

Financial Responsibility Reporting Under the Borrower Defense to Repayment Rule

Last Updated: August 1, 2021

On September 23, 2019, the U.S. Department of Education published the final version of its 2019 “borrower defense to repayment” rule ([the “2019 Rule”](#)). The 2019 Rule, which took effect on July 1, 2020, revised the financial responsibility regulations that require institutions of higher education to report certain “triggering events” to the Department (located at [34 CFR 668.171](#)). If an institution fails to make a required notification under the 2019 Rule, the Department may take administrative action against the institution, to include the initiation of a proceeding to fine, limit, suspend, or terminate the institution’s participation in the federal financial aid programs.

On the following pages, we provide a chart that details the reporting obligations under the 2019 Rule. Pending further guidance from the Department, we suggest that institutions continue to submit financial responsibility notifications via email to FSAFRN@ed.gov.¹ The Department has not specified any required form or content for notices made under the 2019 Rule. However, in a [Q&A document](#) issued on June 3, 2019, the agency offered recommendations.² Institutions should continue to watch for updated guidance from the Department concerning the reporting of triggering events. The Department also has announced its intent to revisit the financial responsibility regulations in a forthcoming negotiated rulemaking.³

1. The Department established this email address for reporting purposes in [guidance](#) issued on March 15, 2019, detailing how institutions should report events under the 2016 version of the borrower defense rule ([the “2016 Rule”](#)). As of August 1, 2021, the Department has not issued any further guidance concerning how to report triggering events.

2. As of August 1, 2021, the Department has not issued any further guidance concerning the form or content of notices of triggering events.

3. Additional information regarding the Department’s negotiated rulemaking agenda for 2021-2022 is located [here](#). It is unlikely that any new regulations concerning financial responsibility reporting would become effective prior to July 1, 2023.

Triggering Event	Reporting Requirement	Citation
	Events occurring after July 1, 2020	All rule citations are to 34 C.F.R.
Final Judgments and Settlements. The institution incurs a liability from a settlement, final judgment, or final determination arising from an administrative or judicial action or proceeding initiated by a Federal or State entity. ⁴	Notify ED no later than 10 days of a liability being incurred under a settlement agreement, or receiving written notification of the final judgment or final determination. ⁵	668.171(c)(1)(i)(A); 668.171(f)(1)(i).
Accrediting Agency Action. The accrediting agency for the institution issued an order, such as a show cause order or similar action that, if not satisfied, could result in the withdrawal, revocation or suspension of institutional accreditation for failing to meet one or more of the agency's standards.	Notify ED no later than 10 days after receiving notice of the accrediting agency action.	668.171(d)(1); 668.171(f)(1)(iv).
State Agency Action. The institution's State licensing or authorizing agency notified the institution that it has violated a State licensing or authorizing agency requirement and that the agency intends to withdraw or terminate the institution's licensure or authorization if the institution does not take the steps necessary to come into compliance with that requirement.	Notify ED no later than 10 days after receiving notice of the State agency action.	668.171(d)(3); 668.171(f)(1)(vi).
Violation of a Security or Loan Agreement. The institution violated a provision or requirement in a security or loan agreement with a creditor and as provided under the terms of that security or loan agreement, a monetary or nonmonetary default or delinquency event occurs, or other events occur, that trigger or enable the creditor to require or impose on the institution, an increase in collateral, a change in contractual obligations, an increase in interest rates or payments, or other sanctions, penalties, or fees.	Notify ED no later than 10 days after the violation occurs, the creditor waives the violation, or the creditor imposes sanctions or penalties in exchange or as a result of granting the waiver.	668.171(d)(2); 668.171(f)(1)(v).

4. "A determination arising from an administrative action or proceeding initiated by a Federal or State entity means the determination was made only after an institution had notice and an opportunity to submit its position before a hearing official. A final determination arising from an administrative action or proceeding initiated by a Federal entity includes a final determination arising from any administrative action or proceeding initiated by the Secretary. For purposes of this section, the liability is the amount stated in the final judgment or final determination. A judgment or determination becomes final when the institution does not appeal or when the judgment or determination is not subject to further appeal." 668.171(c)(1)(i)(A).

5. The 2019 Rule does not include a specific reporting timeframe for settlements. We believe this to be a drafting oversight, and anticipate that ED will expect reporting within 10 days of a liability being incurred under a settlement agreement.

Triggering Event	Reporting Requirement	Citation
	Events occurring after July 1, 2020	All rule citations are to 34 C.F.R.
90/10 Rule Failure. For its most recently completed fiscal year, a proprietary institution did not receive at least 10 percent of its revenue from sources other than title IV, HEA program funds.	Notify ED no later than 45 days after the end of the institution's fiscal year. ⁶	668.171(d)(4); 668.171(f)(1)(vii).
Withdrawal of Equity. For a proprietary institution whose composite score is less than 1.5, there is a withdrawal of owner's equity from the institution by any means (e.g., a capital distribution that is the equivalent of wages in a sole proprietorship or partnership, a distribution of dividends or return of capital, or a related party receivable), unless the withdrawal is a transfer to an entity included in the affiliated entity group on whose basis the institution's composite score was calculated.	<ul style="list-style-type: none"> For a distribution of dividends or return of capital, notify ED no later than 10 days after the dividends are declared or the amount of return of capital is approved. For a related party receivable, notify ED no later than 10 days after that receivable occurs. For a capital distribution that is the equivalent of wages in a sole proprietorship or partnership, notify ED no later than 10 days after the date the Secretary notifies the institution that its composite score is less than 1.5.⁷ 	668.171(c)(1)(i)(B); 668.171(f)(1)(ii).
Publicly Traded Schools. <ul style="list-style-type: none"> The SEC issues an order suspending or revoking the registration of the institution's securities or suspends trading of the institution's securities on any national securities exchange; The national securities exchange on which the institution's securities are traded notifies the institution that it is not in compliance with the exchange's listing requirements and, as a result, the institution's securities are delisted, either voluntarily or involuntarily, pursuant to the rules of the relevant national securities exchange; or The SEC is not in timely receipt of a required report and did not issue an extension to file the report. 	Notify ED no later than 10 days after the date that: <ul style="list-style-type: none"> The SEC issues an order suspending or revoking the registration of the institution's securities pursuant to Section 12(j) of the Exchange Act or suspends trading of the institution's securities on any national securities exchange pursuant to Section 12(k) of the Exchange Act; or The national securities exchange on which the institution's securities are traded involuntarily delists its securities, or the institution voluntarily delists its securities, pursuant to the rules of the relevant national securities exchange. 	668.171(c)(2); 668.171(f)(1)(iii).

6. Proprietary institutions are already required to provide this notice under 668.28(c)(3).

7. "In response to that notice, the institution must report the total amount of the wage-equivalent distributions it made during its prior fiscal year and any distributions that were made to pay any taxes related to the operation of the institution. During its current fiscal year and the first six months of its subsequent fiscal year (18-month period), the institution is not required to report any distributions to the Secretary, provided that the institution does not make wage-equivalent distributions that exceed 150 percent of the total amount of wage-equivalent distributions it made during its prior fiscal year, less any distributions that were made to pay any taxes related to the operation of the institution. However, if the institution makes wage-equivalent distributions that exceed 150 percent of the total amount of wage-equivalent distributions it made during its prior fiscal year less any distributions that were made to pay any taxes related to the operation of the institution at any time during the 18-month period, it must report each of those distributions no later than 10 days after they are made, and the Secretary recalculates the institution's composite score based on the cumulative amount of the distributions made at that time." 668.171(c)(1)(i)(B).

Triggering Event	Reporting Requirement	Citation
	Events occurring after July 1, 2020	All rule citations are to 34 C.F.R.
High Dropout Rates. As calculated by the Secretary, the institution has high annual dropout rates.	The 2019 Rule does not include a reporting requirement for high dropout rates, presumably because ED will calculate these rates and thus requires no notification.	668.171(d)(5).
High Cohort Default Rates. The institution's two most recent official cohort default rates are 30 percent or greater, as determined under subpart N of this part, unless: <ul style="list-style-type: none"> • The institution files a challenge, request for adjustment, or appeal under that subpart with respect to its rates for one or both of those fiscal years; and • That challenge, request, or appeal remains pending, results in reducing below 30 percent the official cohort default rate for either or both of those years, or precludes the rates from either or both years from resulting in a loss of eligibility or provisional certification. 	The 2019 Rule does not include a reporting requirement for high cohort default rates, presumably because ED will calculate these rates and thus requires no notification.	668.171(d)(6).

Submission of Arbitral and Judicial Records

The 2016 Rule revised [34 CFR 685.300](#) to require institutions to submit to the Department copies of specified judicial and arbitral records where borrower defense claims were at issue. The 2019 Rule eliminated these requirements in their entirety.

Inquiries and Disclaimer

Institutions with questions regarding the reporting requirements set out above are welcome to contact [Aaron Lacey](#) at (314) 552-6405 or alacey@thompsoncoburn.com. Aaron Lacey is the Chair of Thompson Coburn's Higher Education practice, host of the firm's popular Higher Education Webinar Series, and editorial director of [REGucation](#), the firm's higher education law and policy blog. In 2017, Aaron was appointed by the U.S. Department of Education to serve as one of 17 primary negotiators charged with overhauling the "borrower defense" rule. The Department designated Aaron to represent and negotiate on behalf of general counsels, attorneys, and compliance officers at institutions of higher education nationwide.

Please note that the purpose of this document is to provide news and information on legal issues and all content provided is for informational purposes only and should not be considered legal advice. The transmission of information from this document does not establish an attorney-client relationship with the reader. If you desire legal advice for a particular situation, you should consult an attorney.



thompsoncoburn.com

Chicago

Dallas

Los Angeles

New York

Southern Illinois

St. Louis

Washington, D.C.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.