

WELCOME & INTRODUCTION

- **Aaron D. Lacey**
 - Partner, Higher Education Practice, Thompson Coburn LLP.
- **Higher Education Practice**
 - Provide regulatory counsel on federal, state, and accrediting agency laws and standards (e.g., Title IV, Title IX, Clery, consumer information).
 - Assist with postsecondary transactions, contract drafting and negotiation, policy creation, and compliance systems design.
 - Represent institutions in student and employee litigation, government investigations, administrative proceedings, audits, and reviews.



WELCOME & INTRODUCTION

- **Prior Experience**
 - Senior Vice President of Regulatory Affairs & Strategic Development for postsecondary institution. Oversaw regulatory, compliance, and government affairs matters for 24 campus locations in Midwest and Southeast United States, as well as for online division.
 - Attorney in DC Higher Education Practice. Provided regulatory and policy guidance, managed agency proceedings, drafted and negotiated wide variety of agreements.



WEBINAR SERIES SCHEDULE

- **The Proposed Borrower Defense Framework (August 24, 2016)**
- Proposed Changes to the Financial Responsibility Standards (August 31, 2016)
- The Proposed Elimination of Arbitration Clauses (September 7, 2016)
- The Proposed Repayment Rate for Proprietary Schools (September 14, 2016)

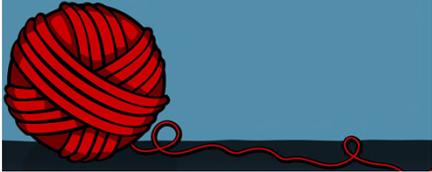


PRESENTATION OUTLINE

- The BD Rulemaking
- The Current BD Framework
- The Proposed BD Framework
 - The Proposed Definition of BD Claim
 - The Proposed Individual Claim Process
 - The Proposed Group Claim Process
 - Proposed Methods for Calculating Relief
- TC Resources



THE BORROWER DEFENSE RULEMAKING



THE CATALYST FOR CHANGE

Prior to 2015, ED had only received **five** DTR claims over the course of 20 years - then Corinthian. As of June 24, 2016:

- **26,603** BD claims filed.
- **\$73,110,502 discharged** (with an additional \$97,613,625 in closed school discharges).

Fourth Report of the Special Master for Borrower Defense to the Under Secretary (June 29, 2016).



THE RULEMAKING TIMELINE

DATE	2016 RULEMAKING EVENTS
Jan. – Mar.	• Negotiated rulemaking committee meets
June 16	• Proposed rules published
August 1	• Comment period closes
Nov. 1	• Deadline for publication of final rule*
July 1, 2017	• Effective date of new rule

*Pursuant to Section 482(c) of the HEA, ED must publish final regulations before November 1 of a given year in order for them to take effect on July of the following year.



ELEMENTS OF THE PROPOSED RULE

Borrower Defense Framework

Financial Responsibility Triggers

Arbitration Agreements

Closed School Discharge

False Certification Discharge

Misrepresentation

Repayment Rates for Prop. Schools



THE CURRENT BORROWER DEFENSE FRAMEWORK




THE CURRENT BD FRAMEWORK

In 1993, Congress created the Direct Loan program. As part of that legislation, Congress directed:

[T]he 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[.]

HEA 455(h); 20 USC 1087e(h).



THE CURRENT BD FRAMEWORK

The following year, ED introduced at 34 CFR § 685.206(c) the basic framework that still exists today:

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    graph TD
      A[ED initiates DL collection proceeding] --> B[Borrower asserts defense against repayment]
      B --> C[ED considers defense]
      C --> D[ED forgives loan amount]
      C --> E[ED has 3 years to initiate separate proceeding to recover forgiven amount from institution]
      D --> E
  
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THE CURRENT BD FRAMEWORK

Under current law, a **defense** includes:

[A]ny act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.

34 CFR § 685.206(c)



THE CURRENT BD FRAMEWORK

In 1995 Notice of Interpretation, ED added that cause of action must directly relate to the **loan** or to the school's **provision of educational services** for which the loan was provided.

- Personal injury tort claims or actions based on allegations of sexual or racial harassment, for example, would be excluded.

60 Fed. Reg. 37768 (Jul. 21, 1995).



THE CURRENT BD FRAMEWORK

With regard to timing:

- A borrower can assert a defense at any time, without regard to when the underlying act or omission occurred.
- ED only has three years from borrower's last award year to "initiate proceeding" to **recover** lost funds from school.

34 CFR § 685.206(c)(3).



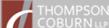
THE CURRENT BD FRAMEWORK

- No discussion in current law of the “process” ED would follow in a **recovery** action - no reference to Subpart G (FLST) or Subpart H (Audit/PR).
- However, in 1995, ED acknowledged schools “entitled to due process in these proceedings.”

60 Fed. Reg. 37768 (Jul. 21, 1995).



THE PROPOSED BORROWER DEFENSE FRAMEWORK

DRAWING THE LINE

Loans made before July 1, 2017	Loans made after July 1, 2017
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FOR LOANS MADE **BEFORE** JULY 1, 2017

Same definition of borrower defense	<ul style="list-style-type: none"> • Must be cause of action under State law • Must relate to loan or educational service
Same time limitation on asserting defense	<ul style="list-style-type: none"> • Borrower may assert defense at any time
New individual claim process	<ul style="list-style-type: none"> • No collection proceeding required • ED staff reviews claim
New group claim process	<ul style="list-style-type: none"> • ED initiates process (no claims required) • Hearing official reviews group claim
No time limitations on recovery actions	<ul style="list-style-type: none"> • No time limitation on ED recovery actions for individual or group claims
New methods for calculating relief	<ul style="list-style-type: none"> • New methods include valuation of institution's education

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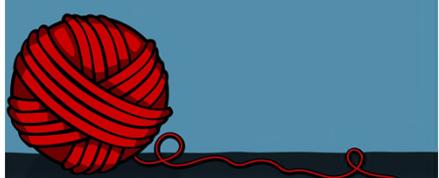
FOR LOANS MADE **AFTER** JULY 1, 2017

New definition of borrower defense claim	<ul style="list-style-type: none"> • Judgement, breach of contract, and substantial misrepresentation
New time limitations on asserting claim	<ul style="list-style-type: none"> • Few limitations, which vary by nature of claim
New individual claim process	<ul style="list-style-type: none"> • No collection proceeding required • ED staff reviews claim
New group claim process	<ul style="list-style-type: none"> • ED initiates process (no claims required) • Hearing official reviews group claim
No time limitations on recovery actions	<ul style="list-style-type: none"> • No time limitation on ED recovery actions for individual or group claims
New methods for calculating relief	<ul style="list-style-type: none"> • New methods include valuation of institution's education

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THE PROPOSED DEFINITION OF A BORROWER DEFENSE CLAIM

(FOR LOANS MADE AFTER JULY 1, 2017)



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BD CLAIM DEFINED

ED proposes that a borrower defense claim be certified where an act or omission of the school relates to (1) the loan or (2) the educational services for which the loan was provided, and:

- Was the basis for a **judgement** against the school;
- Was the basis for a **breach of contract**; or
- Was a **substantial misrepresentation**.

Proposed 34 CFR § 685.222(a)-(d). 

JUDGEMENT

Would include any non-default, favorable contested judgment based on State or Federal law in a court or administrative tribunal of competent jurisdiction.

No limitation on when a claim could be brought.

Proposed 34 CFR § 685.222(b). 

BREACH OF CONTRACT

Would include any breach, without regard to materiality. Contract could include “an enrollment agreement and any school catalogs, bulletins, circulars, student handbooks, or school regulations.”

No limitation on claims to discharge future amounts owed and **six-year limitation** (from the date of the breach) on claims to discharge amounts already paid.

Proposed 34 CFR § 685.222(c). 

SUBSTANTIAL MISREPRESENTATION

Would include any substantial misrepresentation made by the school or any contractual partner. No materiality standard, but borrower must show actual, **reasonable reliance**.

No limitation on claims to discharge future amounts owed and **six-year limitation** (from the date of discovery) on claims to discharge amounts already paid.

Proposed 34 CFR § 685.222(d). 

POINTS OF SIGNIFICANT CONCERN

- The proposed rule permits defense claims to be brought outside the context of a collection action and without regard to whether a borrower is able to make loan payments.
- The proposed rule exposes institutions to recovery actions that would be barred under existing law.



POINTS OF SIGNIFICANT CONCERN

- The proposed rule permits ED to adjudicate disputes between an institution and student concerning traditional common law actions and defenses (*e.g.*, breach of contract, misrepresentation).



POINTS OF SIGNIFICANT CONCERN

- The proposed rule does not include a materiality standard for breaches of contract. Instead, ED offers its assurance that it is “comfortable with its ability to grant relief commensurate to the injury to a borrower alleged under the breach of contract standard.”

81 Fed. Reg. 39341



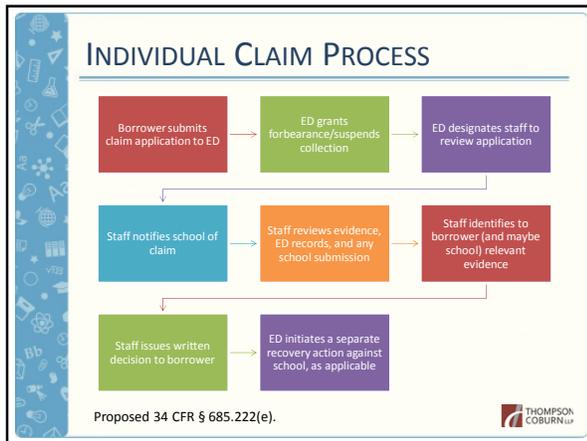
POINTS OF SIGNIFICANT CONCERN

- The proposed rule does not include a materiality standard for substantial misrepresentations.
- A borrower could establish a claim by providing evidence that the institution made a misrepresentation – even if by mistake – and that she reasonably relied upon it to her detriment. Neither the mistake, nor the detriment, need be material.
- Moreover, in group claims, there would be a rebuttable presumption of actual reliance.



THE PROPOSED INDIVIDUAL CLAIM PROCESS





INDIVIDUAL CLAIM PROCESS

- A borrower may request reconsideration at any time based on **new evidence**, which is relevant evidence (1) not previously provided and (2) not identified in the final decision as evidence relied upon.
- ED may reopen a claim at **any time** to consider new evidence.

Proposed 34 CFR § 685.222(e)(5).

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POINTS OF SIGNIFICANT CONCERN

- The proposed rule does not **require** than an independent, unbiased hearing official (*i.e.*, an Administrative Law Judge) oversee the claim.
- The proposed rule does not **require** ED to identify or supply to the school the documentation supplied by the borrower in support of the claim or to identify or supply the records the staff considers relevant to the borrower defense.

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POINTS OF SIGNIFICANT CONCERN

- The proposed rule does not **guarantee** a school the opportunity to provide information to ED or a timeframe for providing a response.
- The proposed rule does not **guarantee** a school the opportunity to appear at a hearing.
- The proposed rule does not **require** that ED notify the school in writing of its determination and the relief granted.



POINTS OF SIGNIFICANT CONCERN

- The proposed rule does not **guarantee** a school the right to request that ED reconsider a borrower defense determination upon the identification of new evidence.
- The proposed rule does not **contemplate** a process for a recovery action – not even the most basic guarantee of notice and an opportunity to be heard.



POINTS OF SIGNIFICANT CONCERN

- The proposed rule does not **contemplate** any form of appeal following the recovery action.
- There are **no limitations periods** on when a borrower can assert a defense for payment of future amounts owed, and there are **no limitations periods** for when ED can seek reimbursement from a school following a borrower’s successful defense.

Proposed 34 CFR § 685.222(e)(5).







GROUP CLAIM PROCESS (OPEN SCHOOL)

- If relief for the group has been denied in full or in part, a borrower may still file an **individual claim** based on the same underlying act or omission.
- ED may reopen a claim at **any time** to consider new evidence.

Proposed 34 CFR § 685.222(h).

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POINTS OF SIGNIFICANT CONCERN

- The proposed rule does not **require** ED to notify the school of the bases for the group's borrower defense, the initiation of the fact-finding process, or any procedure or timeline by which to request records and respond. The proposed rule merely indicates that ED will notify the school “**as practicable.**”



POINTS OF SIGNIFICANT CONCERN

- The proposed rule does not **require** ED to identify or provide to the school the documentation obtained by ED or otherwise supplied by borrowers in support of the claims, or to identify or supply the records the ED official considers relevant to the borrower defense.



POINTS OF SIGNIFICANT CONCERN

- The proposed rule does not **guarantee** a school the opportunity to provide information to ED, or specify a timeframe for providing a response.
- The proposed rule does not **guarantee** a school the opportunity to appear at a hearing.



POINTS OF SIGNIFICANT CONCERN

- The proposed rule states that after reaching a determination with regard to a group borrower defense claim, an institution may appeal. However, the new rule proposes **no procedures for the governance of the appeal.**



POINTS OF SIGNIFICANT CONCERN

- The proposed rule does not **guarantee** a school the opportunity to submit information, or require ED to review such information, in connection with a hearing official's determination of the appropriate amount of **relief** to grant in a group claim.



POINTS OF SIGNIFICANT CONCERN

- There are **no limitations** periods on when a borrower can assert a defense for payment of future amounts owed, and there are **no limitations** periods for when ED can seek reimbursement from a school following a borrower's successful defense.



POINTS OF SIGNIFICANT CONCERN

- A borrower would have the opportunity to seek a more favorable adjudication on a claim that has already been previously concluded by a judgment on the merits made by a hearing official, and could seek that adjudication from a member of the Department's **staff**.
- ED may reopen a claim at **any time** to consider new evidence.



PROPOSED METHODS FOR CALCULATING RELIEF



CALCULATING RELIEF

- The proposed rule provides that the amount of relief will be calculated using one of several methods proposed in the rule or “such other method as the Secretary may determine.”

Proposed 34 CFR § 685.222(i).



CALCULATING RELIEF

Appendix A (**Method One**)

- The difference between what the borrower paid, and **what a reasonable borrower would have paid** had the school made an accurate representation as to the issue that was the subject of the substantial misrepresentation underlying the borrower defense claim.

Proposed Appendix A to Subpart B of Part 685. 

CALCULATING RELIEF

Appendix A (**Method Two**)

- The difference between the amount of financial charges the borrower **could have reasonably believed the school was charging**, and the actual amount of financial charges made by the school, for claims regarding the cost of a borrower's program of study.

Proposed Appendix A to Subpart B of Part 685. 

CALCULATING RELIEF

Appendix A (**Method Three**)

- The total amount of the borrower's economic loss, less **the value of the benefit**, if any, of the education obtained by the student... ED will consider any evidence indicating that no identifiable benefit of the education was received by the student.

Proposed Appendix A to Subpart B of Part 685. 

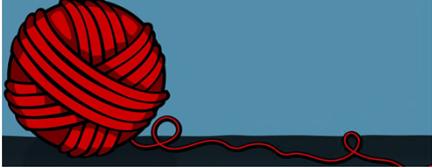
CALCULATING RELIEF

- The **value of the benefit of the education** may include transferable credits obtained and used by the borrower; and for gainful employment programs, qualifying placement in an occupation within the Standard Occupational Classification (SOC) code for which the training was provided, provided the borrower's earnings meet the expected salary for the program's designated occupations or field, as determined using an earnings benchmark for that occupation.

Proposed Appendix A to Subpart B of Part 685.



TC RESOURCES




RESOURCES FROM TC

- Borrower defense webinar series on demand.
- [REGucation](#) higher education law and policy blog.




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An electronic version of this presentation will be distributed to all participants, and is available upon request.



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