



The Proposed Repayment Rate for Proprietary Schools

Part of the *Unraveling the Proposed Borrower Defense Rule*  
Webinar Series | Aug.-Sept. 2016


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## 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.




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## WELCOME & INTRODUCTION

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




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**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)**



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**PRESENTATION OUTLINE**

- The Current Rulemaking
- The Proposed Repayment Rate Framework
- The Proposed Repayment Rate Calculation
- Justifying Another Repayment Rate
- TC Resources



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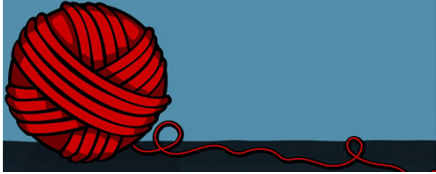
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**THE CURRENT RULEMAKING**



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## 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

Misrepresentation

Repayment Rates for Prop. Schools




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## THE PROPOSED REPAYMENT RATE FRAMEWORK


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**THE PROPOSED FRAMEWORK**

For each fiscal year, ED would calculate a loan repayment rate. If the rate is **less than or equal to zero**, the institution must disclose a warning:

- to prospective and enrolled students
- on its website
- in all promotional materials and advertisements.

Proposed 34 CFR § 668.41(h). 

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**THE PROPOSED FRAMEWORK**

Warnings must be made within 30 days of receiving final rate determination. ED will determine form and content; examples include:

- U.S. Department of Education Warning: A majority of borrowers at this school are not likely to repay their loans.
- U.S. Department of Education Warning: A majority of borrowers at this school have difficulty repaying their loans.
- U.S. Department of Education Warning: Most of the students who attended this school owe more on their student loans five years after leaving school than they originally borrowed.

Proposed 34 CFR § 668.41(h); 81 Fed. Reg. 39372. 

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**THE PROPOSED FRAMEWORK**

Institutions would have an opportunity to review the “cohort” list.

- An institution with 10 or more borrowers that receives a failing repayment rate would have the opportunity to appeal its rate if the institution demonstrates that it has a low participation rate under the Direct Loan program.

ED would **not** calculate a repayment rate for an institution whose cohort is based on fewer than 10 borrowers.

Proposed 34 CFR § 668.41(h). 

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# THE PROPOSED REPAYMENT RATE CALCULATION


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## THE RATE CALCULATION

ED would calculate a loan repayment rate each fiscal year for the **entire institution** (not each program).

- The rate would be for the cohort of borrowers whose Direct Loans entered repayment at any time during the fifth fiscal year **prior** to the most recently completed fiscal year.

Proposed 34 CFR § 668.41(h).




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## THE COHORT PERIOD

"Fiscal Year" runs from October 1 to September 30, and is identified by the year in which it ends.

FY2012	FY2013	FY2014	FY2015	FY2016	FY2017 (ends 9/30/17)
5 <sup>th</sup> Prior FY	4 <sup>th</sup> Prior FY	3 <sup>rd</sup> Prior FY	2 <sup>nd</sup> Prior FY	1 <sup>st</sup> Prior FY	Most recently completed Fiscal Year.

In this example, in which FY2017 is the most recently completed fiscal year, ED would calculate the repayment rate based on borrowers whose Direct Loans entered repayment at any time during FY2012 (October 1, 2011 - September 30, 2012).




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## COHORT EXCLUSIONS

ED would exclude borrowers from the cohort if:

- They were in a **military-related deferment** status during the last fiscal year of the applicable period;
- One or more of the borrower’s loans are either under consideration, or have been approved, for a discharge on the basis of total and **permanent disability**;
- The borrower was **enrolled** in an eligible institution during the last fiscal year of the applicable period; or
- the borrower **died**.

Proposed 34 CFR § 668.41(h). 

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## CALCULATING “DIFFERENCE”

For each borrower in the cohort, ED would calculate the **difference** between the borrower’s current outstanding balance (**COB**) and the borrower’s original outstanding balance (**OOB**).

Proposed 34 CFR § 668.41(h). 

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## CALCULATING “DIFFERENCE”

**OOB – COB = Difference**

**Original Outstanding Balance (OOB)** is defined as the balance owed, including accrued interest, at the time the borrower first entered repayment.

**Current Outstanding Balance (COB)** defined as the balance owed at the end of the most recently completed fiscal year, including capitalized and uncapitalized interest.

Proposed 34 CFR § 668.41(h). 

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## REPAYMENT RATE: CALCULATING PROGRESS

For each borrower, ED would then:

- Express the **Difference** “as a percentage reduction of, or an increase in” the original balance; and
- Convert the percentage into a positive or negative value (positive for percentage decreases and negative for percentage increases).

Defaulted loans for which there is a positive value would be treated as zeros.

Proposed 34 CFR § 668.41(h).




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## CALCULATING THE MEDIAN

ED would plot all the values for the cohort, and determine the median value. **This median value would be the institution’s repayment rate.**

- If the repayment rate is less than or equal to zero, the institution must make the aforementioned warning.

Proposed 34 CFR § 668.41(h).




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## ILLUSTRATION

Repay. Status	Repayment Program	OOB	COB	Difference	% Change	Assigned Value
Active	Standard	\$12,000	\$10,000	\$2,000	16.67%	0.17
Active	Standard	\$12,000	\$10,000	\$2,000	16.67%	0.17
Active	Income-Driven Repayment	\$12,000	\$13,500	-\$1,500	-12.50%	-0.13
Active	Standard, deferred first 3 years following repayment (further education)	\$12,000	\$14,000	-\$2,000	-16.67%	-0.17
Active	Standard, deferred 3 years (econ. hard.)	\$12,000	\$16,000	-\$4,000	-33.33%	-0.33
Default	Default	\$12,000	\$11,000	\$1,000	0.00%	0.00
Default	Default	\$12,000	\$17,000	-\$5,000	-41.67%	-0.42




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**POINTS OF SIGNIFICANT CONCERN**

- An institution with very high percentages of borrowers in active repayment and making payments pursuant to a government-approved program could be determined to have a zero repayment rate.
- The proposed rule only accommodates certain deferments, and then only during certain periods.



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**POINTS OF SIGNIFICANT CONCERN**

- The proposed calculation equates a state of negative amortization with a state of non-payment.
- Penalizing institutions for borrowers who take advantage of repayment programs created and promoted by ED is unfair.



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**JUSTIFYING ANOTHER REPAYMENT RATE**



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**STATUTORY AUTHORITY**

As statutory authority for the proposed repayment rate, ED cites its general authority to:

[P]rescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.

20 U.S.C. §§ 1221e-3 and 3474.




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**JUSTIFYING A NEW REPAYMENT RATE**

ED argues that students should make as informed a decision as possible when deciding to enroll, and that the repayment rate warnings will assist them to do so.

ED's logic is as follows:

- Students need to know if it is likely that they will be **unable** to pay down their loans after graduation.

81 Fed. Reg. 39371-39374.




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**JUSTIFYING A NEW REPAYMENT RATE**

- ED analysis of NSLDS data indicates that the typical borrower in **negative amortization** will have trouble paying down loans after graduation, and is more likely to default.
- Institutions with high numbers of graduates in negative amortization and default will have zero or negative loan repayment rates under the proposed calculation.

81 Fed. Reg. 39371-39374.




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**JUSTIFYING A NEW REPAYMENT RATE**

- Institutions with zero or negative loan repayment rates under the proposed rule will have to make warnings.
- The required repayment rate warnings will thus alert students of the likelihood that they will be **unable** to pay down their loans after graduation.
- ED concludes that this is useful, new information.

81 Fed. Reg. 39371-39374. 

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**POINTS OF SIGNIFICANT CONCERN**

- Though the proposed repayment rate would certainly provide **different** information, it is unclear that the data would be **useful**.
- A borrower will not find the new rate useful unless she understands the methodology underlying the rate, and how it is different from the many rates schools already calculate and disclose.

81 Fed. Reg. 39371-39374. 

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**POINTS OF SIGNIFICANT CONCERN**

And there are many, many other rates.

- ED acknowledges that it already calculates two federal “repayment rates,” one for the College Scorecard website and one pursuant to the Gainful Employment rule.
- These rates are calculated pursuant to methodologies that **differ** from the newly proposed repayment rate.

81 Fed. Reg. 39371-39374. 

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### POINTS OF SIGNIFICANT CONCERN

ED also calculates, reserves the right to calculate, or requires proprietary schools to calculate the following:

SR2K Grad Rate (On-Time, Overall)	SR2K Grad Rate (150%, Overall)	SR2K Grad Rate (On-Time, Disaggregated)	SR2K Grad Rate (150%, Disaggregated)
SR2K Transfer-Out Rate (150%, Overall)	SR2K Retention Rate (150%, Overall)	Completion, Graduation, and Transfer-Out Rates for Student Athletes	GE Completion Rate
GE Withdrawal Rate (100% Program Length)	GE Program Cohort Default Rate	GE Withdrawal Rate (150% Program Length)	GE Annual Earnings Rate
GE Discretionary Income Rate	GE Placement Rate for Institution	GE Placement Rate by Program	




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### POINTS OF SIGNIFICANT CONCERN

ED suggests that it will “look for ways to harmonize the multiple repayment rate methodologies, contingent on consumer testing and user needs.”

- There would seem to be a bigger question, however, regarding the usefulness of this or any other rate when presented alongside so many other rates and disclosures.




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### JUSTIFYING ONLY PROPRIETARY

Recognizing the “administrative burden” the new framework creates, ED proposes to only apply new rule to “the sector of institutions where the frequency of poor repayment outcomes is greatest.”

- ED then takes the position that, based on its projections, “zero and negative repayment outcomes are endemic to the proprietary sector, but are relatively rare in the public and non-profit sectors.”

81 Fed. Reg. 39371-39374.




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**POINTS OF SIGNIFICANT CONCERN**

How significant can the student need for this rate be if it is **outweighed** by the administrative burden associated with the proposed reporting and disclosure requirements?

- In the case of public and private, non-profit institutions, ED is conceding that this cost is more significant than benefit of disclosure.



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**POINTS OF SIGNIFICANT CONCERN**

What is the rationalization for basing an exemption scheme on sector?

- The justification for the repayment rate is the student's need for information and warning.
- Student need is a function of **institutional performance**, not sector.
- As such, any exemption should turn on institutional performance instead of sector (*e.g.*, exempt institutions that demonstrate strong, year-over-year rates for a period of time.)



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**POINTS OF SIGNIFICANT CONCERN**

What is the rationalization for dividing institutions up by tax-status?

- ED appears to have conducted preliminary analysis based on tax-status (i.e., public, private, non-profit, proprietary).
- Would it be more sensible to divide institutions into sectors based on mission, level of offerings, geography, historic CDR performance?



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**POINTS OF SIGNIFICANT CONCERN**

Is the proprietary sector really “far more likely to have poor repayment rates, along with lower post-college earnings and higher default rates, than public or non-profit institutions?”

81 Fed. Reg. 39372 (June 16, 2016)




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**POINTS OF SIGNIFICANT CONCERN**

ED’s three-year official cohort default rates indicate that the distinction among the sectors is marginal, at best.

- According to the most recently published rates, calculated August 8, 2015, the average cohort default rate for proprietary schools was **15.8%**, while the national average for all schools was **11.8%**.

<http://www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf>




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**POINTS OF SIGNIFICANT CONCERN**

- The two highest cohort default rates among all sectors of higher education were for less than 2-year, private, non-profit schools (**22.4%**) and 2-3 year public schools (**19.1%**).
  - For both less than 2-year, and 2-3 year, proprietary institutions, the CDR was **17.7%**.
- Also of note, total proprietary defaults was 235,384, while total 2-3 year public school defaults was 173,628.

<http://www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf>




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**POINTS OF SIGNIFICANT CONCERN**

The distinction in the rate of negative amortization also is minimal.

- An institution’s “repayment rate” under the proposed methodology will be significantly impacted by the number of borrowers with loans in a state of negative amortization.
- Since ED began promoting income-driven repayment plans, an increasing number of borrowers in all sectors have met this criterion.



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**POINTS OF SIGNIFICANT CONCERN**

According to the same Brookings Institution study cited by ED, the percent of borrowers with loans in a state of negative amortization after two years was:

- 74% at proprietary institutions
- 64% at 2-year public/np
- 59% at non-selective 4-year public/np
- 48% at somewhat selective public/np

Brookings Institution: <http://www.brookings.edu/~media/projects/bpea/fall-2015/pdf/fooneytextfallbpea.pdf>.



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**POINTS OF SIGNIFICANT CONCERN**

This data seems to suggest that cohort default and repayment rates are more likely to be impacted by degree-level offered and selectivity of institution, and not on tax status.



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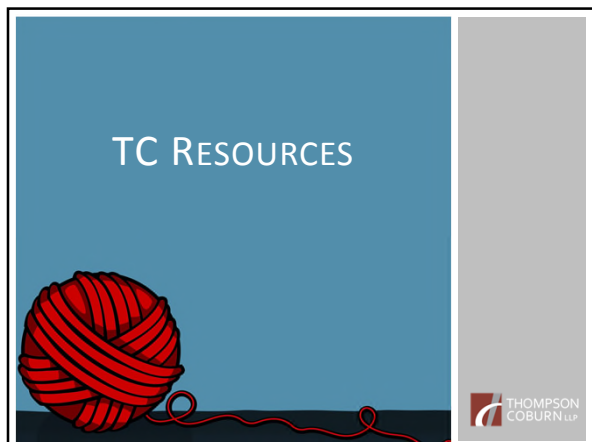
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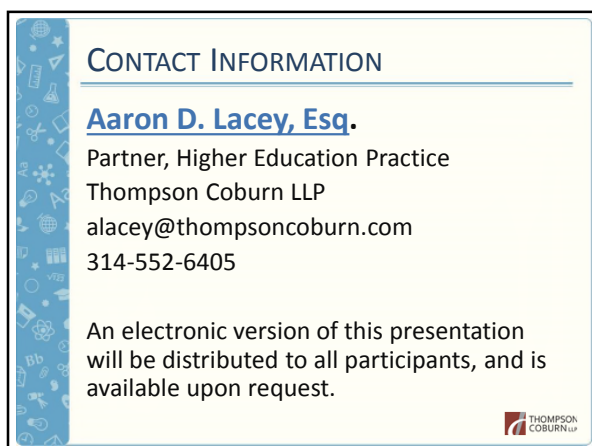
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