

Last Updated: May 12, 2019

On March 15, 2019, the U.S. Department of Education released much anticipated guidance ([the 2019 Guidance](#)) detailing how the agency would go about implementing the 2016 version of its complex and controversial “borrower defense” rule ([the 2016 Rule](#)). The 2016 Rule was scheduled to take effect on July 1, 2017, but was delayed by the current administration. Following an October 2018 decision by the U.S. District Court for the District of Columbia, the delay was set aside, and the 2016 Rule took effect.

Under the 2016 Rule, the financial responsibility regulations found at [34 CFR 668.171](#) have been augmented to require all institutions of higher education to report a wide range of events to the Department. Because the new rule was officially effective July 1, 2017, institutions must report certain events that occurred between July 1, 2017, and March 15, 2019, as well as events that occur in the future. In order to help institutions to comply with these new requirements, we provide below a chart that details the various reporting obligations.

Pursuant to the 2019 Guidance, financial responsibility notifications should be sent via email to FSAFRN@ed.gov. Significantly, there is no standard form or reporting format for making a required notice. Under the new rule, if an institution fails to make a required notification, 668.171(h)(2) empowers the Department to 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.

Reportable Event	Reporting Timeframe		Citation
	Events occurring between July 1, 2017 and March 15, 2019.	Events occurring after March 15, 2019.	
Final Judgments and Settlements. The institution is required to pay any debt or incurs any liability arising from a final judgment in a judicial proceeding or from an administrative proceeding or determination, or from a settlement.	Notify ED by May 14, 2019 if a qualifying event occurred between the fiscal year end for your institution's most recent annual audit submission and March 15, 2019.	Notify ED within 10 days after a payment was required or a liability was incurred.	All rule citations are to 34 C.F.R. 668.171(c)(1)(i)(A); 668.171(h)(1)(i)(B); 2019 Guidance.
Agency BDR Litigation. The institution is being sued in an action brought on or after July 1, 2017 by a Federal or State authority for financial relief on claims related to the making of the Direct Loan for Enrollment at the school or the provision of educational services and the suit has been pending for 120 days.	Notify ED by May 14, 2019 if Agency BDR Litigation occurred after July 1, 2017, has been pending for more than 120 days, and was still pending as of March 15, 2019.	Notify ED within 10 days after the institution is served with the complaint and 10 days after the suit has been pending for 120 days.	668.171(c)(1)(i)(B); 668.171(h)(1)(i)(A); 2019 Guidance.

Reportable Event	Reporting Timeframe		Citation All rule citations are to 34 C.F.R.
	Events occurring between July 1, 2017 and March 15, 2019.	Events occurring after March 15, 2019.	
Other Qualifying Litigation. The institution is being sued in an action brought on or after July 1, 2017 that is not Agency BDR Litigation and: (1) the institution has filed a motion for summary judgment or summary disposition and that motion has been denied or the court has issued an order reserving judgment on the motion; (2) the institution has not filed a motion for summary judgment or summary disposition by the deadline set for such motions by the court or agreement of the parties; or (3) if the court did not set a deadline for filing a motion for summary judgment and the institution did not file such a motion, the court has set a pretrial conference date or trial date and the case is pending on the earlier of those two dates.	Notify ED by May 14, 2019 if qualifying Other Litigation occurred after July 1, 2017, any one of the summary judgment-related standards has been met (see column to left), and the matter was still pending as of March 15, 2019.	Notify ED within 10 days after the institution is served with the complaint; 10 days after the court sets the dates for the earliest of the triggering events, provided that, if the deadline is set by procedural rules, notice of the applicable deadline must be included with notice of the service of the complaint; and 10 days after the earliest of the applicable events occurs.	668.171(c)(1)(ii); 668.171(h)(1)(i); 2019 Guidance.
Accreditor Teach-Out Notice. The institution was required by its accrediting agency that it must submit a teach-out plan, for a reason described in 602.24(c)(1), that covers the closing of the institution or any of its branches or additional locations.	Notify ED by May 14, 2019 if the triggering event occurred between the fiscal year end for your institution's most recent annual audit submission and March 15, 2019.	Notify ED within 10 days after the institution is notified by its accrediting agency that it must submit a teach-out plan.	668.171(c)(1)(iii); 668.171(h)(1)(iii); 2019 Guidance.
Withdrawal of Equity. For a proprietary institution whose composite score is less than 1.5, any withdrawal of owner's equity from the institution by any means, including by declaring a dividend, unless the transfer is to an entity included in the affiliated entity group on whose basis the institution's composite score was calculated.	Notify ED by May 14, 2019 if the withdrawal occurred between the fiscal year end for your institution's most recent annual audit submission and March 15, 2019.	Notify ED within 10 days after the withdrawal is made.	668.171(c)(1)(v); 668.171(h)(1)(iv); 2019 Guidance.
90/10 Failure. For a proprietary institution if, for its most recently completed fiscal year, the institution did not derive at least 10 percent of its revenue from sources other than title IV, HEA program funds, as required under §668.28(c).	Notify ED by May 14, 2019 if the institution failed 90/10 for any fiscal year beginning on or after July 1, 2017.	Notify ED within 45 days after the end of the institution's fiscal year (as already required under 668.28(c)(3)).	668.171(d); 668.171(h)(1)(v); 2019 Guidance.
Publicly Traded Schools. The SEC warns the institution that (1) it may suspend trading on the institution's stock; (2) the institution failed to file a required annual or quarterly report with the SEC within the time period prescribed for that report or by any extended due date under 17 CFR 240.12b-25; or (3) the exchange on which the institution's stock is traded notifies the institution that it is not in compliance with exchange requirements, or its stock is delisted.	Notify ED by May 14, 2019 of any qualifying events that occurred after July 1, 2017.	Notify ED within 10 days after the SEC or exchange warns, notifies, or takes action against the institution, or 10 days after any extension granted by the SEC.	668.171(e); 668.171(h)(1)(vi); 2019 Guidance.

Reportable Event	Reporting Timeframe		Citation
	Events occurring between July 1, 2017 and March 15, 2019.	Events occurring after March 15, 2019.	
State or Accreditor Action. The institution is cited by a State licensing or authorizing agency for failing State or agency requirements; or the institution is or was placed on probation or issued a show-cause order, or placed on an accreditation status that poses an equivalent or greater risk to its accreditation, by its accrediting agency for failing to meet one or more of the agency's standards.	Notify ED by May 14, 2019 of any qualifying events that occurred after July 1, 2017, unless they have been resolved as of March 15, 2019.	Notify ED within 10 days after the institution is cited for violating a State or agency requirement, or 10 days after the institution's accrediting agency places the institution on that status.	All rule citations are to 34 C.F.R. 668.171(g)(2); 668.171(g)(5); 668.171(h)(1)(vii)-(viii); 2019 Guidance.
Violation of Loan Agreement. The institution violates a provision or requirement in a loan agreement and, as provided under the terms of a security or loan agreement between the institution and the creditor, 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 by May 14, 2019 of any qualifying events that occurred after July 1, 2017.	Notify ED within 10 days after a loan violation occurs, the creditor waives the violation, or the creditor imposes sanctions or penalties in exchange or as a result of the waiver.	668.171(g)(6); 668.171(h)(1)(ix); 2019 Guidance.

Submission of Arbitral and Judicial Records

Institutions should keep in mind that there are additional reporting obligations that apply where an institution is sued and the dispute is based on a "borrower defense" claim. These reporting obligations are not located in the section of the regulations concerning financial responsibility. In such cases, [34 CFR 685.300](#) obligates institutions to provide actual copies of specified judicial and arbitral records to the Department as a condition of participating in the federal financial aid programs. Copies of arbitral and judicial records submitted under these rules must be sent to borrowerdefense@ed.gov.

Reportable Event	Reporting Timeframe		Citation
	Events occurring between July 1, 2017 and March 15, 2019.	Events occurring after March 15, 2019.	
Judicial Records. Institutions must submit a copy of the following records to ED for any claim concerning a borrower defense claim filed in a lawsuit by the school against the student or by any party, including a government agency, against the school: <ul style="list-style-type: none"> • The complaint and any counterclaim; • Any dispositive motion filed by a party to the suit; and • The ruling on any dispositive motion and the judgment issued by the court. 	By June 13, 2019, submit judicial records to ED for any lawsuit based on a BDR claim that was pending as of July 1, 2017, or initiated after July 1, 2017.	In the future, submit judicial records within 30 days of filing or receipt, as applicable, of the complaint, answer, or dispositive motion, and within 30 days of receipt of any ruling on a dispositive motion or a final judgment.	All rule citations are to 34 C.F.R. 685.300(h); 2019 Guidance.

Reportable Event	Reporting Timeframe		Citation All rule citations are to 34 C.F.R.
	Events occurring between July 1, 2017 and March 15, 2019.	Events occurring after March 15, 2019.	
<p>Arbitral Records. Institutions must submit a copy of the following records to ED for any claim filed in arbitration by or against the school concerning a borrower defense claim:</p> <ul style="list-style-type: none"> • The initial claim and any counterclaim; • The arbitration agreement filed with the arbitrator or arbitration administrator; • The judgment or award, if any, issued by the arbitrator or arbitration administrator; • If an arbitrator refuses to administer or dismisses a claim due to the school's failure to pay required fees, any communication the school receives from the arbitrator related to such a refusal; and • Any communication the school receives from an arbitrator that a pre dispute arbitration agreement regarding educational services provided by the school does not comply with the administrator's fairness principles, rules or similar requirements. 	By June 13, 2019, submit arbitral records to ED for any arbitration based on a BDR claim that was pending as of July 1, 2017, or initiated after July 1, 2017.	In the future, submit arbitral records within 60 days of filing by the school of any such record with the arbitrator and within 60 days of receipt by the school of any such record filed or sent by someone other than the school, such as the arbitrator or the student.	685.300(g); 2019 Guidance.

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 leader 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 October 2017, Aaron was selected 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 postsecondary institutions nationwide.

Established in 1929, Thompson Coburn LLP is a full-service law firm with locations in St. Louis, Chicago, Los Angeles, and Washington, D.C. With nearly 400 lawyers experienced in virtually all major industries and areas of law, we serve clients throughout the United States. Our higher education practice features a group of attorneys with extensive experience managing regulatory, policy, and lobbying matters for postsecondary institutions. These attorneys offer general counsel, compliance, and training services to small and mid-size colleges and universities, while providing specialized services to large institutions with in-house counsel. We work with institutions in all sectors of higher education, from state flagship universities to small, private career schools. Our knowledge and experience informs our representation, and makes it both stronger and more efficient.

Disclaimer

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.