

June 6, 2022

The following bullet points summarize CECU's more comprehensive presentation of points regarding the U.S. Department of Education's (ED) contemplated Borrower Defense to Repayment Rule (RIN: 1840-AD53) addressed during CECU's June 6, 2022, Executive Order 12866 OIRA meeting, also with other staff from the Office of Management and Budget and ED.

**The Borrower Defense to Repayment (BDR) Rule must not be adopted in its current form**

**The BDR Rule's proposed changes contravene the Higher Education Act of 1965, as amended**

**The BDR Rule's proposed adjudication process undermines core due process principles:**

- Fails to provide fair notice
- Abandons long-held standards of proof
- Allows ED to make untested legal conclusions
- Allows ED to make state law determinations without any meaningful and consistent guidance for doing so
- Presumes liability of institutions for discharge of a full loan amount
- ED would be the prosecutor, judge, jury, and court of last resort in the proposed "recoupment" proceedings

**The proposed BDR Rule would be applied in an unfair way that also undermines core due process principles:**

- 12 members of Congress sent a letter to the Department of Justice on May 27, 2022, arguing the proposed regulatory changes "are inconsistent with the norms of due process"
- Contemplates claims being brought without regard to statutes of limitations
- Would retroactively impose obligations on institutions
- Would disproportionately cause financial and reputational harm to institutions

**There is no indication that ED has undertaken any meaningful analysis prior to submitting its proposed BDR Rule:**

- Any studies that ED conducts or has conducted and the resulting data on which it relies also must comply with the Data Quality Act
- For significant rules, the APA contemplates that ED will weigh the costs and benefits of its contemplated rules

**CONCLUSION: The Department should not proceed in adopting the BDR Rule as currently presented**