

Reminder: Reporting of Borrower Defense to Repayment Financial Responsibility Triggers Due May 14

May 7, 2019

Important note: These rules – except as described below – are applicable to ***All*** institutions participating in the Title IV programs.

The deadline for affected institutions to file reports with the Department of Education under the Obama-era Borrower Defense to Repayment Rule (BDTR) is fast approaching, with the first such reports due on May 14, 2019. This new requirement is based on Department [guidance](#) that implements the rule based on a court order issued in October 2018. As a reminder, BDTR applies to all institutions of higher education that participate in the Federal Student Aid programs.

The Department's recent announcement includes important information on three primary topics: reporting financial responsibility triggers (due May 14th), the use of arbitration agreements and class action waivers, and repayment rate and financial responsibility disclosures. The financial responsibility triggers particularly require careful review to correctly understand what is covered.

Financial responsibility triggers

The Department guidance states that the impact of a majority of the financial responsibility standards addressing debts, liabilities, and losses will have been reflected in the financial statements submitted by schools following the end of their 2017 fiscal year. Thus, for the following events occurring after the fiscal year end for the most recent annual audit submission submitted to the Department, a separate report must be filed with ED by May 14th:

- Any debt or liability arising from a final judgment/determination (judicial or administrative proceeding) or from settlement. There is no minimum trigger for this reporting requirement.
- For a for-profit institution with a composite score less than 1.5, any withdrawal of owner's equity from the institution. (The regulations indicate that movement of funds is not a trigger if the transfer is to "an entity included in the affiliated entity group on whose basis the institution's composite score was calculated.")
- If a school's accrediting agency required the school to submit a teach-out plan.

ED separately identified other reporting requirements that are unrelated to the previously submitted financial statements, which also must be submitted to ED on or before May 14th:

- A lawsuit against the institution brought by a federal or state authority after July 1, 2017, on claims related to a "borrower defense" claim (i.e. based on 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 March 15, 2019.
- Any other lawsuit that is still pending as of March 15, 2019 against the institution and was brought after July 1, 2017, where summary judgment motions have either been denied or were not timely filed, or if such motions were never calendared, the case has been set for pre-trial proceedings, or for trial.
- For for-profit schools, violations of the 90/10 requirement, notice within 45 days after the end of the institution's first fiscal year in which the school's rate exceeded 90%.
- For publicly-traded institutions, notice if any of the following occurred after July 1, 2017: the SEC issues a warning that it may suspend trading on the institution's stock; the school failed to timely file a required annual or quarterly report with the SEC; or the exchange notifies the institution that it is not in compliance with exchange requirements, or its stock is delisted.
- Unless resolved before March 15, 2019, notice of any state licensing or authorizing agency citations and accretor show-cause orders or accretor-imposed probation status occurring after July 1, 2017.
- For violations of a requirement in a loan agreement, notice of all such events occurring after July 1, 2017.

Note that the provisions included in the Department's guidance do not cover all of the financial responsibility triggers. Institutions should refresh themselves on the other triggering events (you can find detailed analysis [here](#)) and timelines for reporting as the expectation is that after the May 14th deadline for "catching up" on events occurring since July 1, 2017, institutions will be required to begin regularly reporting the required triggers according to the BDTR regulations deadlines, generally 10 days from the occurrence of the event.

Arbitration agreements and class action waivers

For those institutions that include pre-dispute arbitration provisions and/or class action waivers in their enrollment agreement or as part of the enrollment process, those provisions will need to be removed or updated to comply with the BDTR requirements by May 14, 2019.

While including an agreement to arbitrate and waive class action is not itself prohibited, students cannot be compelled to handle borrower defense related claims under alternative dispute resolution processes. ED has issued required language (available in both the [electronic announcement](#), and in the rule itself) that must be included in any arbitration or class action provisions. Additionally, Direct Loan borrowers that took out loans after July 1, 2017 that already signed a prior version of an arbitration provision or class action waiver, must be notified using the Department's prescribed language no later than exit counseling, or at the time the borrower files a claim in arbitration, that they are not required to arbitrate or waive the right to join a class action claim.

In addition, before June 13, 2019, institutions must submit all arbitration and judicial records relating to borrower defense related claims (i.e. related to the making of a Direct Loan or the related educational services) that were pending as of July 1, 2017, or initiated after July 1, 2017.

Repayment rate and financial protection disclosures

As part of the BDTR rules, all institutions are subject to publishing disclosures to students regarding the occurrence of certain financial responsibility issues, and for-profit institutions are additionally required to publish a disclosure regarding loan repayment rates. However, implementation of these disclosure requirements have been deferred. The guidance announcement states that ED will conduct consumer testing to determine the optimal form and manner of these warnings, so as of now, institutions are not required to publish additional disclosures on either topic.

If you have any questions regarding the scope of these reporting requirements or other aspects of this process, please contact [Kate Lee Carey](#) for additional guidance.

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.

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