

**Last Updated: July 9, 2022**

On July 6, 2022, the U.S. Department of Education (the “Department”) released the unofficial version of its proposed rewrite of the controversial borrower defense to repayment (“BDR”) rule. The BDR rule details the process by which former students can seek to have their federal loans forgiven based on misconduct by their institution. The unofficial version of the proposed rule can be found [here](#). The Department anticipates publishing the official Notice of Proposed Rulemaking (“NPRM”) in the Federal Register “sometime next week.”

Below, we provide a redline that compares the changes proposed in the NPRM to the current version of the BDR rule. We have created this document to assist institutions as they work to understand the proposed changes and to prepare comments. Institutions interested in commenting on the proposed rule will have 30 days from the date the NPRM is officially published in the Federal Register.

We emphasize that while the NPRM covers several topics in addition to the BDR process (*e.g.*, dispute resolution, disability discharge, closed school loan discharge, false certification discharge, Public Service Loan Forgiveness), **this comparison only includes the proposed changes to the BDR claim process.**

Institutions with questions regarding the proposed BDR rule are welcome to contact Aaron Lacey ([alacey@thompsoncoburn.com](mailto:alacey@thompsoncoburn.com)), Jeff Fink ([jfink@thompsoncoburn.com](mailto:jfink@thompsoncoburn.com)), or Hope Watson ([hwatson@thompsoncoburn.com](mailto:hwatson@thompsoncoburn.com)). Aaron, Jeff, and Hope are all part of Thompson Coburn’s Higher Education Practice and routinely advise postsecondary institutions on matters involving borrower defense to repayment.

## **Disclaimer**

Please note that the purpose of this document is to provide information on a regulatory matter 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.

---

## **§ 600.41 Termination and emergency action proceedings.**

(a) If the Secretary believes that a previously designated eligible institution as a whole, or at one or more of its locations, does not satisfy the statutory or regulatory requirements that define that institution as an eligible institution, the Secretary may -

(1) Terminate the institution's eligibility designation in whole or as to a particular location -

(i) Under the procedural provisions applicable to terminations contained in 34 CFR 668.81, 668.83, 668.86, ~~668.87~~, 668.88, 668.89, 668.90 (a)(1), (a)(4), and (c) through (f), and 668.91; or

(ii) Under a show-cause hearing, if the institution's loss of eligibility results from -

(A) Its previously qualifying as an eligible vocational school;

(B) Its loss of accreditation or preaccreditation;

(C) Its loss of legal authority to provide postsecondary education in the State in which it is physically located;

(D) Its violations of the provisions contained in § 600.5(a)(8) or § 600.7(a);

(E) Its permanently closing; or

(F) Its ceasing to provide educational programs for a reason other than a normal vacation period or a natural disaster that directly affects the institution, a particular location, or the students of the institution or location;

(2) Limit, under the provisions of 34 CFR 668.86, the authority of the institution to disburse, deliver, or cause the disbursement or delivery of funds under one or more title IV, HEA programs as otherwise provided under 34 CFR 668.26 for the benefit of students enrolled at the ineligible institution or location prior to the loss of eligibility of that institution or location; and

(3) Initiate an emergency action under the provisions contained in 34 CFR 668.83 with regard to the institution's participation in one or more title IV, HEA programs.

(b) If the Secretary believes that an educational program offered by an institution that was previously designated by the Secretary as an eligible institution under the HEA does not satisfy relevant statutory or regulatory requirements that define that educational program as part of an eligible institution, the Secretary may in accordance with the procedural provisions described in paragraph (a) of this section -

(1) Undertake to terminate that educational program's eligibility under one or more of the title IV, HEA programs under the procedural provisions applicable to terminations described in paragraph (a) of this section;

(2) Limit the institution's authority to deliver, disburse, or cause the delivery or disbursement of funds provided under that title IV, HEA program to students enrolled in that educational program, as otherwise provided in 34 CFR 668.26; and

(3) Initiate an emergency action under the provisions contained in 34 CFR 668.83 with regard to the institution's participation in one or more title IV, HEA programs with respect to students enrolled in that educational program.

(c)

(1) An action to terminate and limit the eligibility of an institution as a whole or as to any of its locations or educational programs is initiated in accordance with 34 CFR 668.86(b) and becomes final 20 days after the Secretary notifies the institution of the proposed action, unless the designated department official receives by that date a request for a hearing or written material that demonstrates that the termination and limitation should not take place.

(2) Once a termination under this section becomes final, the termination is effective with respect to any commitment, delivery, or disbursement of funds provided under an applicable title IV, HEA program by the institution -

(i) Made to students enrolled in the ineligible institution, location, or educational program; and

(ii) Made on or after the date of the act or omission that caused the loss of eligibility as to the institution, location, or educational program.

(3) Once a limitation under this section becomes final, the limitation is effective with regard to any commitment, delivery, or disbursement of funds under the applicable title IV, HEA program by the institution -

(i) Made after the date on which the limitation became final; and

(ii) Made to students enrolled in the ineligible institution, location, or educational program.

(d) After a termination under this section of the eligibility of an institution as a whole or as to a location or educational program becomes final, the institution may not originate applications for, make awards of or commitments for, deliver, or disburse funds under the applicable title IV, HEA program, except -

(1) In accordance with the requirements of 34 CFR 668.26(c) with respect to students enrolled in the ineligible institution, location, or educational program; and

(2) After satisfaction of any additional requirements, imposed pursuant to a limitation under paragraph (a)(2) of this section, which may include the following:

(i) Completion of the actions required by 34 CFR 668.26(a) and (b).

(ii) Demonstration that the institution has made satisfactory arrangements for the completion of actions required by 34 CFR 668.26(a) and (b).

(iii) Securing the confirmation of a third party selected by the Secretary that the proposed disbursements or delivery of title IV, HEA program funds meet the requirements of the applicable program.

(iv) Using institutional funds to make disbursements permitted under this paragraph and seeking reimbursement from the Secretary for those disbursements.

(e) If the Secretary undertakes to terminate the eligibility of an institution, location, or program under paragraphs (a) and (b) of this section:

(1) If the basis for the loss of eligibility is the loss of accreditation or preaccreditation, the sole issue is whether the institution, location, or program has the requisite accreditation or preaccreditation. The presiding official has no authority to consider challenges to the action of the accrediting agency.

(2) If the basis for the loss of eligibility is the loss of legal authorization, the sole issue is whether the institution, location, or program has the requisite legal authorization. The presiding official has no authority to consider challenges to the action of a State agency in removing the legal authorization.

(3) If the basis for the loss of eligibility of a foreign graduate medical school is one or more annual pass rates on the U.S. Medical Licensing Examination below the threshold required in § 600.55(f)(1)(ii), the sole issue is whether one or more of the foreign medical school's pass rate or rates for the preceding calendar year fell below that threshold. For a foreign graduate medical school that opted to have the Educational Commission for Foreign Medical Graduates (ECFMG) calculate and provide the pass rates directly to the Secretary for the preceding calendar year as permitted under § 600.55(d)(2) in lieu of the foreign graduate medical school providing pass rate data to the Secretary under § 600.55(d)(1)(iii), the ECFMG's calculations of the school's rates are conclusive; and the presiding official has no authority to consider challenges to the computation of the rate or rates by the ECFMG.

#### **§ 668.71 Scope and special definitions.**

(a) If the Secretary determines that an eligible institution has engaged in substantial misrepresentation, the Secretary may -

(1) Revoke the eligible institution's program participation agreement, if the institution is provisionally certified under § 668.13(c);

(2) Impose limitations on the institution's participation in the title IV, HEA programs, if the institution is provisionally certified under § 668.13(c) ;

(3) Deny participation applications made on behalf of the institution; or

(4) Initiate a proceeding against the eligible institution under subpart G of this part.

(b) This subpart establishes the types of activities that constitute substantial misrepresentation by an eligible institution. An eligible institution is deemed to have engaged in substantial misrepresentation when the institution itself, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, marketing, advertising, recruiting or admissions services, makes a substantial misrepresentation about the nature of its educational program, its financial charges, or the employability of its graduates. Substantial misrepresentations are prohibited in all forms, including those made in any advertising, promotional materials, or in the marketing or sale of courses or programs of instruction offered by the institution.

(c) The following definitions apply to this subpart:

*Misrepresentation:* Any false, erroneous or misleading statement an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services makes directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to the Secretary. A misleading statement includes any statement that has the likelihood or tendency to mislead under the circumstances. [A misleading statement may be included in the institution's marketing materials, website, or any other communication to students or prospective students.](#) A statement is any communication made in writing, visually, orally, or through other means. Misrepresentation includes any statement that omits information in such a way as to make the statement false, erroneous, or misleading. Misrepresentation includes the dissemination of a student endorsement or testimonial that a student gives either under duress or because the institution required ~~the student to make~~ such an endorsement or testimonial to participate in a program.

[Misrepresentation also includes the omission of facts as defined under § 668.75.](#)

*Prospective student:* Any individual who has contacted an eligible institution for the purpose of requesting information about enrolling at the institution or who has been contacted directly by the institution or indirectly through advertising about enrolling at the institution.

*Substantial misrepresentation:* Any misrepresentation, [including omission of facts as defined under § 668.75,](#) on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment.

**§ 668.72 Nature of educational program [or institution.](#)**

Misrepresentation concerning the nature of an eligible institution's educational program includes, but is not limited to, false, erroneous or misleading statements concerning -

(a) The particular type(s), specific source(s), nature and extent of its institutional, programmatic, or specialized accreditation;

(b)

(1) ~~Whether a student may transfer~~ The general or specific transferability of course credits earned at the institution to ~~any~~ other institution(s); or

(2) ~~Conditions under which the institution will accept transfer~~ Acceptance of credits earned through prior work or at another institution; toward the educational program at the institution.

(c) Whether successful completion of a course of instruction qualifies a student -

(1) For acceptance to a labor union or similar organization; or

(2) To receive, to apply to take, or to take the examination required to receive, a local, State, or Federal license, or a nongovernmental certification required as a precondition for employment, or to perform certain functions in the States in which the educational program is offered, or to meet additional conditions that the institution knows or reasonably should know are generally needed to secure employment in a recognized occupation for which the program is represented to prepare students;

(d) The requirements for successfully completing the course of study or program and the circumstances that would constitute grounds for terminating the student's enrollment;

(e) Whether its courses are recommended or have been the subject of unsolicited testimonials or endorsements by -

(1) Vocational counselors, high schools, colleges, educational organizations, employment agencies, members of a particular industry, students, former students, or others; or

(2) Governmental officials for governmental employment;

(f) Its size, location, facilities, ~~or~~ equipment, or institutionally-provided equipment, books, or supplies;

(g) The availability, frequency, and appropriateness of its courses and programs in relation to the employment objectives that it states its programs are designed to meet;

~~(h) The nature, age, and availability of its training devices or equipment and their appropriateness to the employment objectives that it states its programs and courses are designed to meet;~~

~~(f)~~

(h) The number, availability, and qualifications, including the training and experience, of its faculty, instructors, and other personnel;

~~(j) The availability of part-time employment or other forms of financial assistance;~~

~~(k)~~

(i) The nature and availability of any tutorial or specialized instruction, guidance and counseling, or other supplementary assistance it will provide to its students before, during or after the completion of a course;

(j) The nature or extent of any prerequisites established for enrollment in any course;

(m) The subject matter, content of the course of study, or any other fact related to the degree, diploma, certificate of completion, or any similar document that the student is to be, or is, awarded upon completion of the course of study;

(n) Whether the academic, professional, or occupational degree that the institution will confer upon completion of the course of study has been authorized by the appropriate State educational agency. ~~This type of misrepresentation includes, in the case of a degree that has not been authorized by the appropriate State educational agency or that requires specialized accreditation, any failure by an eligible;~~

(m) Actual institutional selectivity rates, rankings, or student admissions profiles or requirements, if they are materially different from those included in the institution's marketing materials, website, or other communications made to the student or from those provided by the institution to national ranking companies, accrediting agencies, the Secretary, or others;

(n) The classification of the institution (nonprofit, public or proprietary) for purposes of its participation in title IV, HEA programs, if that is different from the classification determined by the Secretary;

(o) Specialized, programmatic, or institutional certifications, accreditation, or approvals that were not actually obtained, or that the institution fails to disclose these facts in any advertising or promotional materials that reference such degree; or

~~to remove from marketing materials, websites, or other communications to students within a reasonable period of time after such certifications or approvals are revoked or withdrawn;~~

(p) Assistance that will be provided in securing required externships or the existence of contracts with specific externship sites;

(q) Assistance that will be provided to obtain a high school diploma or General Educational Development Certificate (GED);

(r) The pace of completing the program or the time it would take to complete the program contrary to the stated length of the educational program; or

(s) Any matters required to be disclosed to prospective students under §§ 668.42 ~~and~~ 668.43, and 668.45 of this part.

**§ 668.73 Nature of financial charges or financial assistance.**

Misrepresentation concerning the nature of an eligible institution's financial charges includes, but is not limited to, false, erroneous, or misleading statements concerning -

(a) Offers of scholarships to pay all or part of a course charge;

(b) Whether a particular charge is the customary charge at the institution for a course;

(c) The cost of the program and the institution's refund policy if the student does not complete the program;

(d) The availability, amount, or nature of any financial assistance ~~offered~~available to students, ~~including a~~ from the institution or any other entity to pay the costs of attendance at the institution, including part-time employment, housing, and transportation assistance;

(e) A student's responsibility to repay any loans provided, regardless of whether the student is successful in completing the program and obtaining employment; ~~or~~

(ef) The student's right to reject any particular type of financial aid or other assistance, or whether the student must apply for a particular type of financial aid, such as financing offered by the institution; or

(g) The amount, method, or timing of payment of tuition and fees that the student would be charged for the program.

**§ 668.74 Employability of graduates.**

Misrepresentation regarding the employability of an eligible institution's graduates includes, but is not limited to, false, erroneous, or misleading statements concerning -

(a) The institution's relationship with any organization, employment agency, or other agency providing authorized training leading directly to employment;

(b) The institution's ~~plans~~intentions to maintain a placement service for graduates or to otherwise assist its graduates to obtain employment, including any requirements to receive such assistance;

(c) The institution's knowledge about the current or likely future conditions, compensation, or employment opportunities in the industry or occupation for which the students are being prepared;

(d) Whether employment is being offered by the institution exclusively for graduates of the institution, or that a talent hunt or contest is being conducted, including, but not limited to, through the use of phrases such as “Men/women wanted to train for \* \* \*,” “Help Wanted,” “Employment,” or “Business Opportunities”;

(e) Government job market statistics in relation to the potential placement of its graduates; ~~or~~

~~(f) Other requirements that are generally needed to be employed in the fields for which the training is provided, such as requirements related to commercial driving licenses or permits to carry firearms, and failing to disclose factors that would prevent an applicant from qualifying for such requirements,~~

(f) Actual licensure passage rates, if they are materially lower than those included in the institution's marketing materials, website, or other communications made to the student or prospective student; or

(g) (1) Actual employment rates, if they are materially lower than those included in the institution's marketing materials, website, or other communications made to the student or prospective student, including but not limited to:

(i) Rates that are calculated in a manner that is inconsistent with the standards or methodology set forth by the institution's accreditor or a State agency that regulates the institution, or in its institutional policy.

(ii) Actual rates that the institution discloses are inflated by means such as:

(A) Including individuals in an employment rate calculation who are not bona fide employees, such as individuals placed on a 1-day job fair, an internship, externship, or in employment subsidized by the institution;

(B) Including students in the employment rate calculation who were employed in the field prior to graduation;

(C) Excluding students from an employment rate calculation due to the difficulty of placing that student; or

(D) Excluding non-respondents to a survey for calculating an employment rate.

(2) Upon request, the institution must furnish to the Secretary documentation and other information used to calculate the institution's employment rate calculations.

§ 668.75 Omission of fact.

An omission of fact includes the concealment, suppression, or absence of material information relating to the nature of the institution's educational programs, financial charges, or the employability of the institution's graduates. An omission of fact is a misrepresentation under § 668.71 if a reasonable person would have considered the omitted information in making a decision to enroll or continue attendance at the institution. An omission of fact includes, but is not limited to, the concealment, suppression, or absence of material information or statement concerning—

(a) The entity that is actually providing the educational instruction, or implementing the institution's recruitment, admissions, or enrollment process;

(b) The availability of enrollment openings, or requirements for obtaining admission;

(c) The factors that would prevent an applicant from meeting the legal or other requirements to be employed in the field for which the training is provided, for reasons such as prior criminal records~~s~~record or preexisting medical conditions;

(d) The factors that would prevent an applicant from meeting the legal or other requirements to be employed, licensed, or certified in the field for which the training is provided because the academic, professional, or occupational degree or credential that the institution will confer upon completion of the course of study has not been authorized by the appropriate State educational or licensure agency, or requires specialized accreditation that the institution does not have; or,

(e) The nature of the institution's educational programs, the institution's financial charges, or the employability of the institution's graduates.

§ 668.79 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

**§ 668.81 Scope and special definitions.**

(a) This subpart establishes regulations for the following actions with respect to a participating institution or third-party servicer:

(1) An emergency action.

(2) The imposition of a fine.

(3) The limitation, suspension, or termination of the participation of the institution in a title IV, HEA program.

(4) The limitation, suspension, or termination of the eligibility of the servicer to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program.

(5) The determination of -

(i) Borrower defense to repayment claims that are brought by the Department against an institution under § 685.206 ~~or~~ § 685.222 or part 685, subpart D; and

(ii) Liability of an institution to the Secretary for losses to the Secretary arising from these claims.

(b) This subpart applies to an institution or a third-party servicer that violates any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA.

(c) This subpart does not apply to a determination that -

(1) An institution or any of its locations or educational programs fails to qualify for initial designation as an eligible institution, location, or educational program because the institution, location, or educational program fails to satisfy the statutory and regulatory provisions that define an eligible institution or educational program with respect to the Title IV, HEA program for which a designation of eligibility is sought;

(2) An institution fails to qualify for initial certification or provisional certification to participate in any Title IV, HEA program because the institution does not meet the factors of financial responsibility and standards of administrative capability contained in subpart B of this part;

(3) A participating institution's or a provisionally certified participating institution's period of participation, as specified under § 668.13, has expired; or

(4) A participating institution's provisional certification is revoked under the procedures in § 668.13.

(d) This subpart does not apply to a determination by the Secretary of the system to be used to disburse Title IV, HEA program funds to a participating institution (i.e., advance payments and payments by way of reimbursements).

(e) The proceedings described in this subpart provide the institution's sole opportunity for a hearing on the existence and amount of the debt that is required by applicable law prior to the Department collecting the debt from any available funds, including but not limited to offsetting the debt or any liability against funds to be provided to an institution pursuant to any Title IV, HEA program in which that institution participates.

(f) Nothing contained in this subpart limits the right of the Department to gather information, including by subpoena, or conduct any examination, audit, program review, investigation, or other review authorized by other applicable law.

(g) Unless directed by a court of competent jurisdiction, the hearing official, or the Secretary for good cause, if a collateral attack is brought in any court concerning all or any part of any proceeding under this subpart, the challenged proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to timely act as directed in a proceeding authorized by this subpart shall be excused based on the pendency of such court proceeding.

#### ~~§ 668.87 Borrower defense and recovery proceedings.~~

##### ~~(a) Procedures.~~

~~(1) A designated department official begins a borrower defense and recovery proceeding against an institution by sending the institution a notice by certified mail, return receipt requested. This notice~~

~~-~~

~~(i) Informs the institution of the Secretary's intent -~~

~~(A) To determine the validity of borrower defense claims on behalf of a group under § 685.222(h), to demonstrate the validity of borrower defense claims already approved, or both, as applicable; and~~

~~(B) To recover from the institution by offset, by claim on a letter of credit or other protection provided by the institution, or otherwise, for losses on account of borrower defense claims asserted on behalf of the group and borrower defense claims already approved, as applicable;~~

~~(ii) Includes a statement of facts and law sufficient to show that the Department is entitled to grant any borrower defense relief asserted within the statement, and recover for the amount of losses to the Secretary caused by the granting of such relief;~~

~~(iii) Specifies the date on which the Secretary intends to take action to recover the amount of losses arising from the granting of such relief, which date will be at least 20 days from mailing of the notice of intent and informs the institution that the Secretary will not take action to recover~~

~~the amount of such loss on the date specified if the designated department official receives, by that date, a written response from the institution indicating why the Secretary should not recover. The notice shall also inform the institution that if it wishes to request a hearing pursuant to this subpart, the institution must include such a request with its written response; and~~

~~(iv) Informs the institution whether the designated Department official intends to proceed with—~~

~~(A) A single action; or~~

~~(B) An action in two phases—~~

~~(1) The determination whether the institution's act or omission gave rise to valid borrower defense claims; and~~

~~(2) The determination of the amount of borrower defense relief.~~

~~(2) Although the hearing official shall have the discretion to bifurcate proceedings with, or without, a motion of either party, any decision by the designated department official to bifurcate the proceeding in accordance with paragraph (a)(1)(iv)(B) of this section may only be modified on motion with good cause shown.~~

~~(3) A hearing official conducts a hearing in accordance with § 668.89.~~

~~**(b) Effect of a response by the institution.**~~

~~(1) If the institution submits a written response, but does not therein request a hearing, the designated department official, after considering that material, notifies the institution whether the Secretary will take the proposed recovery action for borrower defense claims and, if so, the date of such action and the amount of losses.~~

~~(2) If the institution submits a response and requests a hearing by the time specified in the notice under paragraph (a)(1)(iii) of this section, the designated department official may, in that official's sole discretion, withdraw the notice or transmit the response and request for hearing to the Office of Hearings and Appeals, which sets the date and the place for the hearing. The date of the hearing is at least 15 days after the designated department official receives the request. No liability shall be imposed on the institution prior to the hearing.~~

~~**(c) Limitations on participation.** The parties in any borrower defense and recovery proceeding are the Department and the institution(s) against which the Department seeks to recover losses caused to the Department as a result of borrower defense relief. Borrowers are not permitted to intervene or appear in this proceeding, either on their own behalf or on behalf of any purported group, except as witnesses put forth by either party. However, nothing in this section limits the rights available to borrowers under other regulations, including 34 CFR 685.206 and 685.222.~~

~~**(d) Effect on the borrower.** No proceeding under this subpart imposes liability on any borrower who has already obtained a discharge in an individual proceeding under 34 CFR 685.206(c) or 34 CFR 685.222(e). A borrower defense and recovery proceeding may determine whether and how much~~

~~relief is due to, and whether and how much of a loan remains owing by, a borrower participating in a group process proceeding as defined in 34 CFR 685.222(f) through (h).~~

### **§ 668.89 Hearing.**

(a) A hearing is an orderly presentation of arguments and evidence conducted by a hearing official. At the discretion of the hearing official, any right to a hearing may be satisfied by one or more of the following: Summary disposition pursuant to § 668.88(e), with or without oral argument; an oral evidentiary hearing conducted in person, by telephone, by video conference, or any combination thereof; or a review limited to written evidence.

(b)

(1) Notwithstanding any provision to the contrary, the hearing official sets the procedures to be used in the hearing, and may take steps to expedite the proceeding as appropriate.

(2) The formal rules of evidence and procedures applicable to proceedings in a court of law are not applicable. However, discussions of settlement between the parties or the terms of settlement offers are not admissible to prove the validity or invalidity of any claim or defense.

(3)

(i) The proponent of any factual proposition has the burden of proof with respect thereto.

(ii) The designated department official has the burden of persuasion in any fine, suspension, limitation, or termination proceeding under this subpart.

(iii) ~~The~~ For borrower defenses under §§ 685.206(c) and (e), and 685.222, the designated department official has the burden of persuasion in a borrower defense and recovery action; however, for a borrower defense claim based on a substantial misrepresentation under § 682.222(d), the designated department official has the burden of persuasion regarding the substantial misrepresentation, and the institution has the burden of persuasion in establishing any offsetting value of the education under § 685.222(i)(2)(i).

(4) Discovery, as provided for under the Federal Rules of Civil Procedure, is not permitted.

(5) The hearing official accepts only evidence that is relevant and material to the proceeding and is not unduly repetitious.

(6) The hearing official may restrict the number of witnesses or exclude witnesses to avoid undue delay or presentation of cumulative evidence. Any witness permitted to appear may do so via telephonic, video, or other means, with the approval of the hearing official.

(7) Either party may call qualified expert witnesses. Each party will be limited to calling three expert witnesses, as a matter of right, including any rebuttal or surrebuttal witnesses. Additional expert witnesses shall be allowed only by order of the hearing official, granted only upon a showing of good cause.

(i) At a date set by the hearing official, each party shall serve the other with any report prepared by each of its expert witnesses. Each party shall serve the other party with a list of any rebuttal expert witnesses and a rebuttal report prepared by each such witness not later than 60 days after the deadline for service of expert reports, unless another date is set by the hearing official. A rebuttal report shall be limited to rebuttal of matters set forth in the expert report for which it is offered in rebuttal. If material outside the scope of fair rebuttal is presented, a party may file a motion not later than five days after the deadline for service of rebuttal reports, seeking appropriate relief with the hearing official, including striking all or part of the report, leave to submit a surrebuttal report by the party's own experts, or leave to call a surrebuttal witness and to submit a surrebuttal report by that witness.

(ii) No party may call an expert witness at the hearing unless the party has listed the expert and has provided reports as required by this section.

(iii) Each report shall be signed by the expert and contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored or co-authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified or sought to testify as an expert at trial or hearing, or by deposition, within the preceding four years. A rebuttal or surrebuttal report need not include any information already included in the initial report of the witness.

(8)

(i) Except as provided in paragraph (b)(8)(ii) of this section, if an institution has been required through compulsory process under section 490A of the HEA or other applicable law to submit to the United States or to the Department material regarding an express or an implied representation, the institution cannot thereafter, in any proceeding under this subpart in which it is alleged that the representation was false, erroneous, or misleading, and for any purpose relating to the defense of such allegation, introduce into the record, either directly or indirectly through references contained in documents or oral testimony, any material of any type that was required to be but was not timely submitted in response to that compulsory process.

(ii) The hearing official shall, upon motion at any stage, exclude all material that was required to be but was not timely submitted in response to a compulsory process

described in paragraph (b)(8)(i) of this section, or any reference to such material, unless the institution demonstrates, and the hearing official finds, that by the exercise of due diligence the material could not have been timely submitted in response to the compulsory process, and the institution notified the Department or such other party that issued the order to produce, of the existence of the material immediately upon its discovery. The hearing official shall specify with particularity the evidence relied upon.

(9) When issues not raised in the notice of proposed action are tried without objection at the hearing, they will be treated in all respects as if they had been raised in the notice of proposed action, and no formal amendments are required.

(c) The hearing official makes a transcribed record of the proceeding and makes a copy of the record available to the designated Department official and to the institution or servicer.

### **§ 668.91 Initial and final decisions.**

(a)

(1)

(i) A hearing official issues a written initial decision in a hearing by certified mail, return receipt requested to -

(A) The designated department official who began a proceeding against an institution or third-party servicer;

(B) The institution or servicer, as applicable; and

(C) In the case of a proceeding against a third-party servicer, each institution that contracts with the servicer.

(ii) The hearing official may also transmit the notice by other, more expeditious means if practical.

(iii) The hearing official issues the decision within the latest of the following dates:

(A) The 30th day after the last submission is filed with the hearing official.

(B) The 60th day after the last submission is filed with the hearing official if the Secretary, upon request of the hearing official, determines that the unusual complexity of the case requires additional time for preparation of the decision.

(C) The 50th day after the last day of the hearing, if the hearing official does not request the parties to make any posthearing submission.

(2)

(i) The hearing official's initial decision states whether the imposition of the fine, limitation, suspension, or termination or recovery sought by the designated department official is warranted, in whole or in part. If the designated department official brought a termination action against the institution or servicer, the hearing official may, if appropriate, issue an initial decision to fine the institution or servicer, as applicable, or, rather than terminating the institution's participation or servicer's eligibility, as applicable, impose one or more limitations on the institution's participation or servicer's eligibility.

~~(ii) In a borrower defense and recovery proceeding conducted in two phases under § 668.87(a)(1)(iv)(B), the hearing official's initial decision determines whether the institution is liable for the act or omission described in the notice of intent to recover, and the hearing official issues an initial decision on liability only.~~

(3) Notwithstanding the provisions of paragraph (a)(2) of this section -

(i) If, in a termination action against an institution, the hearing official finds that the institution has violated the provisions of § 668.14(b)(18), the hearing official also finds that termination of the institution's participation is warranted;

(ii) If, in a termination action against a third-party servicer, the hearing official finds that the servicer has violated the provisions of § 668.14(b)(18), the hearing official also finds that termination of the institution's participation or servicer's eligibility is warranted;

(iii) In an action brought against an institution or third-party servicer that involves its failure to provide a letter of credit, or other financial protection under § 668.15 or § 668.171(c) or (d), the hearing official finds that the amount of the letter of credit or other financial protection established by the Secretary under § 668.175 is appropriate, unless the institution demonstrates that the amount was not warranted because -

(A) For financial protection demanded based on events or conditions described in § 668.171(c) or (d), the events or conditions no longer exist, have been resolved, or the institution demonstrates that it has insurance that will cover all potential debts and liabilities that arise from the triggering event or condition. The institution can demonstrate it has insurance that covers risk by presenting the Department with a copy of the insurance policy that makes clear the institution's coverage;

(B) For financial protection demanded based on the grounds identified in § 668.171(d), the action or event does not and will not have a material adverse effect on the financial condition, business, or results of operations of the institution;

(C) The institution has proffered alternative financial protection that provides students and the Department adequate protection against losses resulting from the risks

identified by the Secretary. Adequate protection may consist of one or more of the following -

(1) An agreement with the Secretary that a portion of the funds due to the institution under a reimbursement or heightened cash monitoring funding arrangement will be temporarily withheld in such amounts as will meet, no later than the end of a six to 12 month period, the amount of the required financial protection demanded; or

(2) Other form of financial protection specified by the Secretary in a notice published in the Federal Register.

(iv) In a termination action taken against an institution or third-party servicer based on the grounds that the institution or servicer failed to comply with the requirements of § 668.23(c)(3), if the hearing official finds that the institution or servicer failed to meet those requirements, the hearing official finds that the termination is warranted;

(v)

(A) In a termination action against an institution based on the grounds that the institution is not financially responsible under § 668.15(c)(1), the hearing official finds that the termination is warranted unless the institution demonstrates that all applicable conditions described in § 668.15(d)(4) have been met; and

(B) In a termination or limitation action against an institution based on the grounds that the institution is not financially responsible -

(1) Upon proof of the conditions in § 668.174(a), the hearing official finds that the limitation or termination is warranted unless the institution demonstrates that all the conditions in § 668.175(h)(2) have been met; and

(2) Upon proof of the conditions in § 668.174(b)(1), the hearing official finds that the limitation or termination is warranted unless the institution demonstrates that all applicable conditions described in § 668.174(b)(2) or § 668.175(h)(2) have been met.

(4) The hearing official bases findings of fact only on evidence considered at the hearing and on matters given judicial notice.

(b)

(1) In a suspension proceeding, the Secretary reviews the hearing official's initial decision and issues a final decision within 20 days after the initial decision. The Secretary adopts the initial decision unless it is clearly unsupported by the evidence presented at the hearing.

(2) The Secretary notifies the institution or servicer and, in the case of a suspension proceeding against a third-party servicer, each institution that contracts with the servicer of the final decision. If the Secretary suspends the institution's participation or servicer's eligibility, the suspension takes effect on the later of -

(i) The day that the institution or servicer receives the notice; or

(ii) The date specified in the designated department official's original notice of intent to suspend the institution's participation or servicer's eligibility.

(3) A suspension may not exceed 60 days unless a designated department official begins a limitation or termination proceeding under this subpart before the expiration of that period. In that case, the period may be extended until a final decision is issued in that proceeding according to paragraph (c) of this section.

(c)

(1) In a fine, limitation, or termination proceeding, the hearing official's initial decision automatically becomes the Secretary's final decision 30 days after the initial decision is issued and received by both parties unless, within that 30-day period, the institution or servicer, as applicable, or the designated department official appeals the initial decision to the Secretary.

(2)

(i) A party may appeal the hearing official's initial decision by submitting to the Secretary, within 30 days after the party receives the initial decision, a brief or other written statement that explains why the party believes that the Secretary should reverse or modify the decision of the hearing official.

(ii) At the time the party files its appeal submission, the party shall provide a copy of that submission to the opposing party.

(iii) The opposing party shall submit its brief or other responsive statement to the Secretary, with a copy to the appellant, within 30 days after the opposing party receives the appellant's brief or written statement.

(iv) The appealing party may submit proposed findings of fact or conclusions of law. However, the proposed findings of fact must be supported by -

(A) The evidence introduced into the record at the hearing;

(B) Stipulations of the parties if the hearing consisted of written submissions; or

(C) Matters that may be judicially noticed.

(v) Neither party may introduce new evidence on appeal.

(vi) The initial decision of the hearing official imposing a fine or limiting or terminating the institution's participation or servicer's eligibility does not take effect pending the appeal.

(vii) The Secretary renders a final decision. The Secretary may delegate to a designated department official the functions described in paragraph (c)(2) (vii) through (ix) of this section.

(viii) In rendering a final decision, the Secretary considers only evidence introduced into the record at the hearing and facts agreed to by the parties if the hearing consisted only of written submissions and matters that may be judicially noticed.

(ix) If the hearing official finds that a termination is warranted pursuant to paragraph (a)(3) of this section, the Secretary may affirm, modify, or reverse the initial decision, or may remand the case to the hearing official for further proceedings consistent with the Secretary's decision. If the Secretary affirms the initial decision without issuing a statement of reasons, the Secretary adopts the opinion of the hearing official as the decision of the Secretary. If the Secretary modifies, remands, or reverses the initial decision, in whole or in part, the Secretary's decision states the reasons for the action taken.

~~(x) In a borrower defense and recovery proceeding conducted in two phases under § 668.87(a)(1)(iv)(B), if a party appeals an initial decision of the hearing official in the first phase, the Secretary may affirm, modify, or reverse the initial decision, or may remand the case to the hearing official for further proceedings consistent with the Secretary's decision~~

#### § 668.100 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

#### Subpart R — Aggressive and Deceptive Recruitment Tactics or Conduct

##### § 668.500 Scope and purpose.

(a) This subpart identifies the types of activities that constitute aggressive and deceptive recruitment tactics or conduct by an eligible institution. An eligible institution has engaged in aggressive and deceptive recruitment tactics or conduct when the institution itself, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, marketing, advertising, lead generation, recruiting or admissions services, engages in one or more of the prohibited

practices in § 668.501. Aggressive and deceptive recruitment tactics or conduct are prohibited in all forms, including the effects of those tactics or conduct reflected in the institution's advertising or promotional materials, or in the marketing or sale of courses or programs of instruction offered by the institution.

(b) If the Secretary determines that an eligible institution has engaged in aggressive and deceptive recruitment tactics or conduct, the Secretary may –

- (1) Revoke the eligible institution's program participation agreement, if the institution is provisionally certified under § 668.13(c);
- (2) Impose limitations on the institution's participation in the title IV, HEA programs, if the institution is provisionally certified under § 668.13(c);
- (3) Deny participation applications made on behalf of the institution;
- (4) Initiate a proceeding against the eligible institution under subpart G of this part.

§ 668.501 Aggressive and deceptive recruitment tactics or conduct.

(a) Aggressive and deceptive recruitment tactics or conduct include but are not limited to actions by the institution, any of its representatives, or any institution, organization, or person with whom the institution has an agreement to provide educational programs, marketing, recruitment, or lead generation that:

- (1) Demand or pressure the student or prospective student to make enrollment or loan-related decisions immediately, including on the same day of first contact;
- (2) Falsely claim that the student or prospective student would lose the opportunity to attend the institution if they did not enroll immediately or otherwise place an unreasonable emphasis on unfavorable consequences of delay;
- (3) Take advantage of a student's or prospective student's lack of knowledge about, or experience with, postsecondary institutions, postsecondary programs, or financial aid to pressure the student into enrollment or borrowing funds to attend the institution;
- (4) Discourage the student or prospective student from consulting an adviser, a family member, or other resource or individual prior to making enrollment or loanrelated decisions;
- (5) Fail to respond to the student's or prospective student's requests for more information, including about the cost of the program and the nature of any financial aid;
- (6) Obtain the student's or prospective student's contact information through websites that:
  - (i) Falsely appear to offer assistance to individuals seeking Federal, state or local benefits;
  - (ii) Falsely advertise employment opportunities; or,
  - (iii) Present false rankings of the institution or its programs;

- (7) Use threatening or abusive language or behavior toward the student or prospective student; or,  
(8) Repeatedly engage in unsolicited contact for the purpose of enrolling or reenrolling after the student or prospective student has requested not to be contacted further.

§ 668.509 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

**§ 685.103 Applicability of subparts.**

- (a) Subpart A contains general provisions regarding the purpose and scope of the Direct Loan Program.
- (b) Subpart B contains provisions regarding borrowers in the Direct Loan Program.
- (c) Subpart C contains certain requirements regarding schools in the Direct Loan Program.
- (d) Subpart D contains provisions regarding ~~school eligibility for participation and origination~~ borrower defense to repayment in the Direct Loan Program.

§ 685.109 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

**§ 685.205 Forbearance.**

(a) **General.** "Forbearance" means permitting the temporary cessation of payments, allowing an extension of time for making payments, or temporarily accepting smaller payments than previously scheduled. The borrower has the option to choose the form of forbearance. Except as provided in paragraph (b)(9) of this section, if payments of interest are forborne, they are capitalized. The Secretary grants forbearance if the borrower or endorser intends to repay the loan but requests forbearance and provides sufficient documentation to support this request, and -

- (1) The Secretary determines that, due to poor health or other acceptable reasons, the borrower or endorser is currently unable to make scheduled payments;

(2) The borrower's payments of principal are deferred under § 685.204 and the Secretary does not subsidize the interest benefits on behalf of the borrower;

(3) The borrower is in a medical or dental internship or residency that must be successfully completed before the borrower may begin professional practice or service, or the borrower is serving in a medical or dental internship or residency program leading to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility that offers postgraduate training;

(4) The borrower is serving in a national service position for which the borrower is receiving a national service education award under title I of the National and Community Service Act of 1990;

(5)

(i) The borrower is performing the type of service that would qualify the borrower for loan forgiveness under the requirements of the teacher loan forgiveness program in § 685.217.

(ii) Before a forbearance is granted under § 685.205(a)(5)(i), the borrower must -

(A) Submit documentation for the period of the annual forbearance request showing the beginning and ending dates that the borrower is expected to perform, for that year, the type of service described in § 685.217(c); and

(B) Certify the borrower's intent to satisfy the requirements of § 685.217(c).

(iii) The Secretary grants forbearance under paragraph (a)(5) of this section only if the Secretary believes, at the time of the borrower's annual request, that the expected forgiveness amount under § 685.217(d) will satisfy the anticipated remaining outstanding balance on the borrower's loan at the time of the expected forgiveness;

(6) For not more than three years during which the borrower or endorser -

(i) Is currently obligated to make payments on loans under title IV of the Act; and

(ii) The sum of these payments each month (or a proportional share if the payments are due less frequently than monthly) is equal to or greater than 20 percent of the borrower's or endorser's total monthly gross income.

(7) The borrower is a member of the National Guard who qualifies for a post-active duty student deferment, but does not qualify for a military service or other deferment, and is engaged in active State duty for a period of more than 30 consecutive days, beginning -

(i) On the day after the grace period expires for a Direct Subsidized Loan or Direct Unsubsidized Loan that has not entered repayment; or

(ii) On the day after the borrower ceases enrollment on at least a half-time basis, for a Direct Loan in repayment.

(8)

(i) The Secretary may grant a forbearance to permit a borrower or endorser to resume honoring the agreement to repay the debt after default. The terms of the forbearance agreement in this situation must include a new agreement to repay the debt signed by the borrower or endorser or a written or oral affirmation of the borrower's or endorser's obligation to repay the debt.

(ii) If the forbearance is based on the borrower's or endorser's oral affirmation of the obligation to repay the debt, the forbearance period is limited to 120 days, such a forbearance is not granted consecutively, and the Secretary will -

(A) Orally review with the borrower the terms and conditions of the forbearance, including the consequences of interest capitalization, and all other repayment options available to the borrower;

(B) Send a notice to the borrower or endorser that confirms the terms of the forbearance and the borrower's or endorser's affirmation of the obligation to repay the debt and that includes information on all other repayment options available to the borrower; and

(C) Retain a record of the terms of the forbearance and affirmation in the borrower's or endorser's file.

(iii) For purposes of this section, an "affirmation" means an acknowledgement of the loan by the borrower or endorser in a legally binding manner. The form of the affirmation may include, but is not limited to, the borrower's or endorser's -

(A) New signed repayment agreement or schedule, or another form of signed agreement to repay the debt;

(B) Oral acknowledgement and agreement to repay the debt documented by the Secretary in the borrower's or endorser's file and confirmed by the Secretary in a notice to the borrower; or

(C) A payment made on the loan by the borrower or endorser.

(9)

(i) The borrower is performing the type of service that would qualify the borrower for a partial repayment of his or her loan under the Student Loan Repayment Programs administered by the Department of Defense under 10 U.S.C. 2171, 2173, 2174, or any other student loan repayment programs administered by the Department of Defense.

(ii) To receive a forbearance under this paragraph, the borrower must submit documentation showing the time period during which the Department of Defense considers the borrower to be eligible for a partial repayment of his or her loan under a student loan repayment program.

(b) **Administrative forbearance.** In certain circumstances, the Secretary grants forbearance without requiring documentation from the borrower. These circumstances include but are not limited to -

(1) A properly granted period of deferment for which the Secretary learns the borrower did not qualify;

(2) The period for which payments are overdue at the beginning of an authorized deferment or forbearance period;

(3) The period beginning when the borrower entered repayment without the Secretary's knowledge until the first payment due date was established;

(4) The period prior to a borrower's filing of a bankruptcy petition;

(5) A period after the Secretary receives reliable information indicating that the borrower (or the student in the case of a Direct PLUS Loan obtained by a parent borrower) has died, or the borrower has become totally and permanently disabled, until the Secretary receives documentation of death or total and permanent disability;

(6) Periods necessary for the Secretary to determine the borrower's eligibility for discharge -

(i) Under [§](#) 685.206(c), (d) and (e);

(ii) Under § 685.214;

(iii) Under § 685.215;

(iv) Under § 685.216;

(v) Under § 685.217;

(vi) Under § 685.222; ~~or~~

(vii) [Under part 685, subpart D; or](#)

[\(viii\)](#) Due to the borrower's or endorser's (if applicable) bankruptcy;

(7) A period of up to three years in cases where the effect of a variable interest rate on a fixed-amount or graduated repayment schedule causes the extension of the maximum repayment term;

(8) A period during which the Secretary has authorized forbearance due to a national military mobilization or other local or national emergency;

(9) A period of up to 60 days necessary for the Secretary to collect and process documentation supporting the borrower's request for a deferment, forbearance, change in repayment plan, or consolidation loan. Interest that accrues during this period is not capitalized; or

(10) For Direct PLUS Loans first disbursed before July 1, 2008, to align repayment with a borrower's Direct PLUS Loans that were first disbursed on or after July 1, 2008, or with Direct Subsidized Loans or Direct Unsubsidized Loans that have a grace period in accordance with § 685.207(b) or (c). The Secretary notifies the borrower that the borrower has the option to cancel the forbearance and continue paying on the loan.

(c) ***Period of forbearance.***

(1) The Secretary grants forbearance for a period of up to one year.

(2) The forbearance is renewable, upon request of the borrower, for the duration of the period in which the borrower meets the condition required for the forbearance.

**§ 685.206 Borrower ~~responsibilities~~[Responsibilities](#) and ~~defenses~~[Defenses](#).**

(a) The borrower must give the school the following information as part of the origination process for a Direct Subsidized, Direct Unsubsidized, or Direct PLUS Loan:

(1) A statement, as described in 34 CFR part 668, that the loan will be used for the cost of the student's attendance.

(2) Information demonstrating that the borrower is eligible for the loan.

(3) Information concerning the outstanding FFEL Program and Direct Loan Program loans of the borrower and, for a parent borrower, of the student, including any Federal Consolidation Loan or Direct Consolidation Loan.

(4) A statement authorizing the school to release to the Secretary information relevant to the student's eligibility to borrow or to have a parent borrow on the student's behalf (e.g., the student's enrollment status, financial assistance, and employment records).

(b)

(1) The borrower must promptly notify the Secretary of any change of name, address, student status to less than half-time, employer, or employer's address; and

(2) The borrower must promptly notify the school of any change in address during enrollment.

(c) ***Borrower defense to repayment for loans first disbursed prior to July 1, 2017.***

(1) For loans first disbursed prior to July 1, 2017, the borrower may assert a borrower defense under this paragraph. A "borrower defense" refers to any act or omission of the school attended by the student that relates to the making of the loan for enrollment at the school or the provision of educational services for which the loan was provided that would give rise to a cause of action against the school under applicable State law, and includes one or both of the following:

(i) A defense to repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part.

(ii) A claim to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(2) The order of objections for defaulted Direct Loans are as described in § 685.222(a)(6). A borrower defense claim under this section must be asserted, and will be resolved, under the procedures in § 685.222(e) to (k).

(3) For an approved borrower defense under this section, except as provided in paragraph (c)(4) of this section, the Secretary may initiate an appropriate proceeding to collect from the school whose act or omission resulted in the borrower defense the amount of relief arising from the borrower defense, within the later of -

(i) Three years from the end of the last award year in which the student attended the institution; or

(ii) The limitation period that State law would apply to an action by the borrower to recover on the cause of action on which the borrower defense is based.

(4) The Secretary may initiate a proceeding to collect at any time if the institution received notice of the claim before the end of the later of the periods described in paragraph (c)(3) of this section. For purposes of this paragraph, notice includes receipt of -

(i) Actual notice from the borrower, from a representative of the borrower, or from the Department;

(ii) A class action complaint asserting relief for a class that may include the borrower; and

(iii) Written notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower.

(d) ***Borrower defense to repayment for loans first disbursed on or after July 1, 2017, and before July 1, 2020.*** For borrower defense to repayment for loans first disbursed on or after July 1, 2017, and before July 1, 2020, a borrower asserts and the Secretary considers a borrower defense in accordance with § 685.222.

(e) ***Borrower defense to repayment for loans first disbursed on or after July 1, 2020, and before July 1, 2023.*** This paragraph (e) applies to borrower defense to repayment for loans first disbursed on or after July 1, 2020, [and before July 1, 2023.](#)

(1) ***Definitions.*** For the purposes of this paragraph (e), the following definitions apply:

(i) A “Direct Loan” [under this paragraph \(e\)](#) means a Direct Subsidized Loan, a Direct Unsubsidized Loan, or a Direct PLUS Loan.

(ii) “Borrower” means

(A) The borrower; and

(B) In the case of a Direct PLUS Loan, any endorsers, and for a Direct PLUS Loan made to a parent, the student on whose behalf the parent borrowed.

(iii) A “borrower defense to repayment” [under this paragraph \(e\)](#) includes -

(A) A defense to repayment of amounts owed to the Secretary on a Direct Loan, or a Direct Consolidation Loan that was used to repay a Direct Loan, FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act, Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act; and

(B) Any accompanying request for reimbursement of payments previously made to the Secretary on the Direct Loan or on a loan repaid by the Direct Consolidation Loan.

(iv) The term “provision of educational services” under this paragraph (e) refers to the educational resources provided by the institution that are required by an accreditation agency or a State licensing or authorizing agency for the completion of the student’s educational program.

(v) The terms “school” and “institution” under this paragraph (e) may be used interchangeably and include an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services.

(2) ***Federal standard for loans first disbursed on or after July 1, 2020, and before July 1, 2023.*** For a Direct Loan or Direct Consolidation Loan first disbursed on or after July 1, 2020, and before July 1, 2023, a borrower may assert a defense to repayment under this paragraph (e), if the borrower establishes by a preponderance of the evidence that —

(i) The institution at which the borrower enrolled made a misrepresentation, as defined in § 685.206(e)(3), 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:

(A) Enrollment or continuing enrollment at the institution or

(B) The provision of educational services for which the loan was made; and

(ii) The borrower was financially harmed by the misrepresentation.

(3) ***Misrepresentation.*** A “misrepresentation,” for purposes of this paragraph (e), is a statement, act, or omission by an eligible school to a borrower that is false, misleading, or deceptive; that was 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 enrollment or continuing enrollment at the institution or the provision of educational services for which the loan was made. Evidence that a misrepresentation defined in this paragraph (e) may have occurred includes, but is not limited to:

(i) Actual licensure passage rates materially different from those included in the institution’s marketing materials, website, or other communications made to the student;

(ii) Actual employment rates materially different from those included in the institution’s marketing materials, website, or other communications made to the student;

(iii) Actual institutional selectivity rates or rankings, student admission profiles, or institutional rankings that are materially different from those included in the institution's marketing materials, website, or other communications made to the student or provided by the institution to national ranking organizations;

(iv) The inclusion in the institution's marketing materials, website, or other communication made to the student of specialized, programmatic, or institutional certifications, accreditation, or approvals not actually obtained, or the failure to remove within a reasonable period of time such certifications or approvals from marketing materials, website, or other communication when revoked or withdrawn;

(v) The inclusion in the institution's marketing materials, website, or other communication made to the student of representations regarding the widespread or general transferability of credits that are only transferrable to limited types of programs or institutions or the transferability of credits to a specific program or institution when no reciprocal agreement exists with another institution or such agreement is materially different than what was represented;

(vi) A representation regarding the employability or specific earnings of graduates without an agreement between the institution and another entity for such employment or sufficient evidence of past employment or earnings to justify such a representation or without citing appropriate national, State, or regional data for earnings in the same field as provided by an appropriate Federal agency that provides such data. (In the event that national data are used, institutions should include a written, plain language disclaimer that national averages may not accurately reflect the earnings of workers in particular parts of the country and may include earners at all stages of their career and not just entry level wages for recent graduates.);

(vii) A representation regarding the availability, amount, or nature of any financial assistance available to students from the institution or any other entity to pay the costs of attendance at the institution that is materially different in availability, amount, or nature from the actual financial assistance available to the borrower from the institution or any other entity to pay the costs of attendance at the institution after enrollment;

(viii) A representation regarding the amount, method, or timing of payment of tuition and fees that the student would be charged for the program that is materially different in amount, method, or timing of payment from the actual tuition and fees charged to the student;

(ix) A representation that the institution, its courses, or programs are endorsed by vocational counselors, high schools, colleges, educational organizations, employment agencies, members of a particular industry, students, former students, governmental officials, Federal or State agencies, the United States Armed Forces, or other individuals or

entities when the institution has no permission or is not otherwise authorized to make or use such an endorsement;

(x) A representation regarding the educational resources provided by the institution that are required for the completion of the student's educational program that are materially different from the institution's actual circumstances at the time the representation is made, such as representations regarding the institution's size; location; facilities; training equipment; or the number, availability, or qualifications of its personnel; and

(xi) A representation regarding the nature or extent of prerequisites for enrollment in a course or program offered by the institution that are materially different from the institution's actual circumstances at the time the representation is made, or that the institution knows will be materially different during the student's anticipated enrollment at the institution.

(4) **Financial harm.** ~~Financial~~ Under this paragraph (e), financial harm is the amount of monetary loss that a borrower incurs as a consequence of a misrepresentation, as defined in § 685.206(e)(3). Financial harm does not include damages for nonmonetary loss, such as personal injury, inconvenience, aggravation, emotional distress, pain and suffering, punitive damages, or opportunity costs. The Department does not consider the act of taking out a Direct Loan or a loan repaid by a Direct Consolidation Loan, alone, as evidence of financial harm to the borrower. Financial harm is such monetary loss that is not predominantly due to intervening local, regional, or national economic or labor market conditions as demonstrated by evidence before the Secretary or provided to the Secretary by the borrower or the school. Financial harm cannot arise from the borrower's voluntary decision to pursue less than full-time work or not to work or result from a voluntary change in occupation. Evidence of financial harm may include, but is not limited to, the following circumstances:

(i) Periods of unemployment upon graduating from the school's programs that are unrelated to national or local economic recessions;

(ii) A significant difference between the amount or nature of the tuition and fees that the institution represented to the borrower that the institution would charge or was charging, and the actual amount or nature of the tuition and fees charged by the institution for which the Direct Loan was disbursed or for which a loan repaid by the Direct Consolidation Loan was disbursed;

(iii) The borrower's inability to secure employment in the field of study for which the institution expressly guaranteed employment; and

(iv) The borrower's inability to complete the program because the institution no longer offers a requirement necessary for completion of the program in which the borrower

enrolled and the institution did not provide for an acceptable alternative requirement to enable completion of the program.

(5) **Exclusions.** The Secretary will not accept the following as a basis for a borrower defense to repayment ~~under this paragraph (e)~~

(i) A violation by the institution of a requirement of the Act or the Department's regulations for a borrower defense to repayment under paragraph (c) or (d) of this section or under § 685.222, unless the violation would otherwise constitute the basis for a successful borrower defense to repayment under this paragraph (e); or

(ii) A claim that does not directly and clearly relate to enrollment or continuing enrollment at the institution or the provision of educational services for which the loan was made, including, but not limited to ~~—~~

(A) Personal injury;

(B) Sexual harassment;

(C) A violation of civil rights;

(D) Slander or defamation;

(E) Property damage;

(F) The general quality of the student's education or the reasonableness of an educator's conduct in providing educational services;

(G) Informal communication from other students;

(H) Academic disputes and disciplinary matters; and

(I) Breach of contract, unless the school's act or omission would otherwise constitute the basis for a successful defense to repayment under this paragraph (e).

(6) **Limitations period ~~and tolling of the limitations period for arbitration proceedings.~~**

(i) A borrower must assert a defense to repayment under this paragraph (e) within ~~three~~**3** years from the date the student is no longer enrolled at the institution. A borrower may only assert a defense to repayment under this paragraph (e) within the timeframes set forth in § 685.206(e)(6)(~~i~~) and (~~ii~~) and (e)(7).

~~(ii) For pre-dispute arbitration agreements, as defined in § 668.41(h)(2)(iii), the limitations period will be tolled for the time period beginning on the date that a written request for arbitration is~~

~~filed, by either the student or the institution, and concluding on the date the arbitrator submits, in writing, a final decision, final award, or other final determination, to the parties.~~

(7) **Extension of limitation periods and reopening of applications.** For loans first disbursed on or after July 1, 2020, and before July 1, 2023, the Secretary may extend the time period when a borrower may assert a defense to repayment under § 685.206(e)(6) or may reopen a borrower's defense to repayment application to consider evidence that was not previously considered only if there is:

(i) A final, non-default judgment on the merits by a State or Federal Court that has not been appealed or that is not subject to further appeal and that establishes the institution made a misrepresentation, as defined in § 685.206(e)(3); or

(ii) A final decision by a duly appointed arbitrator or arbitration panel that establishes that the institution made a misrepresentation, as defined in § 685.206(e)(3).

(8) **Application and Forbearance.** To assert a defense to repayment under this paragraph (e), a borrower must submit an application under penalty of perjury on a form approved by the Secretary and sign a waiver permitting the institution to provide the Department with items from the borrower's education record relevant to the defense to repayment claim. The form will note that pursuant to ~~paragraph § 685.205(b)(6)(i) of this section~~, if the borrower is not in default on the loan for which a borrower defense has been asserted, the Secretary will grant forbearance and notify the borrower of the option to decline forbearance. The application requires the borrower to ~~—~~

(i) Certify that the borrower received the proceeds of a loan, in whole or in part, to attend the named institution;

(ii) Provide evidence that supports the borrower defense to repayment application;

(iii) State whether the borrower has made a claim with any other third party, such as the holder of a performance bond, a public fund, or a tuition recovery program, based on the same act or omission of the institution on which the borrower defense to repayment is based;

(iv) State the amount of any payment received by the borrower or credited to the borrower's loan obligation through the third party, in connection with a borrower defense to repayment described in paragraph (e)(2) of this section;

(v) State the financial harm, as defined in paragraph (e)(4) of this section, that the borrower alleges to have been caused and provide any information relevant to assessing whether the borrower incurred financial harm, including providing documentation that the borrower actively pursued employment in the field for which the borrower's education prepared the borrower if the borrower is a recent graduate (failure to provide

such information results in a presumption that the borrower failed to actively pursue employment in the field); whether the borrower was terminated or removed for performance reasons from a position in the field for which the borrower's education prepared the borrower, or in a related field; and whether the borrower failed to meet other requirements of or qualifications for employment in such field for reasons unrelated to the school's misrepresentation underlying the borrower defense to repayment, such as the borrower's ability to pass a drug test, satisfy driving record requirements, and meet any health qualifications; and

(vi) State that the borrower understands that in the event that the borrower receives a 100 percent discharge of the balance of the loan for which the defense to repayment application has been submitted, the institution may, if allowed or not prohibited by other applicable law, refuse to verify or to provide an official transcript that verifies the borrower's completion of credits or a credential associated with the discharged loan.

***(9) Consideration of order of objections and of evidence in possession of the Secretary under this paragraph (e).***

(i) If the borrower asserts both a borrower defense to repayment and any other objection to an action of the Secretary with regard to a Direct Loan or a loan repaid by a Direct Consolidation Loan under this paragraph (e), the order in which the Secretary will consider objections, including a borrower defense to repayment under this paragraph (e), will be determined as appropriate under the circumstances.

(ii) With respect to the borrower defense to repayment application submitted under this paragraph (e), the Secretary may consider evidence otherwise in the possession of the Secretary, including from the Department's internal records or other relevant evidence obtained by the Secretary, as practicable, provided that the Secretary permits the institution and the borrower to review and respond to this evidence and to submit additional evidence.

***(10) School response and borrower reply under this paragraph (e).***

(i) Upon receipt of a borrower defense to repayment application under this paragraph (e), the Department will notify the school of the pending application and provide a copy of the borrower's request and any supporting documents, a copy of any evidence otherwise in the possession of the Secretary, and a waiver signed by the student permitting the institution to provide the Department with items from the student's education record relevant to the defense to repayment claim to the school, and invite the school to respond and to submit evidence, within the specified timeframe included in the notice, which shall be no less than 60 days.

(ii) Upon receipt of the school's response, the Department will provide the borrower a copy of the school's submission as well as any evidence otherwise in possession of the

Secretary, which was provided to the school, and will give the borrower an opportunity to submit a reply within a specified timeframe, which shall be no less than 60 days. The borrower's reply must be limited to issues and evidence raised in the school's submission and any evidence otherwise in the possession of the Secretary.

(iii) The Department will provide the school a copy of the borrower's reply.

(iv) There will be no other submissions by the borrower or the school to the Secretary, unless the Secretary requests further clarifying information.

(11) **Written decision under this paragraph (e).**

(i) After considering the borrower's application and all applicable evidence under this paragraph (e), the Secretary issues a written decision——

(A) Notifying the borrower and the school of the decision on the borrower defense to repayment under this paragraph (e);

(B) Providing the reasons for the decision; and

(C) Informing the borrower and the school of the relief, if any, that the borrower will receive, consistent with paragraph (e)(12) of this section, and specifying the relief determination.

(ii) If the Department receives a borrower defense to repayment application that is incomplete and is within the limitations period in § 685.206(e)(6) or (7), the Department will not issue a written decision on the application and instead will notify the borrower in writing that the application is incomplete and will return the application to the borrower.

(12) **Borrower defense to repayment relief under this paragraph (e).**

(i) If the Secretary grants the borrower's request for relief based on a borrower defense to repayment under this paragraph (e), the Secretary notifies the borrower and the school that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay or will be reimbursed for amounts paid toward the loan voluntarily or through enforced collection. The amount of relief that a borrower receives under this paragraph (e) may exceed the amount of financial harm, as defined in § 685.206(e)(4), that the borrower alleges in the application pursuant to § 685.206(e)(8)(v). The Secretary determines the amount of relief and awards relief limited to the monetary loss that a borrower incurred as a consequence of a misrepresentation, as defined in § 685.206(e)(3). The amount of relief cannot exceed the amount of the loan and any associated costs and fees and will be reduced by the amount of refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation,

compromise, or any other financial benefit received by, or on behalf of, the borrower that was related to the borrower defense to repayment under this paragraph (e). In awarding relief under this paragraph (e), the Secretary considers the borrower's application, as described in § 685.206(e)(8), which includes information about any payments received by the borrower and the financial harm alleged by the borrower. In awarding relief under this paragraph (e), the Secretary also considers the school's response, the borrower's reply, and any evidence otherwise in the possession of the Secretary, which was previously provided to the borrower and the school, as described in § 685.206(e)(10). The Secretary also updates reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan or loans repaid by the borrower's Direct Consolidation Loan under this paragraph (e).

(ii) The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include ~~one or both of the following, if applicable:~~

~~(A) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act and~~

~~(B) Eliminating or recalculating the subsidized usage period determining that the borrower is associated with not in default on the loan ~~or loans discharged pursuant to § 685.200(f)(4)(iii)~~ and is eligible to receive assistance under title IV of the Act.~~

(13) ***Finality of borrower defense to repayment decisions under this paragraph (e)***. The determination of a borrower's defense to repayment by the Department included in the written decision referenced in paragraph (e)(11) of this section is the final decision of the Department and is not subject to appeal within the Department.

(14) ***Cooperation by the borrower under this paragraph (e)***. The Secretary may revoke any relief granted to a borrower under this section who refuses to cooperate with the Secretary in any proceeding under paragraph (e) of this section or under ~~34 CFR~~ part 668, subpart G. Such cooperation includes, but is not limited to ~~---~~

(i) Providing testimony regarding any representation made by the borrower to support a successful borrower defense to repayment under this paragraph (e); and

(ii) Producing, within timeframes established by the Secretary, any documentation reasonably available to the borrower with respect to those representations and any sworn statement required by the Secretary with respect to those representations and documents.

(15) ***Transfer to the Secretary of the borrower's right of recovery against third parties under this paragraph (e)***.

(i) Upon the grant of any relief under this paragraph (e), the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the provision of educational services for which the loan was received, against the school, its principals, its affiliates and their successors, or its sureties, and any private fund, including the portion of a public fund that represents funds received from a private party. If the borrower asserts a claim to, and recovers from, a public fund, the Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense to repayment and for the same loan for which the discharge was granted under this section.

(ii) The provisions of this paragraph (e)(15) apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(iii) Nothing in this paragraph (e)(15) limits or forecloses the borrower's right to pursue legal and equitable relief arising under applicable law against a party described in this paragraph (e)(15) for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

**(16) *Recovery from the school under this paragraph (e).***

(i) **Recovery from the school under this paragraph (e).(i)** The Secretary may initiate an appropriate proceeding to require the school whose misrepresentation resulted in the borrower's successful borrower defense to repayment under this paragraph (e) to pay to the Secretary the amount of the loan to which the defense applies in accordance with ~~34~~ **CFR** part 668, subpart G. This paragraph (e)(16) would also be applicable for provisionally certified institutions.

(ii) **The Under this paragraph (e), the** Secretary will not initiate such a proceeding more than ~~five~~ **5** years after the date of the final determination included in the written decision referenced in paragraph (e)(11) of this section. The Department will notify the school of the borrower defense to repayment application within 60 days of the date of the Department's receipt of the borrower's application.

**§ 685.212 Discharge of a loan obligation.**

**(a) *Death.***

(1) If a borrower (or a student on whose behalf a parent borrowed a Direct PLUS Loan) dies, the Secretary discharges the obligation of the borrower and any endorser to make any further payments on the loan based on -

(i) An original or certified copy of the death certificate;

(ii) An accurate and complete photocopy of the original or certified copy of the death certificate;

(iii) An accurate and complete original or certified copy of the death certificate that is scanned and submitted electronically or sent by facsimile transmission; or

(iv) Verification of the borrower's or student's death through an authoritative Federal or State electronic database approved for use by the Secretary.

(2) Under exceptional circumstances and on a case-by-case basis, the Secretary discharges a loan based upon other reliable documentation of the borrower's or student's death that is acceptable to the Secretary.

(3) In the case of a Direct Consolidation Loan that repaid a Direct PLUS Loan or a Federal PLUS Loan obtained on behalf of a student who dies, the Secretary discharges an amount equal to the portion of the outstanding balance of the consolidation loan, as of the date of the student's death, attributable to that Direct PLUS Loan or Federal PLUS Loan.

(b) **Total and permanent disability.** If a borrower meets the requirements in § 685.213, the Secretary discharges the obligation of the borrower and any endorser to make any further payments on the loan.

(c) **Bankruptcy.** If a borrower's obligation to repay a loan is discharged in bankruptcy, the Secretary does not require the borrower to make any further payments on the loan.

(d) **Closed schools.** If a borrower meets the requirements in § 685.214, the Secretary discharges the obligation of the borrower and any endorser to make any further payments on the loan. In the case of a Direct Consolidation Loan, the Secretary discharges the portion of the consolidation loan equal to the amount of the discharge applicable to any loan disbursed, in whole or in part, on or after January 1, 1986 that was included in the consolidation loan.

(e) **False certification and unauthorized disbursement.** If a borrower meets the requirements in § 685.215, the Secretary discharges the obligation of the borrower and any endorser to make any further payments on the loan. In the case of a Direct Consolidation Loan, the Secretary discharges the portion of the consolidation loan equal to the amount of the discharge applicable to any loan disbursed, in whole or in part, on or after January 1, 1986 that was included in the consolidation loan.

(f) **Unpaid refunds.** If a borrower meets the requirements in § 685.216, the Secretary discharges the obligation of the borrower and any endorser to make any further payments on the amount of the loan equal to the unpaid refund and any accrued interest and other charges associated with the unpaid refund. In the case of a Direct Consolidation Loan, the Secretary discharges the portion of the consolidation loan equal to the amount of the unpaid refund owed on any loan disbursed, in whole or in part, on or after January 1, 1986 that was included in the consolidation loan.

(g) **Payments received after eligibility for discharge -**

(1) **For the discharge conditions in paragraphs (a), (c), (d), and (e) of this section.** Upon receipt of acceptable documentation and approval of the discharge request, the Secretary returns to the sender, or, for a discharge based on death, the borrower's estate, any payments received after the date that the eligibility requirements for discharge were met.

(2) **For the discharge condition in paragraph (b) of this section.** Upon making a final determination of eligibility for discharge based on total and permanent disability, the Secretary returns to the sender any payments received after the date specified in § 685.213(b)(4)(iii) or 685.213(c)(2)(i), as applicable.

(3) **For the discharge condition in paragraph (f) of this section.** Upon receipt of acceptable documentation and approval of the discharge request, the Secretary returns to the sender payments received in excess of the amount owed on the loan after applying the unpaid refund.

(h) **Teacher loan forgiveness program.** If a new borrower meets the requirements in § 685.217, the Secretary repays up to \$5,000, or up to \$17,500, of the borrower's Direct Subsidized Loans, Direct Unsubsidized Loans, and, in certain cases, Direct Consolidation Loans.

(i) **Public Service Loan Forgiveness Program.** If a borrower meets the requirements in § 685.219, the Secretary cancels the remaining principal and accrued interest of the borrower's eligible Direct Subsidized Loan, Direct Unsubsidized Loan, Direct PLUS Loan, and Direct Consolidation Loan.

(j) **September 11 survivors discharge.** If a borrower meets the requirements in § 685.218, the Secretary discharges the obligation of the borrower and any endorser to make any further payments -

(1) On an eligible Direct Loan if the borrower qualifies as the spouse of an eligible public servant;

(2) On the portion of a joint Direct Consolidation Loan incurred on behalf of an eligible victim, if the borrower qualifies as the spouse of an eligible victim;

(3) On a Direct PLUS Loan incurred on behalf of an eligible victim if the borrower qualifies as an eligible parent; and

(4) On the portion of a Direct Consolidation Loan that repaid a PLUS loan incurred on behalf of an eligible victim, if the borrower qualifies as an eligible parent.

(k) ***Borrower defenses.***

(1) If a borrower defense is approved under § 685.206(c) or under § 685.206(d) and § 685.222 -

(i) The Secretary discharges the obligation of the borrower in whole or in part in accordance with the procedures in §§ 685.206(c) and 685.222, respectively; and

(ii) The Secretary returns to the borrower payments made by the borrower or otherwise recovered on the loan that exceed the amount owed on that portion of the loan not discharged, if the borrower asserted the claim not later than -

(A) For a claim subject to § 685.206(c), the limitation period under applicable law to the claim on which relief was granted; or

(B) For a claim subject to § 685.222, the limitation period in § 685.222(b), (c), or (d), as applicable.

(2) In the case of a Direct Consolidation Loan, a borrower may assert a borrower defense under § 685.206(c) or § 685.222 with respect to a Direct Loan, FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act, Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act that was repaid by the Direct Consolidation Loan.

(i) The Secretary considers a borrower defense claim asserted on a Direct Consolidation Loan by determining -

(A) Whether the act or omission of the school with regard to the loan described in this paragraph (k)(2), other than a Direct Subsidized, Unsubsidized, or PLUS Loan, constitutes a borrower defense under § 685.206(c), for a Direct Consolidation Loan made before July 1, 2017, or under § 685.222, for a Direct Consolidation Loan made on or after July 1, 2017, and before July 1, 2020; or

(B) Whether the act or omission of the school with regard to a Direct Subsidized, Unsubsidized, or PLUS Loan made on after July 1, 2017, and before July 1, 2020, that was paid off by the Direct Consolidation Loan, constitutes a borrower defense under § 685.222.

(ii) If the borrower defense is approved, the Secretary discharges the appropriate portion of the Direct Consolidation Loan.

(iii) The Secretary returns to the borrower payments made by the borrower or otherwise recovered on the Direct Consolidation Loan that exceed the amount owed on that portion of the Direct Consolidation Loan not discharged, if the borrower asserted the claim not later than -

(A) For a claim asserted under § 685.206(c), the limitation period under the law applicable to the claim on which relief was granted; or

(B) For a claim asserted under § 685.222, the limitation period in § 685.222(b), (c), or (d), as applicable.

(iv) The Secretary returns to the borrower a payment made by the borrower or otherwise recovered on the loan described in this paragraph (k)(2) only if -

(A) The payment was made directly to the Secretary on the loan; and

(B) The borrower proves that the loan to which the payment was credited was not legally enforceable under applicable law in the amount for which that payment was applied.

(3) If a borrower's application for a discharge of a loan based on a borrower defense is approved under § 685.206(e), the Secretary discharges the obligation of the borrower, in whole or in part, in accordance with the procedures described in § 685.206(e).

[\(4\) If a borrower's application for a discharge of a loan based on a borrower defense is approved under 34 CFR part 685, subpart D, the Secretary discharges the obligation of the borrower, in whole or in part, in accordance with the procedures described in 34 CFR part 685, subpart D.](#)

#### **§ 685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.**

(a) **General.** Participation of a school in the Direct Loan Program means that eligible students at the school may receive Direct Loans. To participate in the Direct Loan Program, a school must -

(1) Demonstrate to the satisfaction of the Secretary that the school meets the requirements for eligibility under the Act and applicable regulations; and

(2) Enter into a written program participation agreement with the Secretary.

(b) **Program participation agreement.** In the program participation agreement, the school must promise to comply with the Act and applicable regulations and must agree to -

(1) Identify eligible students who seek student financial assistance at the institution in accordance with section 484 of the Act;

(2) Estimate the need of each of these students as required by part F of the Act for an academic year. For purposes of estimating need, a Direct Unsubsidized Loan, a Direct PLUS Loan, or any loan obtained under any State-sponsored or private loan program may be used to offset the expected family contribution of the student for that year;

(3) Certify that the amount of the loan for any student under part D of the Act is not in excess of the annual limit applicable for that loan program and that the amount of the loan, in combination with previous loans received by the borrower, is not in excess of the aggregate limit for that loan program;

(4) Set forth a schedule for disbursement of the proceeds of the loan in installments, consistent with the requirements of section 428G of the Act;

(5) On a monthly basis, reconcile institutional records with Direct Loan funds received from the Secretary and Direct Loan disbursement records submitted to and accepted by the Secretary;

(6) Provide timely and accurate information to the Secretary for the servicing and collecting of loans -

(i) Concerning the status of student borrowers (and students on whose behalf parents borrow) while these students are in attendance at the school;

(ii) Upon request by the Secretary, concerning any new information of which the school becomes aware for these students (or their parents) after the student leaves the school; and

(iii) Concerning student eligibility and need, for the alternative origination of loans to eligible students and parents in accordance with part D of the Act;

(7) Provide assurances that the school will comply with [loan information](#) requirements established by the Secretary ~~relating to student loan information~~ with respect to loans made under the Direct Loan Program;

(8) Accept responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement;

(9) Provide for the implementation of a quality assurance system, as established by the Secretary and developed in consultation with the school, to ensure that the school is complying with program requirements and meeting program objectives;

(10) Provide that the school will not charge any fees of any kind, however described, to student or parent borrowers for origination activities or for the provision of ~~any~~ information necessary for a student or parent to receive a loan under part D of the Act or for any benefits associated with such a loan;

(11) Comply with ~~either~~the provisions of paragraphs (d) through (i) of this section regarding student claims and disputes;

(12) Comply with other provisions that the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of part D of the Act; and

~~(1213)~~ Accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts discharged by the Secretary pursuant to §§ 685.206, 685.214, 685.215, 685.216, ~~and~~ 685.222, and part 685, subpart D.

(c) **Origination.** A school that originates loans in the Direct Loan Program must originate loans to eligible students and parents in accordance with part D of the Act. The note or evidence of the borrower's obligation on the loan originated by the school is the property of the Secretary.

(d) Borrower defense claims in an internal dispute process. The school will not compel any student to pursue a complaint based on allegations that would provide a basis for a borrower defense claim through an internal dispute process before the student presents the complaint to an accrediting agency or government agency authorized to hear the complaint.

(e) Class action bans.

(1) The school will not seek to rely in any way on a pre-dispute arbitration agreement or on any other pre-dispute agreement with a student who has obtained or benefited from a Direct Loan, with respect to any aspect of a class action that is related to a borrower defense claim, unless and until the presiding court has ruled that the case may not proceed as a class action and, if that ruling may be subject to appellate review on an interlocutory basis, the time to seek such review has elapsed or the review has been resolved.

(2) Reliance on a pre-dispute arbitration agreement, or on any other pre-dispute agreement, with a student, with respect to any aspect of a class action includes, but is not limited to, any of the following:

- (i) Seeking dismissal, deferral, or stay of any aspect of a class action;
- (ii) Seeking to exclude a person or persons from a class in a class action;
- (iii) Objecting to or seeking a protective order intended to avoid responding to discovery in a class action;
- (iv) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action;
- (v) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action after the trial court has denied a motion to certify the class but before an appellate court has ruled on an interlocutory appeal of that motion, if the time to seek such an appeal has not elapsed or the appeal has not been resolved; and
- (vi) (vi) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action, after the trial court in that class action has granted a motion to dismiss the claim and noted that the consumer has leave to refile the claim on a class basis, if the time to refile the claim has not elapsed.

(3) Required provisions and notices:

- (i) After the effective date of this regulation, the school must include the following provision in any agreements with a student recipient of a Direct Loan for attendance at the school, or a student for whom the PLUS loan was obtained, that include pre-dispute arbitration or any other pre-dispute agreement addressing class actions: “We agree that this agreement cannot be used to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Direct Loan or our provision of educational services for which the Direct Loan was obtained. We agree that the court has exclusive jurisdiction to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.”
- (ii) When a pre-dispute arbitration agreement or any other pre-dispute agreement addressing class actions has been entered into before the effective date of this regulation and does not contain the provision described in paragraph (e)(3)(i) of this section, the school must either ensure the agreement is amended to contain that provision or provide the student to whom the agreement applies with written notice of that provision.

(iii) The school must ensure the agreement described in paragraph (e)(3)(ii) of this section is amended to contain the provision set forth in paragraph (e)(3)(i) or must provide the notice to students specified in that paragraph no later than the exit counseling required under § 685.304(b), or the date on which the school files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment, whichever is earlier.

(A) Agreement provision. “We agree that neither we, nor anyone else who later becomes a party to this agreement, will use it to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit in court even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. We agree that the court has exclusive jurisdiction to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.”

(B) Notice provision. “We agree not to use any predispute agreement to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. We agree that the court has exclusive jurisdiction to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.”

(f) Pre-dispute arbitration agreements.

(1)

(i) The school will not enter into a pre-dispute agreement to arbitrate a borrower defense claim or rely in any way on a pre-dispute arbitration agreement with respect to any aspect of a borrower defense claim.

(ii) A student may enter into a voluntary post-dispute arbitration agreement with a school to arbitrate a borrower defense claim.

(2) Reliance on a pre-dispute arbitration agreement with a student with respect to any aspect of a borrower defense claim includes, but is not limited to, any of the following:

- (i) Seeking dismissal, deferral, or stay of any aspect of a judicial action filed by the student, including joinder with others in an action;
- (ii) Objecting to or seeking a protective order intended to avoid responding to discovery in a judicial action filed by the student; and
- (iii) Filing a claim in arbitration against a student who has filed a suit on the same claim.

(3) Required provisions and notices:

- (i) The school must include the following provision in any pre-dispute arbitration agreements with a student recipient of a Direct Loan for attendance at the school, or, with respect to a Parent PLUS Loan, a student for whom the PLUS loan was obtained, that include any agreement regarding arbitration and that are entered into after the effective date of this regulation: “We agree that neither we nor anyone else will use this agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit for such a claim, or you may be a member of a class action lawsuit for such a claim even if you do not file it. This provision does not apply to lawsuits concerning other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.”
- (ii) When a pre-dispute arbitration agreement has been entered into before the effective date of this regulation that did not contain the provision specified in paragraph (f)(3)(i) of this section, the school must either ensure the agreement is amended to contain the provision specified in paragraph (f)(3)(iii)(A) of this section or provide the student to whom the agreement applies with the written notice specified in paragraph (f)(3)(iii)(B) of this section.
- (iii) The school must ensure the agreement described in paragraph (f)(3)(ii) of this section is amended to contain the provision specified in paragraph (f)(3)(iii)(A) of this section or must provide the notice specified in paragraph (f)(3)(iii)(B) of this section to students no later than the exit counseling required under § 685.304(b), or the date on which the school files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment, whichever is earlier.

(A) Agreement provision. “We agree that neither we, nor anyone else who later becomes a party to this pre-dispute arbitration agreement, will use it to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit for such a claim or you may be a member of a class action lawsuit for such a claim even if you do not file it. This provision does not apply to other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.”

(B) Notice provision. “We agree not to use any pre-dispute arbitration agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit regarding such a claim or you may be a member of a class action lawsuit regarding such a claim even if you do not file it. This provision does not apply to any other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Direct Loan or the provision of educational services for which the loan was obtained.”

(g) Submission of arbitral records.

(1) A school must submit a copy of the following records to the Secretary, in the form and manner specified by the Secretary, in connection with any borrower defense claim filed in arbitration by or against the school:

- (i) The initial claim and any counterclaim;
- (ii) The arbitration agreement filed with the arbitrator or arbitration administrator;
- (iii) The judgment or award, if any, issued by the arbitrator or arbitration administrator;
- (iv) If an arbitrator or arbitration administrator refuses to administer or dismisses a claim due to the school's failure to pay required filing or administrative fees, any communication the school receives from the arbitrator or arbitration administrator related to such a refusal; and

(v) Any communication the school receives from an arbitrator or an arbitration administrator related to a determination 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, if such a determination occurs;

(2) A school must submit any record required pursuant to paragraph (g)(1) of this section within 60 days of filing by the school of any such record with the arbitrator or arbitration administrator 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, the arbitration administrator, or the student.

(3) The Secretary shall publish the records submitted by schools in paragraph (g)(1) in a centralized database accessible to the public.

(h) Submission of judicial records.

(1) A school must submit a copy of the following records to the Secretary, in the form and manner specified by the Secretary, in connection with any borrower defense claim filed in a lawsuit by the school against the student or by any party, including a government agency, against the school:

(i) The complaint and any counterclaim;

(ii) Any dispositive motion filed by a party to the suit; and

(iii) The ruling on any dispositive motion and the judgment issued by the court;

(2) A school must submit any record required pursuant to paragraph (h)(1) of this section 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;

(3) The Secretary shall publish the records submitted by schools in paragraph (h)(1) in a centralized database accessible to the public.

(i) Definitions. For the purposes of paragraphs (d) through (h) of this section, the term –

(1) Borrower defense claim means an act or omission that is or could be asserted as a borrower defense as defined in:

(i) § 685.206(c)(1);

(ii) § 685.222(a)(5);

(iii) § 685.206(e)(1)(iii); or

(iv) § 685.401(a);

(2) *Class action* means a lawsuit in which one or more parties seek class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23;

(3) *Dispositive motion* means a motion asking for a court order that entirely disposes of one or more claims in favor of the party who files the motion without need for further court proceedings;

(4) *Pre-dispute arbitration agreement* means any agreement, regardless of its form or structure, between a school or a party acting on behalf of a school and a student that provides for arbitration of any future dispute between the parties.

#### **§ 685.308 Remedial actions.**

(a) **General.** The Secretary may require the repayment of funds and the purchase of loans by the school if the Secretary determines that the school is liable as a result of -

(1) The school's violation of a Federal statute or regulation;

(2) The school's negligent or willful false certification under § 685.215; or

(3) The school's actions that gave rise to a successful claim for which the Secretary discharged a loan, in whole or in part, pursuant to ~~§§~~ 685.206, ~~§~~ 685.214, ~~§~~ 685.216, ~~or §~~ 685.222, or part 685, subpart D.

(b) In requiring a school to repay funds to the Secretary or to purchase loans from the Secretary in connection with an audit or program review, the Secretary follows the procedures described in 34 CFR part 668, subpart H.

(c) The Secretary may impose a fine or take an emergency action against a school or limit, suspend, or terminate a school's participation in the Direct Loan Program in accordance with 34 CFR part 668, subpart G.

## Subpart D: Borrower Defense to Repayment

### § 685.400 Scope and purpose.

This subpart sets forth the provisions under which a borrower defense to repayment may be asserted and applies to borrower defense applications pending with the Secretary on July 1, 2023 or received by the Secretary on or after July 1, 2023.

### § 685.401 Borrower defense-general.

(a) Definitions. For the purposes of this subpart, the following definitions apply:

#### Borrower means

(1) The borrower; and

(2) In the case of a Direct PLUS Loan, any endorsers, and for a Direct PLUS Loan made to a parent, the student on whose behalf the parent borrowed.

Borrower defense to repayment means 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, and includes the following:

(1) A defense to repayment of amounts owed to the Secretary on a Direct Loan including a Direct Consolidation Loan that was used to repay a Direct Loan, a FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act, Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act; and

(2) Any accompanying request for reimbursement of payments previously made to the Secretary on the Direct Loan or on a loan repaid by the Direct Consolidation Loan.

Department official means the employee of the Department who administers the group process described in § 685.402, the individual process as described in § 685.403, and the institutional response process in § 685.405.

Direct Loan means a Direct Subsidized Loan, a Direct Unsubsidized Loan, a Direct PLUS Loan, or a Direct Consolidation Loan.

School and institution may be used interchangeably and include an eligible institution as defined in § 600.2, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs

or to provide marketing, advertising, recruiting, or admissions services. School or institution also includes persons affiliated with the institution as described in § 668.174(b).

State requestor means a State as defined in § 600.2, a State attorney general, a State oversight or regulatory agency with the authority from that State.

(b) Federal standard for borrower defense applications received on or after July 1, 2023, and for applications pending with the Secretary on July 1, 2023. A borrower with a balance due on a Direct Loan or other Federal student loan that is consolidated into a Federal Direct Consolidation Loan will be determined to have a defense to repayment of a Direct Loan under this subpart, if at any time the borrower establishes by a preponderance of the evidence that—

(1) The institution made a substantial misrepresentation as defined in part 668, subpart F, in connection with the borrower’s decision to attend, or to continue attending, the institution or the borrower’s decision to take out a Direct Loan or other Federal student loan that is consolidated into a Federal Direct Consolidation Loan;

(2) The institution made a substantial omission of fact, as defined in part 668, subpart F, in connection with the borrower’s decision to attend, or to continue attending, the institution or the borrower’s decision to take out a Direct Loan or other Federal student loan that is consolidated into a Federal Direct Consolidation Loan;

(3) The institution failed to perform its obligations under the terms of a contract with the student and such failure was in connection with the borrower’s decision to attend, or to continue attending, the institution or the borrower’s decision to take out a Direct Loan or other Federal student loan that is consolidated into a Federal Direct Consolidation Loan;

(4) The institution engaged in aggressive and deceptive recruitment conduct or tactics as defined in part 668, subpart R, in connection with the borrower’s decision to attend, or to continue attending, the institution or the borrower’s decision to take out a Direct Loan or other Federal student loan that is consolidated into a Federal Direct Consolidation Loan; or,

(5)

(i) The borrower, whether as an individual or as a member of a class, or a governmental agency has obtained against the institution a favorable judgment based on State or Federal law in a court or administrative tribunal of competent jurisdiction in connection with the borrower’s decision to attend, or to continue attending, the institution or the borrower’s decision to take out a Direct Loan or other Federal student loan that is consolidated into a Federal Direct Consolidation Loan; or,

(ii) The Secretary sanctioned or otherwise took adverse action against the institution at which the borrower enrolled under part 668, subpart G, for reasons that could give rise to a borrower defense claim under (b)(1) through (4) of this section.

(c) Violation of State law. A borrower has a borrower defense to repayment under this subpart if the Secretary identifies an act or omission of the school attended by the student that relates to the making of the loan for enrollment at the school or the provision of educational services for which the loan was provided that would give rise to a cause of action against the school under applicable State law.

(d) Exclusions. An institution's violation of an eligibility or compliance requirement in the Act or its implementing regulations is not a basis for a borrower defense under this subpart unless the violation would otherwise constitute a basis for a borrower defense under this subpart.

#### § 685.402 Group process for borrower defense.

(a) Group process, generally. Upon consideration of factors including, but not limited to, common facts and claims by borrowers, and the promotion of compliance by an institution or other title IV, HEA program participant, the Secretary may initiate a process to determine whether a group of borrowers from one institution or commonly owned institutions identified by the Secretary has a borrower defense under this subpart.

(b) Secretary initiated group process. The Secretary may create a group based upon information from sources that include but are not limited to—

(1) Actions by the federal government, State attorneys general, other State agencies or officials, or other law enforcement activity;

(2) Lawsuits related to educational programs filed against the institutions which are the subject of the claims or judgments rendered against the institutions; or,

(3) Individual borrower defense claims pursuant to § 685.403.

(c) State requestor-initiated group process. The Secretary shall consider a request to form a group from a State requestor in which the requestor-

(1) Submits an application to the Secretary, on a form approved by the Secretary that

(i) Identifies the requested group, including at minimum:

(A) The name of the institution or commonly owned institutions;

(B) The campuses or programs which are the subject of the claim, if applicable;

(C) A description of the conduct that forms the basis for the borrower defense claim under the Federal standard in § 685.401(b);

(D) An analysis of why the requestor believes the conduct should result in an approved borrower defense claim under the Federal standard in § 685.401(b); and,

(E) The period during which the activity in (c)(1)(C) of this section occurred;

(ii) Provides evidence beyond sworn borrower statements that supports each element of the claim made in paragraph (c)(1) of this section; and

(iii) Provides the names and other identifying information of borrowers in the group to the extent available; and,

(2) Provides any other information or supporting documentation reasonably requested by the Secretary within 90 days of the Secretary's request.

(3) The Secretary may consolidate multiple group applications related to the same institution or institutions.

(4) The Secretary shall provide a response to any materially complete State requestor group request under paragraph (c) within 365 days of receipt. That response shall include:

(i) Whether the Secretary will choose to form a group and a definition of the group formed;

(ii) If the Secretary chooses not to form a group, the reasons for not doing so; and

(iii) Any additional information needed from the State requestor to continue the State requested group process.

(5)

(i) If the Secretary denies in whole or in part a State request to form a group under the process described in paragraph (c) of this section, for reasons other

than that the Secretary already has formed a group that includes the members of the proposed group or has findings that cover the members of the proposed group, the State requestor submitting the group claim may request that the Secretary reconsider the decision upon the identification of new evidence that was not previously available to the Secretary in forming the group.

(ii) The State requestor submitting the group claim under subsection (c) of this section must request reconsideration of the group formation no later than 90 days from the date of the Secretary's initial decision regarding formation of the group.

(iii) The Secretary shall provide a response to the State requestor that requested reconsideration of the group's formation within 90 days of receipt of the reconsideration request.

(d) *Process after group formation.* Upon formation of a group of borrowers under this section, the Secretary—

(1) Designates a Department official to present the group's claim in the institutional response process described in § 685.405;

(2) For borrowers who have an application pending with the Secretary prior to the formation of the group, notifies those borrowers that they are an identified member of the group formed under this section and follows § 685.403(d) or § 685.403(e) as appropriate;

(3) For borrowers whose names were submitted by the State requestor and that can be identified by the Secretary, or that can otherwise be identified by the Secretary, if the borrower is not in default and does not have a separate application pending with the Secretary, follows the procedures under § 685.403(d) except that interest on the loan shall stop accumulating immediately;

(4) For borrowers whose names were submitted by the State requestor and that can be identified by the Secretary, or that can otherwise be identified by the Secretary, if the borrower is in default and does not have a separate application pending with the Secretary, follows the procedures under § 685.403(e) except that the interest on the loan shall stop accumulating immediately;

(5) For possible group members that the Secretary cannot identify, the Secretary will take reasonable steps to identify and notify potential members of the group, and if the Secretary ultimately is able to identify any additional members, then it shall follow

the process under subparagraphs (d)(3) and (4) of this section to allow those additional members to opt-in the group formed; and,

(6) If the Secretary later identifies a borrower that should have received the benefits as described under subparagraph (d)(3) or (4) of this section, either prior to the adjudication of the group or after an adjudication that results in the approval of a group borrower defense, the Secretary shall retrospectively apply the benefits available to the borrower under those subparagraphs and no other consequences shall apply.

685.403 Individual process for borrower defense.

(a) Individual process, generally.

(1) If § 685.402 does not apply to an individual borrower who has submitted a borrower defense application, the Secretary shall initiate a process to determine whether the individual borrower has a borrower defense under this subpart.

(2) If § 685.402 applies to an individual borrower who is covered under a group borrower defense application being considered by the Secretary, that group borrower defense application shall toll the timelines under § 685.406 on adjudicating the individual borrower application.

(3) Paragraph (a)(1) of this section shall not apply to claims covered by a group claim under § 685.402, including claims submitted prior to the formation of such a group, until after the Secretary makes a decision on that group claim.

(b) Individual process.

(1) The Secretary shall consider a borrower defense claim from an individual borrower in which the borrower—

(i) Submits an application to the Secretary, on a form approved by the Secretary; and,

(ii) Provides additional supporting evidence for the claims made under subparagraph (b)(1)(i) of this section, if any;

(2) The individual must provide any other information or supporting documentation reasonably requested by the Secretary.

(c) Individual borrower status. Upon receipt of a materially complete application under this section, the Secretary—

(1) Designates a Department official to present the individual's claim in the institutional response process described in § 685.405;

(2) Notifies the borrower that it will adjudicate the claim under § 685.406(c); and

(3) Places all the borrower's loans in forbearance in accordance with paragraph (d) of this section or stopped enforcement collections in accordance with paragraph (e) of this section, as applicable.

(d) The Secretary grants forbearance on all of the borrower's title IV loans that are not in default in accordance with § 685.205 and—

(1) Notifies the borrower of the option to decline forbearance and to continue making payments on the borrower's loans, and the availability of income-contingent repayment plans under § 685.209 and the income-based repayment plan under § 685.221; and,

(2) Does not charge interest on the borrower's loans beginning 180 days from the date the borrower was initially granted forbearance under paragraph (d) of this section if the Department official has failed to make a determination on the borrower's claim by that date and continuing until the Department notifies the borrower of the decision.

(e) The Secretary—

(1) Suspends collection activity on all defaulted title IV loans until the Secretary issues a decision on the borrower defense claim;

(2) Does not charge interest on the borrower's loans beginning 180 days from the date the Secretary initially suspended collection activity under subparagraph (e)(1) of this section if the Secretary has not made a determination on the borrower's claim by that date and continuing until the Department notifies the borrower of the decision;

(3) Notifies the borrower of the suspension of collection activity and explains that collection activity will resume no earlier than 90 days following final adjudication of the borrower defense claim if the Secretary determines that the borrower does not qualify for a full discharge; and

(4) Notifies the borrower of the option to begin or continue making payments under a rehabilitation agreement or other repayment agreement on the defaulted loan.

§ 685.404 Group process based on prior Secretarial final actions.

(a) For purposes of forming a Secretary-initiated group process in accordance with § 685.402(b), the Department official may consider final actions as described in § 685.401(b)(5)(ii). Such final actions include but are not limited to:

(1) Actions arising from a final audit determination or final program review determination regarding the relevant institution;

(2) An institution's failure to meet the administrative capability requirements that relate to the provision of educational services provided by the institution, in accordance with § 668.16;

(3) An institution's loss of eligibility due to its cohort default rates, in accordance with part 668, subpart N;

(4) Fines, limitations, suspension, termination, or emergency actions against the institution taken by the Secretary in accordance with part 668, subpart G; and,

(5) Other final actions as determined by the Secretary.

(b) For groups based on prior Secretarial final actions in accordance with this section, § 685.405 shall not apply to the affected institutions.

#### § 685.405 Institutional response.

(a) For purposes of adjudicating a borrower defense claim, the Department official notifies the institution of the group claim under § 685.402 or individual claim under § 685.403, and requests a response from the school. Such notification also may include, but is not limited to, requests for documentation to substantiate the school's response.

(b)

(1) The notification in paragraph (a) of this section tolls any limitation period by which the Secretary may recover from the institution under § 685.409.

(2) The Department official requests a response from the institution within 90 days of the Department official's notification.

(c) With its response, the institution must submit an affidavit, on a form approved by the Secretary, certifying under penalty of perjury that the information submitted to the Department official is true and correct.

(d) If the institution does not respond to the Department official's information request within 90 days, the Department official shall presume that the institution does not contest the borrower defense to repayment claim.

§ 685.406 Adjudication of borrower defense applications.

(a) The Department official adjudicates a borrower defense claim in accordance with this section.

(b)

(1) Group process, adjudication. For a group formed under § 685.402, the Department official considers any evidence related to the claim, including materials submitted as part of the group application, individual claims that are part of the group, evidence in the Secretary's possession, evidence provided by the institution during the institutional response process described in § 685.405, and any other relevant information.

(2) For a group of borrowers under § 685.402 for which the Department official determines there may be a borrower defense under § 685.401(b), there is a rebuttable presumption that each member of the group relied on the act or omission giving rise to the borrower defense in deciding to attend, or continue attending, the institution, and that such reliance was reasonable.

(c) Individual process, adjudication. For an individual process under § 685.403, the Department official adjudicates the borrower defense using the information available to it. The Department official considers any evidence related to the claim, including materials submitted as part of the individual application, evidence in the Secretary's possession, evidence provided by the institution during the institutional response process described in § 685.405, and any other relevant information.

(d) If the Department official requires additional information from the school, the school must respond to the Department official's information request within 90 days. If the Department official requires additional information from the individual, the individual must respond within a reasonable timeframe.

(e) The Department official issues a written decision as follows:

(1) Full or partial approval. If the Department official approves the borrower defense claim in full or in part—

(i) The written decision states that Secretary's determination and any discharge provided under § 685.408 on the basis of that claim.

(ii) The Secretary places a borrower's Direct Loans associated with a group borrower defense claim into forbearance until the Secretary discharges the loan obligations under § 685.212(k). If any balance remains on the Direct Loans not associated with the borrower defense claim or for loans that were not fully

discharged, those loans will return to their status prior to the claim process. The Secretary resumes collection activities on those Direct Loans not associated with the borrower defense claim or for loans that were not fully discharged no earlier than 90 days from the date the Department official issues a written decision. No interest will be charged on the loans during the forbearance period.

(2)

(i) Full denial, group. If the Department official denies the borrower defense in full, the written decision states the reasons for the denial, the evidence upon which the decision was based, and the portion of the loans that is due and payable to the Secretary. The Department official informs the borrowers that for the Direct Loans associated with the group borrower defense claim, those loans will return to their status prior to the group claim process. The Secretary resumes collection activities on the Direct Loans associated with the group borrower defense claim no earlier than 90 days from the date the Department official issues a written decision. The Department official also informs individual borrower from the group claim initially adjudicated under § 685.406(b)(1) the option to file a new borrower defense application under an individual process in accordance with § 685.403.

(ii) Full denial, individual. If the Department official denies the borrower defense in full, the written decision states the reasons for the denial, the evidence upon which the decision was based, and the portion of the loans that is due and payable to the Secretary. The Department official informs the borrowers that if any balance remains on the Direct Loans associated with the borrower defense claim, those loans will return to their status prior to the claim process. The Secretary resumes collection activities on the loans under which a forbearance or stopped collection was granted during adjudication of the claim in accordance with §§ 685.403(d) and (e), and 685.402(d)(2) through (d)(4), no earlier than 90 days from the date the Department official issues a written decision. The Department official also informs the borrower of the opportunity to request reconsideration of the claim pursuant to § 685.407.

(3) The Secretary provides copies of the written decision in this subsection to:

(i) An individual whose claim was adjudicated under § 685.406(c), as applicable;

(ii) The members of the group whose claims were adjudicated under § 685.406(b)(1), as applicable;

(iii) The school, to the extent practicable; and,

(iv) The State requestor who requested the group claims process, as applicable.

(f) Adjudication, timelines.

(1) The Secretary shall adjudicate a group or individual borrower defense claim under the following timelines:

(2) For a group claim under § 685.402(c), within 2 years of the date the Department official notified the State requestor under § 685.402(c)(4).

(3) For an individual claim under § 685.403, within 3 years of the date the Department determines the borrower submitted a materially complete application.

(4) The timelines in subparagraphs (f)(2) or (3) of this section shall not apply for additional adjudications carried out as part of the reconsideration process in § 685.407.

(5) An individual claim under § 685.403 that is included in a group claim under § 685.402 shall be subject to the adjudication timeline for that group under paragraph (f)(2) of this section, and any timelines associated with individual adjudication in paragraph (f)(3) shall be tolled until the Department official renders a decision on the claim under § 685.402.

(6) The Secretary shall provide an interim update to the individual borrower submitting a claim under § 685.403 or to the State requestor requesting a group process under § 685.402 no later than 1 year after the dates in subparagraphs (f)(2) and (3) of this section. Such notification shall –

(i) Indicate the Secretary’s progress in adjudicating the claim or claims; and,

(ii) Provide an expected timeline for rendering a decision on the claim.

(7) Only those loans covered by claims on which the Secretary has not yet issued the written decision under paragraph (e) of this section by the dates identified in subparagraph (f)(2) or (3) of this section shall be deemed unenforceable.

§ 685.407 Reconsideration.

(a) The decision of the Department official is final as to the merits of the borrower defense and any discharge that may be granted on the claim. Notwithstanding the foregoing—

(1) If the borrower defense is denied in full or in part, an individual may request that the Secretary reconsider their individual borrower defense claim on the following grounds for:

(i) Administrative or technical errors;

(ii) Consideration under an otherwise applicable State law standard under § 685.401(c) in lieu of the Federal standard; or,

(iii) Identification of evidence that was not previously provided by the borrower and that was not identified in the final decision as a basis for the Department official's determination;

(2)

(i) If the borrower defense is denied in full or in part for a group claim adjudicated under § 685.406(b)(1), any of the State requestors that requested to form a group under § 685.402(c) may request that the Secretary reconsider the borrower defense for the reasons provided under (a)(1)(i) through (iii) of this section. A State entity's reconsideration request made in accordance with subparagraph (a)(1)(ii) of this section must provide:

(A) The applicable State law standard;

(B) Why the State requestor requests use of such State law standard;

(C) Why application of the State law standard would result in a different outcome for the group than adjudication under the Federal standard;  
and

(D) Why the applicable State law standard would lead to a borrower defense.

(ii) An individual borrower from a group claim initially adjudicated under § 685.406(b)(1) may not file a reconsideration request under this section.

(3) The borrower or State requestor that requested to form a group under § 685.402(c) must request reconsideration under this section no later than 90 days from the date of the Department official's written decision, for any decisions issued on or after the effective date of these regulations.

(4) Reconsideration process.

(i) The Secretary shall consider a reconsideration request under (a)(1) or (a)(2)(i) of this section in which the individual or State requestor—

(A) Submits an application to the Secretary, on a form approved by the Secretary; and,

(B) Provides additional supporting evidence for the reconsideration claims made in paragraph (a)(4)(i) of this section, if any;

(ii) The borrower or State requestor entity submitting the reconsideration request must provide any other information or supporting documentation reasonably requested by the Secretary regarding the reconsideration request.

(b) The Secretary designates a different Department official for the reconsideration process than the one who conducted the initial adjudication.

(c) If accepted for reconsideration by the Secretary, the Department official follows the procedures in § 685.405 to notify the institution of the claim and the basis for the group's borrower defense under § 685.402 or individual's borrower defense under § 685.403 for purposes of adjudicating reconsideration of the borrower defense claim and to request a response from the school to the reconsideration request.

(d) If accepted for reconsideration by the Secretary, the Department official follows the procedures in § 685.403(d) for granting forbearance and § 685.403(e) for defaulted loans, as applicable.

(e) The Department official adjudicates the borrower's reconsideration request under § 685.406 and provides notice of the final decision upon reconsideration in accordance with § 685.406(e).

(f)

(1) The Secretary may reopen at any time a borrower defense application that was partially or fully denied. If a borrower defense application is reopened by the Secretary, the Secretary follows the procedures in § 685.403(d) for granting forbearance and for § 685.403(e) for defaulted loans, as applicable.

(2) Upon reopening a borrower defense application under (f) of this section, the Department official adjudicates the claim under § 685.406 and provides notice of the final decision on the reopened case in accordance with § 685.406(e).

§ 685.408 Discharge.

(a)

(1) Discharge amounts. There is a presumption that a borrower with an approved borrower discharge claim adjudicated under § 685.406(b) or (c) is eligible for full discharge of the Federal student loans associated with the approved claim unless the Department official is presented with a preponderance of evidence to the contrary.

(2) The Secretary does not limit the period on a borrower's ability to receive a reimbursement of payments previously made that are associated with a fully or partially approved claim.

(b) The Department official may rebut the presumption that the borrower or borrowers are eligible for full discharge if—

(1) The conduct that resulted in the approved borrower defense claim relates to an easily quantifiable sum that is related to books, supplies and materials, or other charges that are not direct academic expenses, in which case the discharge amount is equal to that sum;

(2) The conduct that resulted in the approved borrower defense claim relates to a substantial misrepresentation, substantial omissions of fact, breaches of contract, or aggressive or deceptive recruitment tactics or conduct, that did not involve the educational services provided. In that case, the amount of the discharge is tied to the full amount of harm experienced by the borrower as a result of the act or omission, but in no case shall be greater than the full amount of the loan; or,

(3) The conduct that resulted in the approved borrower defense claim relates to a substantial misrepresentation, substantial omissions of fact, breaches of contract, or aggressive or deceptive recruitment tactics or conduct, that did not involve the outcomes of the borrower's education. In that case, the amount of the discharge is tied to the full amount of harm experienced by the borrower as a result of the act or omission, but in no case shall be greater than the full amount of the loan.

(c)

(1) If the Department official determines that the presumption of full discharge has been rebutted, the official recommends an appropriate discharge amount to the Secretary. The discharge amount shall be an easily quantifiable amount that is less than the full amount of the loan or loans related to the claim, or 50 percent of the disbursed balance of the loan if the amount is not easily quantifiable.

(2) For a group process under § 685.406(b), the Department official shall recommend the same discharge amount to the Secretary for all members of the group, either in dollars or as a percentage of the loan amount.

(d) In determining whether an amount is easily quantifiable, the Department official—

(1) May consider factors such as the amount of debt taken on by borrowers at that program compared to the median debt level at all programs of the same level and classification of instructional program (CIP) code offered by all other institutions of higher education;

(2) May consider publicly available information on the price of books, supplies, or other materials; and

(3) May not base the determination upon individual or group measurements of the borrower's earnings or employment.

(e) The Department official recommends an appropriate amount of discharge to the Secretary, which may include a discharge of all amounts owed to the Secretary on the loan at issue and the reimbursement of amounts previously collected by the Secretary on the loan, an easily quantifiable amount that is less than the full amount of the loan or loans related to the claim, or 50 percent of the disbursed balance of the loan if the amount is not easily quantifiable.

(f) The Secretary makes a final decision after taking into account the Department official's recommendation and the record compiled under §§ 685.402, 685.403, 685.404, 685.405, and 685.407, as applicable.

(g) The Secretary issues a written decision setting forth the amount of the discharge granted, after which the designated Department official deciding the claim notifies the borrower of the discharge provided and –

(1) Specifies the amount of the discharge;

(2) Advises that there may be State tax implications; and

(3) If the borrower does not receive a full discharge of all loans covered by the claim, advises the borrower of the option to file a request for reconsideration in accordance with § 685.407.

(h) Consistent with the discharge amount determined under this section, the Secretary discharges the borrower's obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay and, if applicable, reimburses the borrower for amounts paid toward the loan voluntarily or through enforced collection.

(i) The Secretary affords the borrower such further relief as appropriate under the circumstances. Such further relief includes, but is not limited to, one or both of the following:

(1) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(2) Updating or deleting adverse reports the Secretary previously made to consumer reporting agencies regarding the borrower's Direct Loan.

(j) The total amount of discharge granted with respect to a borrower defense cannot exceed the amount of the loan and any associated costs and fees and will be reduced by the amount of any refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation, compromise, or any other financial benefit received by, or on behalf of, the borrower that was related to the borrower defense. The relief to the borrower may not include non-pecuniary damages such as inconvenience, aggravation, emotional distress, or punitive damages.

§ 685.409 Recovery from institutions.

(a) For loans first disbursed on or after July 1, 2023, the Secretary shall collect from the school, or in the case of a closed school, a person affiliated with the school as described in § 668.174(b), any liability to the Secretary for any amounts discharged or reimbursed to borrowers under the discharge process described in § 685.408.

(b) Notwithstanding the foregoing paragraph (a), the Secretary may choose not to collect from the school, or in the case of a closed school, a person affiliated with the school as described in § 668.174(b), any liability to the Secretary for any amounts discharged or reimbursed to borrowers under the discharge process described in § 685.408, under the following conditions, such as:

(1) The cost of collecting would exceed the amounts received; or

(2) The claims were approved outside of the limitations period in paragraph (c) of this section;

(c)

(1) Limitations period to recover from school. The Secretary shall initiate a proceeding to collect from the school the amount of discharge or reimbursement resulting from a borrower defense under § 685.408 no later than 6 years after the borrower's last date of attendance at the institution;

(2) The limitations period described in subparagraph (c)(1) of this section shall not apply if at any time prior to the end of the limitations period—

(i) the Department official notifies the school of the borrower's claim in accordance with § 685.405(b);

(ii) the institution receives a class action complaint asserting relief for a class that may include the borrower for underlying facts that may form the basis of a claim in accordance with this subpart; or

(iii) the institution receives written notice, including a civil investigative demand or other written demand for information, from a Federal or State agency that has power to initiate an investigation into conduct of the school relating to specific programs, periods, or practices that may have affected the borrower, for underlying facts that may form the basis of a claim under this subpart.

(3) For a borrower defense under § 685.401(b)(5), the Secretary may initiate a proceeding to collect at any time.

§ 685.410 Cooperation by the borrower. To obtain a discharge under this subpart, a borrower must reasonably cooperate with the Secretary in any proceeding under this subpart.

§ 685.411 Transfer to the Secretary of the borrower's right of recovery against third parties.

(a) Upon the granting of any discharge under this subpart, the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the contract for educational services for which the loan was received, against the school, its principals, its affiliates, and their successors, its sureties, and any private fund.

(b) The provisions of this section apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(c) Nothing in this section limits or forecloses the borrower's right to pursue legal and equitable relief against a party described in this section for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

§ 685.499 Severability. If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.



Document comparison by Workshare 10.0 on Tuesday, July 26, 2022 10:22:26 AM

Input:	
Document 1 ID	iManage://ss-dms/DMS/26663644/1
Description	#26663644v1<ss-dms> - Before_Proposed Rule_BDR
Document 2 ID	iManage://ss-dms/DMS/26663645/1
Description	#26663645v1<ss-dms> - After_Proposed Rule_BDR
Rendering set	MS Word Proof

Legend:	
<u>Insertion</u>	
<del>Deletion</del>	
<del>Moved from</del>	
<u>Moved to</u>	
Style change	
Format change	
<del>Moved deletion</del>	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	498
Deletions	137
Moved from	6
Moved to	6
Style change	0
Format changed	0
Total changes	647