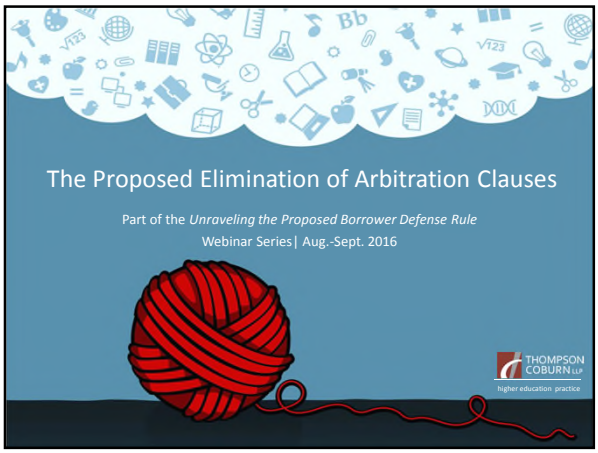


Welcome & Introduction

- Jeffrey R. Fink
  - Partner, Litigation Practice, Thompson Coburn LLP.
- Postsecondary Litigation Practice
  - Defend lawsuits and arbitrations brought by state attorneys general and former students in several states, including claims of fraud and violation of state consumer protection statutes and False Claims Act over representations about employment opportunities, transferability of credits, financial aid, accreditation, and educational quality.
  - Challenge government suspensions in financial aid programs, including veterans' benefits.
  - Defend employee-related litigation.

Welcome & Introduction

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

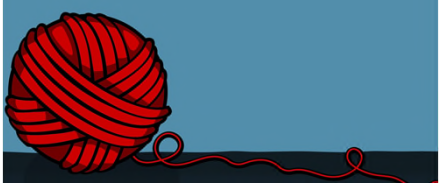
Webinar Series Schedule

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

Presentation Outline

- The Current Rulemaking
- The Proposed Class Action and Arbitration Provisions
- The Policy Debate
- Points of Significant Concern
- In the Meantime… Arbitration Agreement Best Practices
- TC Resources

The Current Rulemaking



The Rulemaking Timeline

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

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

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Elements of the Proposed Rule

Borrower Defense Framework

- Financial Responsibility Triggers
- Arbitration Agreements
- Closed School Discharge
- False Certification Discharge
- Misrep-resentation
- Repayment Rates for Prop. Schools

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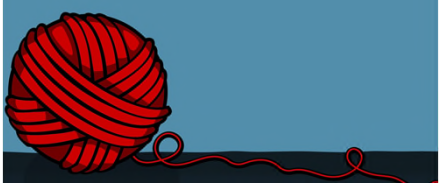
The Proposed Class Action and Arbitration Provisions



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The DL Participation Agreement

The HEA directs ED to enter into agreements with institutions to participate in the Direct Loan Program.

- Section 685.300 of the regulations requires institutions wishing to participate in the DL Program to "[e]nter into a written program participation agreement with [ED]," and details terms of participation.

20 U.S.C. § 1087c(a); 34 C.F.R. § 685.300.

The DL Participation Agreement

This "Direct Loan Program" agreement is part of each institution's Program Participation Agreement, which provides in the section titled Scope of Coverage:

> This Agreement covers the Institution's eligibility to participate in each of the following listed Title IV, HEA programs, and incorporates by reference the regulations cited.
>
> …
>
> - **FEDERAL DIRECT STUDENT LOAN PROGRAM**, 20 U.S.C. §§ 1087a *et seq*.; 34 C.F.R. Part 685.

From standard Program Participation Agreement

The DL Participation Agreement

Pursuant to the HEA, ED is directed to include in the agreement, among other things:

> Such other provisions as the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of this part.

20 U.S.C. § 1087d(a)(6).

The DL Participation Agreement

ED proposes to insert new requirements into 685.300 (terms of DL participation).

- ED contends these new requirements are necessary to "protect the interests of the United States."
- They would become a condition of participation and appear in a school's PPA.

81 Fed. Reg. 39380 (June 16, 2016).

Qualifying Claims

New requirements would only relate to student claims or complaints that could form the basis of a borrower defense claim.

- This means claims or complaints based on acts or omissions of the school that (1) relate to the making of a federal loan or the provision of educational services for which the loan was provided; and (2) could be asserted as a defense to repayment under proposed 685.206(c) or 685.222.

For purposes of this presentation, we will refer to these as qualifying claims.

Proposed 34 C.F.R. § 685.300(i).

The Proposed Restrictions

Internal Remedies	• Schools prohibited from compelling exhaustion of internal remedies (685.300(d)).
Class Action Waivers	• Schools prohibited from obtaining or enforcing waiver of class action lawsuits (685.300(e)(1)-(2)).
Mandatory Language Class Actions	• Schools must include language permitting participation in class actions (668.300(e)(3)).
Pre-Dispute Arbitration Agreements	• Schools prohibited from obtaining or enforcing arbitration agreements (685.300(f)(1)-(2)).
Mandatory Language Pre-Dispute Arbitration	• Schools must include language permitting lawsuits (668.300(f)(3)).
Notification of Qualifying Claims	• Schools must notify ED of any qualifying claims filed in arbitration or court (668.300(g)-(h)).

Proposed 34 C.F.R. § 685.300(d)-(i).

Exhaustion of Internal Remedies

Institutions would be prohibited from requiring students to first seek resolution of qualifying claims through an internal process.

- Students must be permitted to go directly to an institution's accreditor or the appropriate government agency.

Proposed 34 C.F.R. § 685.300(d).

Class Action Prohibition

Schools would be prohibited from relying on a class action waiver in a pre-dispute agreement:

- With a student; and
- With respect to any aspect of a class action that relates to a qualifying claim.

Does not have to be in an enrollment agreement or in an arbitration agreement.

Proposed 34 C.F.R. § 685.300(e)(1)-(2).

Mandatory Class Action Language

Any future agreement with a student for attendance that includes a pre-dispute agreement addressing class action would be required to state:

> We agree that neither we nor anyone else will use this 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 Direct Loan or the provision by us of educational services for which the Direct Loan was obtained.

Proposed 34 C.F.R. § 685.300(e)(3)(i).

Mandatory Class Action Language

- Any existing pre-dispute agreement with a student addressing class actions must be amended to include language specifying that the school will not seek to prevent a class action.
- Alternatively, a school may distribute a written notice to each student specifying that the school will not seek to prevent a class action.

Proposed 34 C.F.R. § 685.300(e)(3)(ii)-(iii).

Pre-Dispute Arbitration Prohibition

Schools would be prohibited from:

- compelling a student to enter into pre-dispute arbitration agreement; or
- relying on, a mandatory pre-dispute agreement to arbitrate qualifying claims.

A "mandatory pre-dispute arbitration agreement" is a pre-dispute arbitration agreement included in an enrollment agreement or other document that must be executed by the student as a condition for enrollment at the school.

Proposed 34 C.F.R. § 685.300(f)(1)-(2).

Mandatory Arbitration Language

Any future, mandatory pre-dispute arbitration agreement with a student must include the following clause:

> We agree that neither we nor anyone else will use this agreement to stop you from bringing a lawsuit regarding our acts or omissions regarding the making of the Direct Loan or the provision by us of educational services for which the 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.

Proposed 34 C.F.R. § 685.300(f)(3).

Mandatory Arbitration Language

- Any existing, mandatory pre-dispute agreement with a student must be amended to include language specifying that school will not seek to prevent a lawsuit.
- Alternatively, a school may distribute a written notice to each student specifying that the school will not seek to prevent a lawsuit.

Proposed 34 C.F.R. § 685.300(f)(3).

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Qualifying Claim Notification

Schools would be required to notify and provide documentation to ED if a matter involving a qualifying claim is filed in arbitration or court.

- Requirement would apply if claim is filed by or against school.
- Would have to notify ED within 60 days of filing.

Proposed 34 C.F.R. § 685.300(g)-(h).

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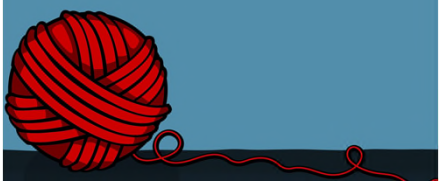
The Policy Debate



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ED Policy Underlying the Rule

ED takes the view that class action and pre-dispute arbitration provisions can:

- Affect whether institutions are held accountable for qualifying claims;
- Make it more likely that the costs of losses from qualifying claims will be passed on to the taxpayer;
- Reduce the incentive for institutions to engage in fair and ethical business practices rather than practices that give rise to qualifying claims; and
- Frustrate or reduce the effectiveness of ED's proposed processes for submitting and determining the validity of borrower defense claims.

81 Fed. Reg. 39380 (June 16, 2016).

ED Policy Underlying the Rule

- ED claims that the risk of class action lawsuits will motivate schools to change their practices.
- ED cites a CFPB study regarding class actions, which generally found that in the case of consumer financial products, "a ban on the use of mandatory predispute arbitration agreements … to preclude assertion of claims through class action lawsuits would benefit consumers [and] serve the public interest."

81 Fed. Reg. 39382-39383 (June 16, 2016).

ED Policy Underlying the Rule

ED acknowledges that litigation may not lead to better results for consumers:

> [T]he CFPB considered a ban on mandatory pre-dispute arbitration agreements, and… preliminarily found the evidence to be "inconclusive whether individual arbitration conducted during the Study period is superior or inferior to individual litigation in remediating consumer harm . . ."

81 Fed. Reg. 39384 (June 16, 2016).

ED Policy Underlying the Rule

But ED emphasizes that when it comes to the ban on pre-dispute arbitration:

> [T]he interests at stake in this determination are not the interests of the "public" and "consumers," but the interests of the Federal taxpayers whose funds are at risk for borrower defense claims asserted on Federal Direct Loans…

81 Fed. Reg. 39384 (June 16, 2016).

ED Policy Underlying the Rule

ED's policy argument is not about better results for individual students, it's about:

- Facilitating penalties sufficient to change industry behavior;
- Shifting risk away from the taxpayer, and
- Permitting borrowers access to state courts to facilitate the establishment of borrower defense claims under state law.

81 Fed. Reg. 39384 (June 16, 2016).

An Alternative Perspective

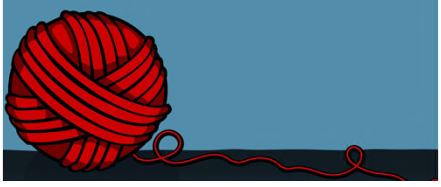
Arbitration can benefit both school and student:

- Arbitration can be cheaper and faster than litigation for both parties.
- Arbitration allows for simpler procedural and evidentiary rules.
- Arbitration is more flexible as to discovery and hearings.

An Alternative Perspective

- Schools and students can keep their disputes confidential.
- Schools can avoid class actions and limit their risk.
- Overall, arbitration is shown to achieve fair outcomes.

Points of Significant Concern



Points of Significant Concern

It is unclear whether ED has authority to ban schools from using or enforcing pre-dispute arbitration agreements with students.

- The Federal Arbitration Act (FAA) says that pre-dispute arbitration agreements are generally valid and enforceable. The FAA implements a strong federal policy favoring arbitration of disputes.
- ED concedes that it "does not have the authority … to displace or diminish the effect of the FAA." Yet, ED claims that it can bar pre-dispute arbitration agreements that would be enforceable under the FAA.

81 Fed. Reg. 39385 (June 16, 2016).

Points of Significant Concern

ED has no express authority from Congress to regulate arbitration agreements.

- The Higher Education Act is silent about arbitration.
- Compare with the Dodd-Frank Act, which gives authority to the Consumer Financial Protection Board to regulate arbitration agreements in consumer financial agreements.

12 U.S.C. § 5518(b).

Points of Significant Concern

ED asserts that it has implicit authority under 28 U.S.C. § 1087d(a)(6).

- That statute, however, provides that a program participation agreement shall include, among other things, "such other provisions as the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of this part."

Points of Significant Concern

ED's implicit authority under Section 1087 is also limited by other federal statutes, including the Federal Arbitration Act. ED cannot issue rules that violate federal statutes.

- The interests of the United States are defined by federal statutes such as the FAA.
- Provisions in program participation agreements that conflict with federal statutes such as the FAA presumably are not "necessary to protect the interests of the United States."

Points of Significant Concern

A ban on pre-dispute arbitration agreements would seem to violate the FAA.

- This is a hot issue with the National Labor Relations Board (NLRB).
- The NLRB has been deciding that employers can't have arbitration agreements with their employees that ban class action claims in arbitration.

Points of Significant Concern

- The Fifth Circuit has struck down the NLRB's decisions because the National Labor Relations Act (NLRA) is silent about arbitration and doesn't override the FAA.
- Other courts—the Seventh and Ninth Circuits—have upheld the NLRB's decisions on the basis that the NLRA prohibits employers from interfering with collective action by employees.

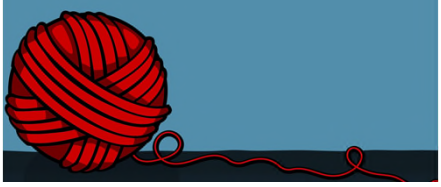
Points of Significant Concern

ED contends that students needs to be able to present borrower defense claims "to an authority well-situated to consider the merits of their claims and provide effective recourse directly against the school."

- But Congress and the United States Supreme Court have made clear that arbitration is just as effective as litigation to determine the validity of most all legal claims. There is no apparent reason why an exception should be made for borrower defense claims.

81 Fed. Reg. 39380 (June 16, 2016).

In the Meantime… Arbitration Agreement Best Practices



In the Meantime…

- Schools with class action waivers or pre-dispute arbitration agreements should continue to monitor the rulemaking closely.
- In the meantime, observe best practices with regard to your arbitration agreements and language.

Arb. Agreements (Best Practices)

Arbitration agreements require the student's assent.

- Schools should avoid disputes about whether a student agreed to arbitration.
- Wet-ink signatures are best.
- Electronic signatures are more likely to be disputed.

ARB. AGREEMENTS (BEST PRACTICES)

Arbitration agreements should be mutual.

- The student and the school should both be required to arbitrate any claims between them.
- Courts may not enforce the arbitration agreement if the school reserves the right to sue a student.

ARB. AGREEMENTS (BEST PRACTICES)

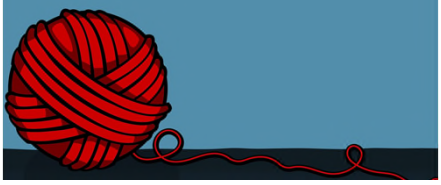
Schools can't retain unilateral right to change the arbitration agreement.

- Schools should be careful if their enrollment agreements incorporate school catalogs or other documents.

ARB. AGREEMENTS (BEST PRACTICES)

- Courts are more likely to enforce arbitration agreements if students are not required to pay significant expenses to arbitrate (i.e., arbitration filing fees and arbitrator compensation).
- Schools should be sure their arbitration agreements clearly prohibit class action claims in arbitration.

TC Resources



Resources from TC

- Borrower defense webinar series on demand.
- REG*ucation* higher education law and policy blog.

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