

## insights

TYPES NOT MAPPED YET July 11, 2022 | TTR not mapped yet | Aaron D. Lacey, Jeffrey R. Fink, Hope A. Watson

# Department of Education proposes sweeping revisions to Borrower Defense to Repayment rule

On July 6, 2022, the U.S. Department of Education (the “Department”) released the unofficial version of its proposed rewrite of the borrower defense to repayment (“BDR”) rule. The BDR rule details the process by which former students can seek to have their federal loans forgiven based on misconduct by their institution. The unofficial version of the proposed rule can be found [here](#). The Department anticipates publishing the official Notice of Proposed Rulemaking (“NPRM”) in the Federal Register “sometime next week.”

### *Significant changes proposed to BDR*

As expected, the Biden administration proposed significant and controversial changes to the [current BDR regulations](#). For example, the proposed rule would apply to all borrower defense applications received by the Department on or after July 1, 2023, and to applications pending before the Secretary on that date, without regard to when the alleged misconduct took place. As such, past conduct that may not constitute a basis for a claim under current law could become a basis for a claim if the borrower simply waits to file after July 1, 2023. The new text also would significantly broaden the bases for bringing a claim, to include breach of contract or “aggressive and deceptive recruitment,” the latter a newly proposed defined term. Among many other changes, the proposed rule also would eliminate any statute of limitations for BDR claims, would permit the Department to initiate group claims (similar to class actions) - even in the absence of any claim being filed by a borrower - and would include a rebuttable presumption that any alleged misconduct justifies the discharge of the borrowers entire loan.

Thompson Coburn attorneys are in the process of examining the proposed rule. **We invite you to join us for a free webinar on July 29, 2022, during which we will discuss the NPRM in detail, highlight significant changes, and suggest opportunities for comment.** Individuals may register for the webinar [here](#).

Further, to assist institutions with their review of the proposed rule, we have created [a redline](#) that compares the changes proposed in the NPRM to the current version of the BDR rule. We emphasize that while the NPRM covers several topics in addition to the BDR process (e.g., dispute resolution, disability discharge, closed school loan discharge, false certification discharge, Public Service Loan Forgiveness), **this comparison only includes the proposed changes to the BDR claim process.**

### *Timeline for a final rule*

While the timeline of the federal rulemaking process varies based on a number of factors, we expect this proposed BDR rule to generate significant interest and thousands of comments. The comment period will last 30 days following the official publication of the proposed rule in the Federal Register, after which time the Department must review and consider all comments submitted. While it is not possible to predict the exact timing of the final rule, in order for the rule to go into effect by July 1, 2023, the Department must publish the final rule no later than November 1, 2022. We believe the Department is very committed to achieving a final rule by the November deadline.

The current BDR regulations remain in effect until a final rule is issued and effective. This means that institutions must continue to comply with the Trump administration’s rule throughout the current rulemaking process and until a new rule becomes effective. To assist institutions in complying with the current BDR rule, Thompson Coburn has made the following resources free and available to the higher education community:

1. TC’s two-part webinar series, [An Examination of ED’s New Borrower Defense Rule: the Borrower Defense Claim Process](#), addressing the current BDR framework; and

2. TC's [Responding to Student Borrower Defense to Repayment Claims webinar](#), presenting a discussion of how institutions can respond to BDR claims and attempt to avoid potential liability for federal student loans discharged by the Department.

#### Comments

We encourage the higher education community to seriously consider submitting comments. It is important for the Department to hear from the regulated community and comments will help to shape the Department's decision-making and the final rule. Institutions interested in posting comments may do so online via the [Federal eRulemaking Portal](#).

*Postsecondary institutions with questions regarding the BDR rulemaking, BDR compliance, or submitting comments are welcome to contact [Aaron Lacey](#), [Jeff Fink](#), or [Hope Watson](#).*

#### About REGucation

Welcome to REGucation, the higher education blog that strives, through practical advice and insight, to help the higher education community manage a fast-changing and increasingly complex regulatory environment.

Our goal is to serve as a practical, concise, and accessible resource for institutions confronting regulatory and policy issues. The blog focuses on the extraordinarily broad and sophisticated set of legal challenges faced by contemporary post-secondary institutions, including those involving real estate, construction, joint ventures, litigation, intellectual property, immigration, taxation, financing, employees and benefits, and government relations, to name a few. We also cover the staggering collection of federal, state, and accrediting agency laws and standards specific to higher education.

If there are topics you would like us to cover, or questions you may have regarding a topic that already has been addressed, please do not hesitate to reach out. Finally, if you would like to contribute a guest article, we would love to hear from you.

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