

The 2016 rule included a compendium of factors that were determined by ED to indicate that an institution is not financially responsible and thus could be at risk of inability to continue to provide its educational services, or outright closure. There are three types of triggers in the 2016 rule: those that would, on their face, automatically indicate a lack of financial responsibility (e.g., a failing 90/10 score); a change in financial condition, such as a liability created by a judicial settlement, that would trigger a recalculation of the composite score – a result of less than 1.0 being an indicator of a

financial responsibility issue; and finally, certain discretionary triggers that ED may determine create financial responsibility concerns (e.g., a material increase in Title IV receipts year-over-year). As part of the 2016 rule, institutions would be required to notify ED within a certain timeframe that such a trigger had occurred, at which point ED would determine what action was required of the institution to continue participation in the student aid programs.

ED noted in its announcement that if one of these triggering events arose prior to the commencement of the institution's current fiscal year, it would have already been reported to ED in the financial statements submitted for the previous year, and therefore separate action on the part of the institution is not required. However, if any of the enumerated events occurred following the end of the last fiscal year for which financial statements have been submitted, an institution needs to submit a separate notification to the department relating to the following:

- The institution has a debt or liability arising from a final judgment/determination (judicial or administrative proceeding) or from settlement.
- The institution is required by its accrediting agency to submit a teach-out plan.
- For an institution with a composite score less than 1.5, any withdrawal of owner's equity from the institution.
- A lawsuit against the institution brought by a federal or state authority after July 1, 2017, on claims related to the making of a Direct Loan or the provision of educational services, which has been pending for more than 120 days *and which is still pending as of the date of this announcement.*
- Any other type of lawsuit *that is still pending as of the date of this announcement against the institution and was brought after July 1, 2017*, where summary judgment motions have not been filed under certain circumstances or an institution's summary judgment motion has been denied.
- For violations of the 90/10 requirement, an institution must notify the department 45 days after the end of the institution's first fiscal year beginning on or after July 1, 2017.
- Publicly traded institutions must notify the department of certain actions occurring after July 1, 2017 taken by the SEC or stock exchange on which the institution's stock is listed.
- For state licensing or authorizing agency citations and accreditor show-cause orders or accreditor-imposed probation status, institutions must notify the department of all such events occurring after July 1, 2017, *unless they have been resolved as of the date of this announcement.*
- For violations of a requirement in a loan agreement, institutions must notify the department of all such events occurring after July 1, 2017.

Institutions must report these triggers within 60 days of ED's announcement (and presumably for future events, within the timeframe identified in the rule).

Arbitration and Class Action Waiver Bans

It should be noted that the rule does *not* completely prohibit institutions from including a pre-dispute arbitration or class action waiver as part of the enrollment process. As ED explains, the ban is only applicable to claims made in relation to a borrower defense claim (meaning, relating to an act or omission by the school in relation to the making of a Direct Loan or the attendant educational services). Nor does the rule ban the use of arbitration once a claim has been made, as long as the borrower freely agrees to pursue an alternative dispute resolution process rather than pursue the matter in court. As this guidance was included in the original rule's preamble, this note in ED's recent announcement was obviously intended to clarify that the very presence of such a provision is not a per se violation.

ED then goes on to reiterate what the rule requires, giving a 60-day window for schools to comply. Institutions can 1) remove arbitration and class action waiver language altogether (whether in the enrollment agreement or in a separate agreement); 2) amend the arbitration/class action provisions using ED's required language; 3) issue notice to student borrowers that arbitration and class action waivers cannot be enforced, again using ED's required language, at the earlier of either exit counseling or when a student makes a demand for arbitration; or 4) issue a blanket notice to all students who signed a pre-dispute arbitration or class action waiver agreement describing the now-limited effect of such an agreement or waiver.

This guidance also addresses pending disputes. Any student borrower who is currently engaged in the arbitration process with an institution based on a pre-dispute arbitration provision or class action waiver is not obligated to continue to pursue relief through the arbitral process. Further, if an institution is engaged in the arbitration process currently, it must provide the student the required notice about the unenforceability of the provisions within 10 days of ED's announcement.

Finally, as required by the 2016 BDTR rule, institutions must report all judicial and arbitration claims pending as of July 1, 2017, and initiated thereafter, and submit the associated records to ED within 90 days of ED's announcement.

Disclosures

The 2016 BDTR rule also included two disclosure provisions, one relating to a failing repayment rate and one regarding when an institution experienced a financial trigger event. For both provisions, ED indicates in the March 15 announcement that further consumer testing will be completed to determine how best to communicate information to students, and that a future Federal Register notice will indicate what information will be required in those publications and the method of delivery.

Stay tuned for more refinements and interpretations as Cooley continues to track this new ED guidance in action.

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