

Borrower Defense to Repayment Rule 3.0 – Part II: Student Relief

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On September 11, we published a [detailed look](#) at the portion of the Department of Education's long-awaited revised [Borrower Defense to Repayment Rule](#) (BDTR) that focused on the elements directly impacting institutional operations – financial responsibility triggers, new treatment of leases and long-term debt, and the removal of the ban on arbitration agreements. The institutional elements – not a part of the original BDTR law itself (see below) – were added in the 2016 Obama-era rule for the purpose of deterring “bad conduct” and providing early warning of institutions in trouble.

This article will focus on the impact of the new rule on those for whom the statute was originally intended to protect – Direct Loan borrowers – and more specifically the bases for borrower defense claims and how those claims will be processed. All of these new rules will become effective on July 1, 2020.

To briefly recap the rationale for the BDTR regulations, the [statutory provision](#) for “Borrower Defenses” contains just 80 words:

(h) Notwithstanding any other provision of State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan.

That's all, folks. Like Gainful Employment and other regulatory schemes, a very short statutory provision can (and here has) morphed into something far larger and more prescriptive.

Two important notes worth repeating in this post: The 2016 Obama-era BDTR rule remains in effect until July 2020, when the new rule will become effective. (See our previous blog posts [here](#) and [here](#) for more details on the current rule.) Also, these rules impact all Title IV participating institutions, public, nonprofit and proprietary.

Borrower defense – claims basis and process

The overarching basis for BDTR relief has remained constant, as the department even more succinctly put it on its 2018 [Application for Borrower Defense to Loan Repayment](#):

If your school misled you or engaged in other misconduct, you may be eligible for “borrower defense to repayment...”

The most significant difference between the current (2016) and new (2019) rules is how ED is defining “misconduct” worthy of a defense claim. The 2016 BDTR rule included three bases for making a claim (with varying time periods within which a claim could be made), gave ED the ability to create group claims without the need for individual students filing for relief and ordained a rather limited procedure to enable an institution to contest a claim. The new rule streamlines the process, but in doing so, narrows considerably the basis for a borrower to make a BDTR claim and raises the bar on what the department will consider sufficient evidence to warrant borrower relief.

Because of the timing of this new rule in relation to the 2016 rule and its predecessor, ED also clarified which regulations will apply to loans disbursed at specific points in time:

- For borrowers with loans first disbursed prior to July 1, 2017, BDTR claims will be subject to pre-2016 (i.e., 1994) regulations
- For borrowers with loans first disbursed on or after July 1, 2017, and before July 1, 2020, those claims will be reviewed under the regulations published on November 1, 2016, (the Obama-era rule)
- For borrowers with loans first disbursed on or after July 1, 2020, those will be subject to the new 2019 regulations

Borrower defense claims basis

The new BDTR rule provides one overarching basis for students to make their claim for loan forgiveness: a misrepresentation by the school. But not just any misrepresentation: under the new rule, the definition of a

misrepresentation, for purposes of a BDTR claim, is amended to include:

- a statement, act or omission by an eligible school
- to a borrower
- that is false, misleading or deceptive; *and*
- that was made with knowledge of its false, misleading or deceptive nature, or
- with a reckless disregard for the truth; and
- that directly and clearly relates to
 - enrollment or continuing enrollment at the institution or
 - the provision of educational services for which the loan was made.

This amended definition of misrepresentation is important. It requires that a borrower demonstrate that the institution knowingly or recklessly made a false statement *and* that the false statement was directly related to the student's enrollment *or* was about the educational services that the student was paying for using his or her loan proceeds. This is significantly different from the 2016 rule which sets a much lower threshold. Under the currently effective 2016 rule, a student could prevail with a claim of misrepresentation based on information that was *unintentionally* "misleading under the circumstances," including "any statement that omits information in such a way as to make the statement false, erroneous, or misleading." The new definition requires borrowers to not only show that the statement was false or misleading, but that his or her institution made the statement either *knowing* it was false or with *reckless disregard* to its truthfulness. Importantly, no longer will an unintentionally misleading statement be sufficient to warrant a loan discharge.

In addition, under the new rule, in order to secure relief, a borrower will need to show *by a preponderance of the evidence* (meaning more likely than not) that his or her institution made the misrepresentation *about a material fact* on which the *student reasonably relied* when deciding to take out the loan. Finally, having surmounted these evidentiary challenges, the borrower then has to show that the misrepresentation caused *actual financial harm*. ED has thoughtfully provided new language defining financial harm: periods of unemployment post-graduation that are not related to economic conditions, a significant difference in the cost of the program compared to what the institution said it would charge, a borrower's inability to secure a job in the field if an institution expressly guaranteed employment, or a borrower's inability to finish a program because the school stopped offering it and did not provide an alternative means for the student to finish. ED's intention is clear: a BDTR discharge is only appropriate if it can be proven that there is a clear nexus between an institution's actions and financial harm suffered by the student.

The new rule also sets a much narrower window within which a claim must be filed. Rather than tying the statute of limitations to the type of claim, or in some cases keeping the window open indefinitely, borrowers under the new rule will have three years from the date he or she has either graduated or withdrawn from the institution to file for a BDTR discharge.

All of these elements in combination materially narrow the acceptable bases for a BDTR claim, therefore raising the bar for relief from loan repayment.

Borrower claim is only the first step

When a borrower makes a claim, she or he must submit an application, which the borrower must affirm as accurate and complete (which means a false application is punishable as a crime), and the borrower must provide evidence to support each of the elements of the BDTR claim. This includes demonstrating not only that the borrower suffered harm, but that he or she suffered *the right kind* of financial harm *arising directly* from the alleged misrepresentation by the school. If, for example, a graduate were to claim that she or he was unable to find work in his or her field, the former student would need to prove that he or she was actively searching for employment and that he or she was unable to secure a job specifically because of some deficiency in the education and training provided.

The new BDTR procedure requires ED to provide the information in a borrower's application to the student's institution for their review. If ED has additional information relevant to the borrower's claim, that evidence will also be provided to both parties as part of the process. The institution then has the opportunity to refute the borrower's claims, the borrower can then review the school's (and ED's) information and provide any additional evidence in support of his or her claim before a final decision is rendered. Both the school and the borrower will have at least 60 days to review and provide evidence. Once ED has finished its review, it will issue a written decision, including the basis for the decision and the relief, if any, to be granted to the borrower. The final decision is not subject to administrative appeal.

What comes next

The process doesn't stop here. While the student may be made whole, the government is now left with a discharged

loan. The new rule primarily focuses on the process ED follows to determine whether to grant relief to the borrower; it does not go into great detail about how ED will recover the loss from the institution. As was the case with the 2016 rule, ED will be able to initiate an action against the institution under Subpart G to recover the amount granted to the student up to the full amount of the loan; however, under the new rule, ED must do so within five years of the final BDTR claim decision.

The Subpart G process, which was amended in January 2017 to include the BDTR procedure, is itself a complicated process and has a potentially material impact on the institution. We will provide an in-depth analysis of how the new BDTR rule and the Subpart G process together might impact institutions in BDTR Part III, coming soon to CooleyED.

Closed school discharges

In addition to the new BDTR process, ED has also amended the standards and process around loan discharges provided to students whose institutions closed while (or just after) the student was enrolled.

To be eligible for a Closed School Discharge (CSD), a borrower must show that she or he did not complete the program because the school closed while he or she was enrolled and that he or she did not complete the same program, or a comparable program, through a teach-out at another school or by transferring his/her credits to another school. Borrowers also must certify that they have opted not to participate in an approved teach-out at their own institution or another institution. In a move intended to ensure relief to students who withdrew prior to closure, under the assumption that those students would have been impacted by the deterioration of an institution or programs prior to the actual close date, the new CSD rules also extends from 120 days to 180 days the period prior to closure that a student could have withdrawn and still be eligible for a CSD. ED can extend beyond the 180 days if certain conditions are met such as a revocation of accreditation or state authorization.

Additionally, ED has maintained similar proactive post-closure activities to those that currently exist, including ED retaining the responsibility to track down (including through contact with the school, state agencies and accreditors those students it cannot locate) and notify any borrower who appears to have been enrolled at the time of the closure, or within the previous 180 days, that they may be eligible for a CSD and providing them with an application.

During this time period, ED will suspend collection on the borrower's Direct Loans, but if the borrower does not submit a CSD application within 60 days of ED sending the application, ED will resume collection activities. ED will no longer be required to follow up with the borrower again after the 60 days has passed, nor will ED grant automatic discharge after three years for loans disbursed after July 1, 2020.

And yet another discharge basis ...

False Certification Discharges

False Certification Discharges (FCD) are another flavor of loan relief. The new rule makes changes to the FCD by creating more detailed application procedures and requiring additional supporting statements and/or documents for any claim for discharge in the false certification category. There are a number of different types of FCD, including a borrower who did not have a high school diploma or equivalent, a school that allegedly signed for a loan without the student's consent, a school that allegedly endorsed a loan check without the student's consent and cases of identity theft. Under each of these categories, ED has added specific language about what a borrower must include in their application for a FCD in order for the claim to be approved.

Like the BDTR process, the new standards for CSD and FCD apply only to loans disbursed on or after July 1, 2020.

We will continue to review and analyze all aspects of the new rule and will provide additional updates as ED issues additional guidance and clarification.

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