

Borrower Defense to Repayment 4.0

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In late October 2022, the US Department of Education (ED) published final regulations regarding the [borrower defense to repayment rule](#) (BDTR). The new version attempts to make the discharge process streamlined for borrowers, but has created concern for institutions, as it also removes many of the due process protections included in prior iterations of the rule. Absent legal challenge, the new version of the BDTR will be effective July 1, 2023.

Applicable to all Title IV-participating institutions, the first substantive version of the regulations became effective in 1995 after the authorizing statute became law in 1993. The original BDTR allowed student borrowers to assert a defense against repayment of a Federal Direct Loan based on an act or omission of the school giving rise to a state law claim that would support a challenge to repayment. The focus at that time was not loan discharge or institutional recoupment, but rather, providing a borrower a defense in a wage garnishment or other collection proceedings and was rarely used for the first 20 years. That view changed in 2015.

From 1995 to 2015, there were between five and 60 BDTR requests in total depending on ED's description in public documents. With the closure of Corinthian Colleges and ED's increased public promotion of the BDTR process, hundreds of thousands of claims began pouring in. As a result, in 2016, ED initiated its first rulemaking on BDTR in more than 20 years. This rulemaking resulted in a new BDTR, which became effective in July 2017. Even before that version became effective, the Department of Education under then-Education Secretary Betsy DeVos began discussing concerns about the rule, and initiated another round of rulemaking in 2019 that resulted in a third version of the BDTR, which became effective in July 2020 and continues to control the process today. Starting with the 2017 BDTR, each new iteration of the rule has established a new "federal definition" of wrongful acts sufficient to support a BDTR claim as a replacement for the "state law claim" standard that existed under the 1995 rule (although that option remains available for loans disbursed prior to July 1, 2017). We have discussed changes to the earlier versions of the BDTR regulations [in previous CooleyED blog posts](#).

The 2023 version of the BDTR is part of a larger effort by the Biden administration to address ballooning student debt. These efforts also can be seen in the recent student loan forgiveness policy for all borrowers below certain income thresholds (though at the time of this writing, it has been halted and is working its way through the court system), the extended pause on repayment during the COVID pandemic, and the recently announced settlement in the [Sweet v. Cardona](#) (formerly *Sweet v. DeVos*) case.

Impactful changes in 2023 BDTR regulations

The 2023 BDTR resurrects some of the provisions in the 2017 rule, while also expanding the "acts or omissions" of the institution that could form the basis for a BDTR claim. Below we have highlighted a few, but certainly not all, of the impactful changes in the 2023 BDTR regulations.

Separation between discharge and recoupment

The new BDTR resurrects the separation between the loan discharge process (between the borrower and ED) and the recoupment process (between an institution and ED) from the 2017 rule, which is intended to increase ED's ability to discharge student debt for as many students as possible, as quickly as possible. This bifurcated process will allow ED to act on discharge requests from borrowers more expeditiously, and then separately initiate action to recoup from the institution if the agency chooses to do so. It also allows ED to discharge loans that it cannot seek recoupment for due to the expiration of agency and state recovery limitations periods. Although this efficiency has been the stated goal of the BDTR process since the 2017 rule was implemented, the discharge process has been extremely slow – and fraught with legal challenges and controversy. Additionally, ED has not successfully recovered BDTR discharges from an open school, so it is not clear if this process will facilitate both discharge and recovery. However, it is clear that the agency is prioritizing discharging loans without regard to recoverable amounts or defenses permitted by state laws.

Applicable time frame

Generally, the standards of the 2023 rule applicable to a borrower's BDTR claim will apply to claims **pending on, or**

received on or after, July 1, 2023.

In an attempt to clarify that the department would not “retroactively” apply the 2023 rules, ED indicates in the new BDTR that schools will not be subject to recoupment if the conduct giving rise to the borrower defense claim occurred prior to July 1, 2023. However, if an act occurring before July 1, 2023, would have met the thresholds for discharge under the 1995, 2017 or 2020 version of the rule (as applicable, based on loan disbursement date), ED may still seek recoupment. By way of example, this would mean that if ED concluded that an institution employed an aggressive recruitment tactic (as defined under the 2023 rule) in 2015, ED can discharge the student’s loan based on the 2023 rule, but it cannot recoup from the institution unless such tactics also gave rise to a cause of action under state law as required to assert a BDTR defenses under the 1995 rule (applicable to a loan disbursed in 2015) would not have prohibited that conduct.

Uniform federal standard

A borrower claim may be approved based on a uniform federal standard that includes:

1. Substantial misrepresentation (expanded).
2. Substantial omission of fact.
3. Breach of contract (revived from 2017).
4. Aggressive and deceptive recruitment (new).
5. Judgments against the institution (revised).
6. Final actions by ED (also new).

Group claims

Not only has the group discharge option been reinstated, but groups also can be formed by ED, or upon the request of a third party, which now includes legal assistance groups and an expanded definition of state entities. Individual borrowers are no longer required to file applications in such circumstances. There is now presumption of injury in group claims for all borrowers, even if borrowers did not request relief from repayment obligations and ED presumes that every claim (individual or group) supported by a preponderance of the evidence warrants a 100% loan discharge.

Defense to repayment

Borrowers may assert a defense to repayment “at any time,” as long as the borrower has a balance due, regardless of the time elapsed since the date of the school’s action that supports the claim. Without a statute of limitations, schools would be expected to maintain borrower records indefinitely if they wanted to preserve the ability to defend themselves. In addition, maintaining data and records forever is not only practically impossible, but it also directly contradicts ED’s guidance and best practices around record retention and destruction.

Recoupment process

The process of recoupment has moved from 34 CFR Subpart G (which is used in fine, limitation and suspension matters) to Subpart H (which applies in appeals relating to audit findings and program review determinations). Since there is no track record of the BDTR process under Subpart G to date, it is not clear how much this shift will impact institutions in a recoupment action. However, as written this is a significant shift in favor of ED in terms of required burdens and agency deference. Subpart H historically relates to appeals with more developed administrative records and opportunities for institutions to respond before an appeal. As a result, the institution bears more of a burden to demonstrate all expenditures are proper once the dispute reaches the appeal stage. Consistent with such agency deference, the new BDTR clarifies that ED “...has the burden to prove that the loans it is seeking to recoup on were discharged for the purposes of borrower defense and that the institution has the burden to prove that the decision to discharge the loans was incorrect or inconsistent with law and thus that the institution should not be liable.”

ED recovery

For loans disbursed after July 1, 2023, there is generally a six-year limitations period for ED to recover funds from the school after the borrower’s last date of attendance at the institution, but that period does not apply if the school has received notice of the claim, or a class action suit based on the same facts, during the six-year period. In addition, there is no limited timeframe for recoupment for discharged loan based on 1) a favorable judgment based on state or federal law in a court or administrative tribunal of competent jurisdiction based on the institution’s act or omission relating to the making of covered loan or the provision of educational services for which the loan was provided; or, 2) ED sanctioned or otherwise took adverse action against the institution at which the borrower enrolled under 34 CFR part 668, subpart G, by

denying the institution's application for recertification, or revoking the institution's Provisional Program Participation Agreement based on the institution's acts or omissions that could give rise to a borrower defense claim.

In the case of a closed school, ED may pursue recovery for loans disbursed on or after July 1, 2023, from "a person affiliated with the school." An affiliated person is generally someone with ownership or control over the institution, which includes directors and executive officers. Despite regulatory citations related to that definition, it remains unclear who or what this would cover.

Prohibition and disclosure

The new BDTR brings back the prohibition on pre-dispute arbitration agreements and class action waivers as they apply to borrower defense claims. Institutions also are required to disclose publicly and notify the secretary of education about judicial and arbitration filings and awards pertaining to a BDTR claim.

In the past six years, there have been numerous revisions and changes to the BDTR. Each reworks the understanding and power of ED to forgive and recoup on student borrower loans. Even now, ED is faced with hundreds of thousands of BDTR claims that must be analyzed under three existing rules – and adding another version into the process will only complicate matters and create more risk, both in terms of actual recoupment and interim actions and/or conditions of continued participation based on pending BDTR applications or discharges. For institutions, this complexity creates additional challenges. As more information and guidance becomes available, we will continue to provide updates.

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.

Jasmine Lee focuses on education regulatory matters including compliance issues for postsecondary institutions, K-12 schools, and education related companies.

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