

Borrower Defense to Repayment

Overview

CSPEN supports a fair and equitable process of providing borrowers relief when an individual borrower, or even a group of borrowers, have been defrauded by an institution.

Unfortunately, it is our view that the Department's proposed revisions to the Borrower Defense to Repayment regulations are overly excessive and include expansion of oversight that goes far beyond efforts to protect students from perceived fraud and/or abuse.

Requests For Further Consideration

We hope that both the Office of Information and Regulatory Affairs within the Office of Management and Budget and the U.S. Department of Education will consider the following recommended revisions to the regulatory proposals contained in the "Proposed Regulatory Text for Issue Papers #6, 7, and 8: Borrower Defense to Repayment (Session Three: December 6-10, 2021)".

1. Repeal of new proposed SUBPART R: Aggressive and Deceptive Recruitment Tactics or Conduct.

§668.500 Scope and purpose.

(a) This subpart establishes the types of activities that constitute aggressive and deceptive recruitment tactics or conduct by an eligible institution. An eligible institution is deemed to have 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 section 668.501. Aggressive and deceptive recruitment tactics or conduct 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.

(b) If the Secretary determines that an eligible institution has engaged in aggressive and 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 ability to attend the institution if they did not enroll immediately;
- 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;
- 4) Discourage the student or prospective student from consulting an adviser, a family member, or other resource or individual prior to making enrollment or loan-related 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. 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) Falsely present an individual involved in recruiting as if they are a neutral party or someone operating solely in the best interest of the student or prospective student, including by giving these individuals titles such as counselor, academic advisor, or financial planner;
- 8) Use threatening or abusive language or behavior toward the student or prospective student;
- 9) Involve repeated unsolicited contacts for the purpose of enrolling or reenrolling after the student or prospective student has requested not to be contacted further; or
- 10) Use emotional manipulation to enroll a student or prospective student.

(b) [reserve]

2. **Reinstate the two phase process previously provided as part of the hearing officials decision-making, including the right for an institution to appeal the decision made by the hearing official.**

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

(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.](#)

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

(b) * * * * *

(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.

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(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.](#)

3. Repeal or make significant revisions which limit the Secretary's authority to use the new authorization provided under §685.404 Group Process Based on Prior Secretarial Final Actions.

§685.404 Group Process Based on Prior Secretarial Final Actions

(a) For purposes of forming a Secretary group process in accordance with § 685.402(b), the Department official may consider final actions imposed by the Secretary that directly relate to section 685.401(b). Such final actions include but are not limited to:

- 1) Actions arising from a final program review determination or final audit determination defined under § 668.112(a) or (b), respectively;
- 2) An institution's failure to meet its administrative capability requirements that relate to the education 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 34 CFR part 668, subpart N;
- 4) Fines, limitations, suspension, or other emergency actions taken by the Secretary that relate to misrepresentation, aggressive recruitment, or omissions of fact to borrowers;
- 5) Other final actions as determined by the Secretary.

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

4. Amend the response period provided to the institution to prepare and submit its response to a group or individual notification from 60 days to 270 days.

§685.405 Institutional Response

(a) The Department official notifies the institution of the basis for the group's borrower defense under section 685.402 or individual borrower defense under § 685.403 for purposes of adjudicating the borrower defense claim and to request a response from the school.

(b)(1) The notification in subsection (a) of this section waives 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 ~~60 days~~ 270 days from the Department official's notification.

(c) The institution must submit an affidavit to the Department official, 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 information request, the Department official shall presume that the institution does not contest the borrowers' defense to repayment claim.

*Note that the regulations provide the Department 270 days to prepare its own response to any third-party requestors' submission - §685.402 Group Process for Borrower Defense(c)(5).

5. Thoroughly evaluate whether or not the Reconsideration (§685.407) is need/necessary in light of both the more recent actions taken by the Department to clear out the existing backlog of submitted claims and the effect of the new process on any need for future reconsideration if the proposed regulations are adopted.

6. Reconsider the presumption that all claims warrant full discharge 668.408

§685.408 ~~Relief Discharge amount~~

(a) Discharge amounts. There is a ~~rebuttable presumption~~ that a borrower with an approved claim under § 685.406(c) or § 685.406(b) is eligible for full discharge of the federal student loans associated with an approved borrower defense claim relief unless the Department official is presented with clear and convincing countervailing evidence to the contrary.

7. Repeal or amend the proposed requirement for institutional, and possibly personal, liability recovery.

§685.409 Recovery from Institution

(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 relief process as described under § 685.408.

(b) Notwithstanding the foregoing subsection (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 relief process as described under § 685.408 under the following conditions:

- 1) The cost of collecting would exceed the amounts received;
- 2) The claims were approved outside of the limitations period in subsection (c) of this section;
- 3) A pre-existing settlement agreement determined by a court or administrative tribunal of competent jurisdiction precludes seeking additional financial recoveries; or
- 4) The Secretary previously collected on the claim in a separate proceeding.

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

(2) The limitations period described in paragraph (c)(1) of this section shall not apply if the Department official notifies the school of the borrower's claim in accordance with § 685.405(b) prior to the end of the limitations period.

8. Repeal the revisions to Subpart F: Misrepresentation

Reinstate all Predispute Arbitration provisions contained in the prior regulations and repeal proposed revisions.

§685.206 Borrower responsibilities and defenses.

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(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.

(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 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.

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

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

(11) 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

(12) 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.

(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 predispute arbitration agreement or on any other predispute 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, including to seek a stay or dismissal of particular claims or the entire action, 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 predispute arbitration agreement, or on any other predispute 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) 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, in doing so, the court 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, ~~t~~The school must include the following provision in any 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 predispute arbitration or any other predispute agreement addressing class actions and that are entered into after the effective date of this regulation: “We agree that neither we nor anyone else will use 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 ourthe provision by us of educational services for which the Direct Loan was obtained. We agree that only the court has exclusive jurisdictionis 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 predispute arbitration agreement or any other predispute agreement addressing class actions has been entered into before the effective date of this regulation and does not contain thea provision described in paragraph (e)(3)(i) of this section, the school must either ensure the agreement is amended to contain thate provision specified in paragraph (e)(3)(iii)(A) of this section or provide the student to whom the agreement applies with the written notice of that provisionspecified in paragraph (e)(3)(iii)(B) of this section.

(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) specified in paragraph (e)(3)(iii)(A) of this section or must provide the notice to students specified in that paragraph (e)(3)(iii)(B) of this section to students no later than by 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 only the court has exclusive jurisdictionis 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 only the court has exclusive jurisdictionis 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) Predispute arbitration agreements.

~~(1) (i) The school will not enter into a predispute agreement to arbitrate a borrower defense claim, or rely in any way on a predispute 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 predispute 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 predispute 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 predispute 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 by 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 predispute 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 predispute 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 concerning a borrower defense claim:~~

~~(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 predispute 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 concerning a 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 claim that is or could be asserted as a borrower defense as defined in:~~

~~(i) 34 C.F.R. § 685.206(c)(1);~~

~~(ii) 34 C.F.R. § 685.222(a)(5);~~

~~(iii) 34 C.F.R. § 685.206(c)(1)(iii); or~~

~~(iv) 34 C.F.R. § 685.401(a)(2); § 685.222(a)(5), including a claim other than one based on § 685.222(c) or (d) that may be asserted under § 685.222(b) if reduced to judgment;~~

~~(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) “Predispute 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.~~