

Session #11

Regulatory Update – Borrower Defense

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This PowerPoint or the accompanying presentation should not be interpreted as, or understood to be, legal advice.

The presentation and PowerPoint is intended as an informational summary of the major elements of the 2019 Borrower Defense Rule and should not be relied upon to make any decisions with legal implications or in any proceedings before the Department.

If you have questions about these materials, please consult with outside counsel or contact the Office of Postsecondary Education.

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Abbreviations

- BD = Borrower Defense
- CDR = Cohort Default Rates
- CSD = Closed School Discharge
- FASB = Financial Accounting Standards Board
- FCD = False Certification Discharge
- PP&E = Property, Plant & Equipment

Negotiated Rulemaking

- Website: www2.ed.gov
 - Search: rulemaking
 - Subject: 2017-2018 Rulemaking
 - (See also: 2015-2016 Rulemaking)
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- Contains rulemaking public hearing and session documents, negotiator list, links to Federal Register Notices, etc.

Timelines –

Pre-2016

Loans first
disbursed prior
to July 1, 2017

2016 Rule

Loans first
disbursed on or
after July 1,
2017 and
before July 1,
2020

2019 Rule

Loans first
disbursed on or
after July 1,
2020

2016 Standard →

“An act or omission of the school attended by the student that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided.”

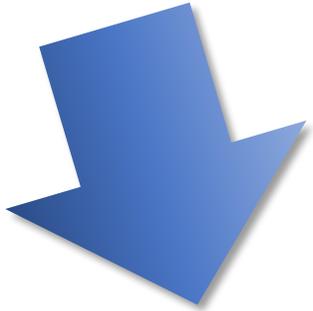
Federal Standard – 2016 v. 2019

2019 Standard - § 685.206 (e)(2)(i)

“The institution at which the borrower enrolled made a misrepresentation...of material fact upon which the borrower reasonably relied in deciding to obtain a Direct Loan, or a loan repaid by a Direct Consolidation Loan, and that directly and clearly relates to enrollment or continuing enrollment at the institution or the provision of education services for which the loan was made and the borrower was financially harmed by the misrepresentation.”

Federal Standard - Simplified

Misrepresentation
of Material Fact



Borrower
Reasonably
Relied Upon



Directly and Clearly Relates to:
1) Enrollment/Continuing
Enrollment
2) Provision of Educational
Services



Borrower Suffers Financial Harm as
a Result of the Misrepresentation

Evidence Standard

2016 Rule = Preponderance of the Evidence for all Claims

2019 Rule = Preponderance of the Evidence for all Claims

“More likely than not”

Greater than 50% likelihood

Notice and Process Requirements for Borrowers

- Borrowers →
 - Sign application, under penalty of perjury, and waiver
 - Provide evidence with application
 - State amount of financial harm suffered
 - Possess opportunity to reply to institution's response (if provided)

Notice and Process Requirements for Institutions

- Institutions →
 - Notified of application
 - Provided BD application
 - Allowed formal opportunity to respond

Types of Claims and Limitations Period

2019 Rule = Affirmative and Defensive Claims



Limitations Period – § 685.206(e)(6)

3 years from the date the student is no longer enrolled

Secretary may extend time period

Period “tolled” →

- Arbitration proceedings
- Court judgments that satisfy “misrepresentation”

Definition of Misrepresentation – §685.206(e)(3)

A *statement, act, or omission* by an eligible school to a borrower that is *false, misleading, or deceptive 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:

- 1) enrollment or continuing enrollment at the institution or
- 2) the provision of educational services for which the loan was made

Misrepresentation Examples - 685.206 (e)(3)(i)-(xi)

- Actual licensure passage rates
- Actual employment rates
- Institutional selectivity and rankings
- Institutional possession of certifications, accreditation, or approvals
- Transferability of credits
- Specific earnings of graduates
- Availability, amount, or nature of financial assistance
- Amount, method, or timing of actual tuition and fees
- Whether courses or programs are endorsed by a third party
- Educational resources provided
- Prerequisites for enrollment

Financial Harm – §685.206(e)(4)

- Definition:
 - Amount of monetary loss that a borrower incurs as a consequence of a misrepresentation
- Student claims the amount of financial harm suffered
- ED determines the amount of financial harm suffered
- Amount may exceed alleged amount
- Relief may *not* exceed amount of the loan and any associated costs/fees

Pre-Dispute Arbitration Agreements and Class Action Waivers

- 2016 Rule – Usage prohibited
- 2019 Rule – Usage allowed
 - If used, institution must provide disclosures to students (§ 668.41(h))
 - Limitations period tolled for period of an arbitration proceeding (§ 685.206(e)(6))

Closed-School Discharge (CSD) – § 685.214 (c)(2)

180-day “look-back” period

Borrower must submit application, under penalty of perjury

Borrower can choose either a CSD or teach-out

If school offers teach-out, student can still choose CSD

Secretary can extend “look-back” period for exceptional circumstances

False Certification Discharge (FCD) – § 685.215

- Borrower submits application under penalty of perjury
- If school certified eligibility but borrower not a high school graduate or otherwise qualified →
borrower qualifies for FCD
- If borrower submitted written attestation to school in lieu of official transcript →
borrower does not qualify for FCD

Financial Responsibility – Triggering Events

Mandatory Triggers –

- Settlement, final judgment, or final determination
- Withdrawal of owner's equity
- Publicly traded institutional triggers
- 2 Discretionary = 1 Mandatory Trigger

Discretionary Triggers –

- Accrediting agency action
- Loan violation
- Violation of licensing/authorizing agency requirement
- 90/10 failure
- High annual dropout rates
- Recent CDR outcomes

Financial Responsibility - Miscellaneous

- Offset agreements allowed
- Other surety, as approved by the Secretary, allowed
- Eliminated 45-day deadlines and increases based upon estimated losses
- Updates ratios and terms to reflect changes to FASB
- Grandfathers-in existing leases - applies new FASB requirements to new leases
- Grandfathers-in existing long-term debt - requires tie-in to PP&E only for new long-term debt

Questions and Answers