

Borrower Defense to Repayment Toolkit

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Introduction

CECU is asking every member school to submit multiple comments on or prior to August 1, 2016. We encourage comments from school leaders, faculty, staff, employers and others! If we do not develop and submit a strong comprehensive response to this NPRM we face the reality that few, if any, changes will take place or that the rule could get worse as our opponents push for an even more egregious and onerous rule. As currently drafted, the rule could result in dramatic elimination of access for students seeking career education.

In this section of the toolkit CECU provides our member institutions with recommended generic comments to include in your comment letters. Feel free to put what we have provided into your own words or copy and paste what we have provided in your comments.

We feel that the recommended comments below are a great starting point for all our member institutions. However, the most persuasive argument a school can make to the Department during the comment period is to provide them with real-life examples of how these various provisions will specifically impact your school and the students you serve. We would also remind you all that your comments will be public so do not include any examples that could be taken out of context and lead to the Department conducting program reviews or attacks from consumer advocates. If you have specific examples you are nervous about attributing directly to your school but believe they should be brought to the Department's attention we will happily accept submissions from our schools and include them in our comments as "examples from the sector."

For your convenience we have broken down the six key issues in the NPRM for you to consider as parts of your comments.

1. Letters of Credit & General Standards of Financial Responsibility
2. Arbitration & Dispute Resolution Procedures
3. Repayment Rate Calculation & Disclosures
4. Process
5. Misrepresentation & Substantial Misrepresentation
6. Record Retention

In-Depth Analysis & Recommended Comments

1. Letters of Credit & General Standards of Financial Responsibility

Issue: Under the proposed regulations there are a series of triggers which would require institutions to post a letter of credit for 10% or more of their previous award year Title IV Loan volume for each violation. These letters of credit stack and a school could be forced to post letters of credit for more than 100%! Additionally, many of these triggers are crafted to target for-profit career schools including politically-motivated lawsuits by state AGs, institutions conducting teach-outs, violating the 90/10 rule, or having 50% of Title IV students in failing or zone GE programs among others.

In-Depth analysis and thoughts to include in your comments:

The draft regulation applies a presumption that a school subject to one of the triggering events is not able to meet its financial or administrative obligations. By presuming this, the Department is denying a school the opportunity to make the demonstration of its financial capabilities. Rather, events such as an accrediting body action or single year failing 90/10 will automatically trigger a 10% letter of credit obligation on the part of the school.

This portion of the NPRM will have a significant impact on for-profit career schools and the students they serve. In reality this section was written by those opposed to our sector's very existence! Imagine if this were in effect during the current administration. Democrat AG's, the CFPB, FTC, and consumer groups could coordinate such filing of frivolous law suits against targeted schools. The trigger for requiring the posting of letters of credit is not a judgement against a school, but simply the filing of a suit no matter how frivolous it might be.

The Department also proposes that the letters of credit to stack, meaning schools could be required to have multiple letters of credit, despite the Department's knowledge of the hurdles schools would encounter securing letters of credit within the required timeframe. If a school would be unable to secure the required lines of credit, the Department would withhold all Title IV funds.

Despite the lack of success for state and federal agencies in proving their allegations against for-profit career schools, the NPRM will impose extremely onerous financial requirements on schools and deem schools not financially responsible during the pendency of the lawsuit based the mere fact an action has been filed. This demonstrates the clear punitive intent of the rules, contradicting the Department's stated rationale for the rule.

Suggested Comments:

- Schools will have a difficult time securing letters of credit.
- The Department has constructed the rule to be so burdensome and over-reaching that it will create more financial issues than it solves.
- The rule does not give the school the ability to demonstrate that it is financially sound in its total financial circumstances.

- Schools will experience more significant financial difficulties than otherwise would result from the triggering events.
- The penalties associated with the triggers will significantly impact a career school's operations and enrollment based on unproven allegations made by other state and federal agencies with which the Department is actively working.
- In your comments, schools should show evidence and/or experience of trying to obtain letters of credit in the current environment and how – despite the high quality of your school's operations – you have been unable to do so.

2. Arbitration & Dispute Resolution Procedures

Issue: Under the proposed regulation, schools would be prohibited from requiring or compelling a borrower to enter into a pre-dispute agreement to arbitration of a borrower defense claim or obtaining or enforcing a waiver of or a ban to class-action lawsuits regarding borrower defense claims. Schools with current pre-dispute arbitration agreements or class-action waivers, even those in effect before the estimated July 1, 2017 implementation date, would be required to modify those agreements with agreements provided by the Department.

In-Depth analysis and thoughts to include in your comments:

We are very concerned that limiting a student's ability to individually seek arbitration, and forcing them into the required Department of Education hearings, will limit recourse to only those students enrolled in large institutions. Students at small institutions will have disproportionate protections or access to remedies because no trial lawyer would focus their energies on small schools. If this were really about protecting all students, rather than serving the interests of trial lawyers, this provision would not exist. Pre-dispute arbitration agreements have proven to be a fair and just method of determining the validity of borrower defense claims. We see no reason why students should not be given an option to their preferred method of adjudication.

Additionally, requiring schools to retroactively change any enrollment contracts with current students will place additional administrative and compliance burdens on schools and will add to student's confusion should the student desire to seek a borrower defense claim.

Suggested Comments:

- Students at smaller schools will have less of an opportunity to have their claims be heard.
- Students who actually prefer arbitration over litigation will no longer have that option.
- Prohibiting arbitration will only give added costs to both the school and the student if the student decides to pursue a claim.

3. Repayment Rate Calculations & New Disclosures:

Issue: The proposed Borrower Defense to Repayment rule, if unchanged, will require for-profit institutions with low repayment rates to provide a new disclosure warning on its website and on all advertising and promotional materials. The repayment rate is yet another repayment rate that differs from others that schools already have to disclose.

In-Depth analysis and thoughts to include in your comments:

In the proposed rule the Department states that “warning students of institutions with particularly low – zero percent or negative – repayment rates will give them critical information.” During the negotiated rulemaking process, the Department proposed to apply this provision to all schools, however, in the end, the Department has arbitrarily decided to apply this requirement to only for-profit colleges.

The Department also states in the NPRM that they decided to exclude traditional schools from the repayment rate warning and disclosure requirements because compliance would impose significant disclosure burdens. Among schools with similar repayment rates there is no justifiable legal or policy rationale that supports imposing a significant disclosure burden on one specific sector, but not others.

The Department is being selective in the application of this provision because of their ideological opposition to the very existence of the for-profit sector. They have no sound or reasoned rationale for applying it only to proprietary institutions.

Suggested Comments:

- The rule unfairly only requires for-profit schools to provide notice, creating unjust compliance and additional burdens.
- All students, regardless of their higher education choice, should be given this information.
- The Department ignores the fact that nearly 30 percent of institutions with equally bad (or worse) repayment rates of for-profit will not be required to provide additional disclosures or warnings to students.
- We request that the Department either pull this new repayment rate definition entirely or apply it to all institutions of higher education.

4. Process

Issue: The proposed Borrower Defense to Repayment rule creates a new and undefined fact-finding endeavor where the Department becomes the advocate, judge, jury, and bailiff, without independent judgments. Meanwhile, schools are given a decreasing role in the fact-finding process, and little opportunity to appeal a decision based upon the determination of a single Department official.

In-Depth analysis and thoughts to include in your comments:

Schools bear an incredible weight defending against any and all borrower defense claims. Yet, the proposed regulation is vague in allowing schools to present their own facts to the Department or hearing official.

CECU is concerned that the procedural process for claims is riddled with problematic language and is hopeful the Department corrects the regulation in the final draft. In an individual claim, the borrower would first file a claim with the Secretary. In the claim, the borrower would have opportunity to provide evidence that supports their borrower defense. The Secretary would then designate a Department official to review the claim through a fact-finding process. Only during this process will a school be able to submit a response or information. The decision of the Department official would be final as to the merits of the claim and any relief that may be warranted. If an individual borrower defense is granted, the school would be very limited in its appeal options. A group process may be started if the Secretary determines it is appropriate to initiate a claim if a group of borrowers have a common borrower defense claim. Once a group has been established, the Secretary will designate a Department official to present the common claims before a hearing official, who was appointed by the Secretary. The irony of a group claim is there would be a rebuttable presumption, an assumption taken by the court that a claim is true, unless proven otherwise, that all of the members of the group reasonably relied upon the misrepresentation. The greatest rebuttable presumption is that a defendant is innocent until proven guilty. But here, a school would be assumed guilty until proven innocent!

CECU is equally concerned with the post-decision process by which claims are handled. During the appeals process, as proposed, the Secretary would be allowed to consider new material that may not have been considered during the original claims process. Additionally, after a borrower defense claim is approved, the Department official or hearing official would determine the appropriate method for calculating the amount of relief to be granted. The amount of relief may include the discharge of any amount owed as well as the recovery of any amount already paid by the borrower.

The Department's proposed rule creates an unfair method for which the Department would recoup money from schools. The process by which an individual claim would recover from a school remains uncertain, while group claims would be recovered out of the same proceeding as the claim. This is alarming as school's due process during this period is limited to only their involvement in the fact finding process and not during recovery.

Suggested Comments:

- The Department and hearing officials seemingly have complete and independent discretion at what evidence they choose to use to factor into their decision.
- The Department has created an individual claims process where the standard which the student can assert a successful borrower defense has yet to be established; and the claim application can either result in an administrative forbearance or suspension in collection activity, which will lead to frivolous claims intended to delay repayment.
- The Department should not be allowed to choose a hearing official, then advocate on behalf of the group before their chosen official.
- If a group's claim is denied, individual members of the group would be able to file claims as individuals. This would not only create a pseudo double jeopardy situation for the schools, but will also require schools to devote more resources towards defending against claims that had already been denied.
- Students should be required to opt-in to the group, as opposed to being required to opt-out. Under the proposed regulation, students' personal information may be used in claims without their knowledge or consent.
- The regulation does nothing to prevent frivolous or political ideology driven claims. The potential for abuse is high, which will only increase compliance costs to schools.

5. Misrepresentation & Substantial Misrepresentation:

Issue: The Department proposes to expand the definition of misrepresentation to include omissions of information. The regulations also specify factors that, if present in conjunction with a misrepresentation on the part of the school, would likely elevate that misrepresentation to a substantial misrepresentation.

In-Depth analysis and thoughts to include in your comments:

Our concerns about the process and the limited role that an institution has in that fact finding and judgement are compounded by the vague standards set regarding misrepresentation and substantial misrepresentation.

The Department appears to have intentionally crafted these misrepresentation claims in a manner that will provide redress to students at career colleges, but not to similarly situated students attending traditional schools. While the Department has set vague standards they have narrowed the scope for which students can bring claims for borrower defense to repayment. Based on comments by senior Department of Education officials these criteria have been chosen precisely because they apply predominantly to for-profit schools.

For example: the Department will not recognize as a borrower defense to repayment claim an action that is not directly related to the loan or to the provision of educational services, such as personal injury or allegations of sexual or racial harassment. The current rule allows a student to raise any act or omission of the school that, under state law, would give rise to a potential borrower defense to repayment claim. The NPRM states that violations of an "eligibility requirement" will not be

used as the basis for a borrower defense to repayment claim. This provision means students will not be able to bring claims against schools for issues such as Title IX (a liability issue predominantly applicable to traditional schools) as the basis for a defense to repayment. In our view misrepresenting campus safety is certainly something that should give rise to a successful borrower defense to repayment claim.

Suggested Comments:

- The proposed rule significantly narrows the scope of the new borrower defense rules by focusing only on judgments, substantial misrepresentations and breaches of contract as the basis for a successful claim.
- The criteria for a successful claim is inadequate and inconsistent with the purpose of the statute and the implementing regulations.
- Students would not be able to raise non-loan related issues as a cause for a borrower defense claim, such as campus safety.

6. Record Retention

Issue: Current regulations allow the Secretary to initiate a borrower defense claim within the three year period which each recipient of Federal funds is required to keep records that disclose “the amount and disposition of those funds.” As proposed, the regulation would eliminate the current regulation, and the resulting statute of limitations, to allow the Secretary to pursue claims for an infinite amount of time.

In-Depth analysis and thoughts to include in your comments:

Requiring schools to maintain records of federal funds disbursements for an unknown timeframe creates an extreme and unlimited burden on schools in their efforts to maintain compliance. Creating an unlimited timeframe for students to pursue borrower defenses will decrease a school’s ability to adequately respond to all claims, from those with the most merit down to the most frivolous.

Suggested Comments:

- Eliminating a statute of limitations for the filing of a claim exposes schools to limitless claims.
- Requiring schools to maintain records of loans for an infinite time creates unnecessary compliance implications and burdens.

Guidelines for Submitting Comments

We recommend using the following checklist while you are developing and submitting comments:

1. Once your comments are finalized save them in PDF format
 - i. Go to the [regulations.gov portal](#) for this regulation
 - ii. Click "[Comment Now](#)" on the far right side
 - iii. Upload your comment document(s) – If you are uploading more than one document we recommend you save them with titles like "<insert abbreviated name of school>_Attachment1_<insert name of document>" for example if CECU were to submit separate comments for the Letters of Credit issue and Arbitration issue we would name the files:
 - i. "CECU_Attachment1_Letters of Credit"
 - ii. "CECU_Attachment2_Arbitration"
 - iv. If desired you can provide your contact information
 - v. If you are submitting on behalf of a third party there is a box to check – if you select that box you must fill out additional information
2. You must then select a "category" – there you can identify as simply an "Institution of Higher Education" or they have the sectors listed as well (i.e. "Private/For-Profit Institution of Higher Education")
 - i. For students, employers of your graduates or other 3rd parties there are options for them to select as well
3. Click on "Continue" at the bottom of the page
4. You will be taken to a preview page that will show you how your comment will appear on the federal register
5. If you would like to edit your comment click on the "Edit" button at the bottom of the page
6. Check the "I read and understand the statement above." box
7. If you are ready to submit your comments click on the "Submit Comment" button

Important Links & Dates

Below we are providing member schools with a list of important links to save as a reference. We also provide a list of important dates to remember as we move forward with the rulemaking and implementation process.

Links to remember:

- [Regulations.gov](#) portal: submit and read comments
- Federal Register [Publication of Proposed Rule](#)
- Department of Education [Notice of Proposed Rulemaking](#)
- Department of Education [FAQ](#)
- Department of Education [Fact Sheet](#)
- Department of Education [Negotiated Rulemaking for Higher Education 2015-2016](#) home page

Timeline of past and future events:

August 20, 2015: [Notice of Intent](#) to Establish Negotiated Rulemaking Committee for DTR

September 10, 2015: [Public Hearing](#) – Washington D.C.

September 16, 2015: [Public Hearing](#) – San Francisco, CA

October 20, 2015: Federal Register [published request](#) for nominations to serve as negotiators

December 21, 2015: [Published request](#) for additional nominations to serve as negotiators

January 12-14, 2016: First Session of Negotiated Rulemaking

February 17-19, 2016: Second Session of Negotiated Rulemaking

March 16-18, 2016: Third Session of Negotiated Rulemaking

June 16, 2016: Notice of Proposed Rulemaking [published in Federal Register](#)

August 1, 2016: Deadline for [public comments](#)

October 31, 2016: Anticipated publication date of Final Rule

July 1, 2017: Projected effective date of the new regulation