



Decoding the Final Borrower Defense Rule

A Webinar Series from the Thompson Coburn Higher Education Team



Borrower Defense Webinar Series

- Webinar series schedule:
 - The New Borrower Defense Framework (November 29, 2016)
 - The Revised Financial Responsibility Standards (December 1, 2016)
 - **Changes to Closed School and False Certification Discharge (December 6, 2016)**
 - The Elimination of Pre-Dispute Arbitration Clauses and the New Repayment Rates for Proprietary Schools (December 8, 2016)

WELCOME & INTRODUCTION

- **Aaron D. Lacey**
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- **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.

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.

Presentation Outline

- Politics & Prognostications
- The New Rule from 40,000 Feet
- A CSD Primer
- Changes to the CSD Framework
- CSD: Selected Commentary
- False Certification Discharge
- TC Resources

Politics & Prognostications



Look Into My Crystal Ball...

Will this rule ever go into effect?

- **The Congressional Review Act**
 - Permits Congress to enact a “resolution of disapproval,” which if passed by both houses of Congress and signed by the President overturns any rule promulgated by a federal administrative agency.
 - Congress must act within 60 legislative days of a rule’s introduction.

Look Into My Crystal Ball...

- Sets an expedited legislative path, requires only a simple majority rather than the usual 60 votes needed to block a filibuster.
- Removal through rulemaking
 - ED can modify or remove the rule through the rulemaking process
- Suspension of enforcement
 - ED can simply determine not to enforce the rule

Look Into My Crystal Ball...

- Congress will not act, nor will the White House, if the borrower defense rule is not a **priority**.
- The borrower defense statute and existing rule are already on the books, and will remain even if the new rule is struck down.
- Thousands of claims are being submitted, and will have to be dealt with through some process.

The New Rule from 40,000 Feet



Elements of the New Rule

Borrower Defense Framework

Financial
Responsibility Triggers

Arbitration
Agreements

Closed School
Discharge

False
Certification
Discharge

Misrep-
resentation

Repayment
Rates for
Prop. Schools

Implementation Timeline

DATE	2016 RULEMAKING EVENTS
Jan. – Mar.	<ul style="list-style-type: none">• Negotiated rulemaking committee meets
June 16	<ul style="list-style-type: none">• Proposed rules published
August 1	<ul style="list-style-type: none">• Comment period closes
Nov. 1	<ul style="list-style-type: none">• Publication of final rule in Federal Register*
July 1, 2017	<ul style="list-style-type: none">• 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.

^Also pursuant to Section 482(c) of the HEA, ED has designated certain regulations for voluntary, early implementation by the regulated community, and elected to implement early certain requirements that are entirely the responsibility of ED.

A CSD Primer



A CSD Primer

When is a borrower eligible for a CSD?

- If a borrower is “unable to complete the program” in which he or she enrolled “due to the closure of the institution... then [ED] shall discharge the borrower's liability on the loan (including interest and collection fees) by repaying the amount owed on the loan...

20 USC § 1087(c).

A CSD Primer

Why should a school be concerned with CSD exposure?

- Because the HEA specifies that ED “**shall** subsequently pursue any claim available to such borrower against the institution **and its affiliates and principals** or settle the loan obligation pursuant to [its] financial responsibility authority...”

20 USC § 1087(c).

A CSD Primer

ED can recover from the school the amounts forgiven through CSD?

- Yes, the HEA specifically provides that a borrower whose loan has been forgiven has “deemed to have assigned to the United States the right to a loan refund up to the amount discharged against the institution **and its affiliates and principals.**”

20 USC § 1087(c).

A CSD Primer

- This right has been challenged and affirmed:

“The applicable federal statutes, regulations, and case law specify that upon closure of a school, the Secretary has the authority to discharge students' loans if they are unable to complete their academic program due to the school's closure **and then recover the value of the discharged loans from the institution.**”

*See In the Matter of Coll. of Visual Arts, Respondent, Docket No.: 15-05-SP, 2015 WL 6396241, at *1 (July 20, 2015); see also In re College of Visual Arts, Dkt. No. 14-23-SA; In re Denver Academy of Court Reporting, Dkt. No. 05-26-SP, Dep't of Educ. (Sept. 27, 2005).*

A CSD Primer

Are parents who took out PLUS loans able to file for a CSD?

- Yes. Both the statute and regulation make clear that a parent borrower is eligible to apply for a CSD if “the student on whose behalf a parent borrowed, is unable to complete the program...”

20 USC § 1087(c).

A CSD Primer

Does the CSD framework only apply to the closure of the main campus and all its locations?

- No. For purposes of the CSD framework, a “school” means a school's main campus or **any location or branch of the main campus**, regardless of whether the school or its location or branch is considered eligible.

34 CFR § 682.402(d) (FFEL); 34 CFR § 685.214 (DL).

A CSD Primer

When is a school considered closed?

- A school's closure date is the date that the school ceases to provide educational instruction in all programs, as determined by ED.

34 CFR § 682.402(d) (FFEL); 34 CFR § 685.214 (DL).

A CSD Primer

Exactly which students are eligible for a CSD?

- ED regulations extend eligibility to any student:
 - Who could not complete his or her program because the school closed; or
 - Who withdrew from the school not more than **120 days** prior to the date the school closed.

34 CFR § 682.402(d) (FFEL); 34 CFR § 685.214 (DL).

A CSD Primer

- **However**, ED may extend the 120-day period in exceptional circumstances, which includes:
 - The school's loss of accreditation;
 - The school's discontinuation of the majority of its academic programs;
 - Action by the State to revoke the school's license to operate or award academic credentials in the State; or
 - A finding by a State or Federal government agency that the school violated State or Federal law.

34 CFR § 682.402(d) (FFEL); 34 CFR § 685.214 (DL).

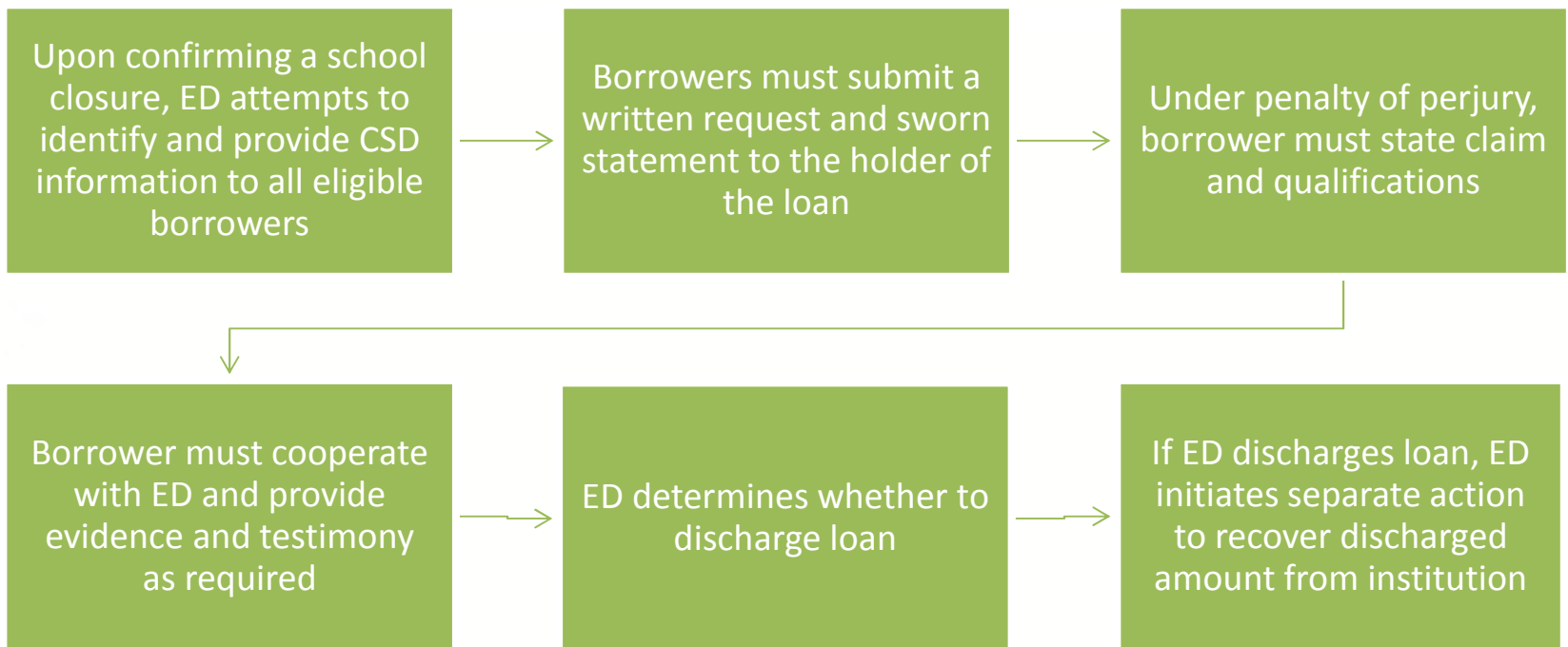
A CSD Primer

What if we arrange for a teach-out or transfer opportunities?

- A student remains eligible for a CSD so long as he or she has not **completed** the program through a teach-out or transfer opportunity.
- The student could reject the opportunity outright, or begin participating in the teach-out, but fail to complete.
- Thus, arranging teach-out and transfer opportunities does not **necessarily** mitigate CSD exposure (though certainly it helps).

34 CFR § 682.402(d) (FFEL); 34 CFR § 685.214 (DL).

The Current CSD Cycle



34 CFR § 682.402(d) (FFEL); 34 CFR § 685.214 (DL).

Changes to the CSD Framework



Changes to the CSD Framework

Categories of Change

Increased Outreach by ED, Lenders, and Guaranty Agencies

Increased Outreach by Institutions

Provides for Automatic Discharge

Increased Outreach by ED

What kind of increased outreach and communication is required of ED, guaranty agencies, and lenders?

- If a borrower fails to submit his or her CSD application within 60 days, ED/lender will provide borrower with another discharge application and an explanation of the requirements and procedures for obtaining a discharge.
- If a guaranty agency denies a borrower's closed school discharge, it must notify the borrower of the reasons for the denial.

New 34 CFR § 682.402(d); 34 CFR § 685.214(c).

Increased Outreach by Institutions

What must institutions do for their part?

- Institutions must provide “all enrolled students with a closed school discharge application and a written disclosure, describing the benefits and consequences of a closed school discharge as an alternative to completing their educational program through a teach-out agreement.”

New 34 CFR § 668.14(b)(32).

Changes to the CSD Framework

When must the disclosures be made?

- Disclosures must be made **immediately** upon the institution's submitting a required teach-out plan to its accreditor.
- “[T]he provision of the teach-out plan triggers the provision of the closed school disclosures and application form.”

New 34 CFR § 668.14(b)(32); 81 Fed. Reg. 76033 (Nov. 1, 2016).

Changes to the CSD Framework

What specific events trigger a teach-out plan and the distribution of CSD materials?

- The initiation by the Secretary of an action under [34 CFR 600.41](#) or subpart G of this part or the initiation of an emergency action under § 668.83, to terminate the participation of an institution in any title IV, HEA program.
- The institution's accrediting agency acts to withdraw, terminate, or suspend the accreditation or preaccreditation of the institution.

New 34 CFR § 668.14(b)(31).

Changes to the CSD Framework

- The institution's State licensing or authorizing agency revokes the institution's license or legal authorization to provide an **educational program**.
- The institution intends to close **a location** that provides 100 percent of at least one program.
- The institution otherwise **intends** to cease operations.

New 34 CFR § 668.14(b)(31).

Changes to the CSD Framework

What exactly must we disclose?

- The current closed school discharge form provided to borrowers is ED's *Loan Discharge Application: School Closure*. In the coming months, ED will revise the form to reflect changes in the CSD regulations.
- “We do not have plans to develop written closed school discharge disclosure materials for schools to use, although we may develop such materials in the future if warranted.”

81 Fed. Reg. 76035 (Nov. 1, 2016).

Changes to the CSD Framework

Can ED discharge loans without a CSD application?

- Yes. Under current law, ED “**may** discharge a loan... without an application from the borrower if [ED] determines, based on information in [its] possession, that the borrower qualifies for the [CSD].”

34 CFR § 685.214.

Changes to the CSD Framework

How does the new rule create an **automatic** discharge?

- The new rule provides that with respect to schools that closed on or after **November 1, 2013**, ED will discharge the loan without an application from the borrower if the borrower did not subsequently re-enroll in any title IV-eligible institution within a period of three years from the date the school closed.

New 34 CFR § 685.214(c)(2).

Changes to the CSD Framework

- ED has stated that it intends to pursue **early implementation** for this provision:

“[ED] intends to exercise [its] authority under section 482(c) of the HEA to... implement the new and amended regulations specific to automatic closed school discharges... as soon as operationally possible after the publication date of these final regulations. We will publish a separate Federal Register notice to announce this implementation date.”

81 Fed. Reg. 75928 (Nov. 1, 2016).

CSD: Selected Commentary



CSD: Selected Commentary

Regarding the application of the rule to wind-downs:

“We disagree with the recommendation that a school that plans to keep a closing location open until all of the students have either graduated or withdrawn should be exempted from the requirement to provide its students with the closed school disclosures or the application. **Because all students at such a school or location are entitled to the option of a closed school discharge**, we believe that all such borrowers should receive this information, so that they have full knowledge of their options. While many of the students at such a school location may plan to take advantage of the teach-out, not all necessarily will.”

81 Fed. Reg. 76034 (Nov. 1, 2016).

CSD: Selected Commentary

Is this view consistent with the HEA?

If a borrower is “unable to complete the program” in which he or she enrolled “due to the closure” of the institution... then [ED] shall discharge the borrower's liability on the loan (including interest and collection fees) by repaying the amount owed on the loan...

20 USC § 1087(c).

CSD: Selected Commentary

Regarding the impact of the rule on program completion:

“We disagree with the comment suggesting that the proposed regulations create an incentive to withdraw that is contrary to public policy. Although public policy generally favors higher rates of program completion, **it is not always in the individual borrower's best interest to continue a program through graduation.** In a closed school situation, the value of the degree the borrower obtains may be degraded, depending on the reasons for the school closure... We do not believe that it is good public policy to **require** these borrowers to repay that debt if they cannot or choose not to complete the program and are eligible for a closed school discharge.”

81 Fed. Reg. 76034 (Nov. 1, 2016).

CSD: Selected Commentary

Regarding the application of the rule to voluntary closures:

“Similarly, we disagree with the recommendation that voluntary school closures be exempted from the requirements. As noted earlier, the teach-out requirements in 34 CFR 668.14(a)(31) apply whether the school is forced to close or voluntarily closes...With regard to schools being discouraged from acting responsibly and voluntarily providing teach-outs, as noted above, **closing schools are required to provide teach-outs**. A school that declines to provide teach-outs as a result of these final regulations would be in violation of the requirements specified in the school's PPA.”

81 Fed. Reg. 76034 (Nov. 1, 2016).

CSD: Selected Commentary

- An institution must “submit a teach-out **plan** to its accrediting agency in compliance with 34 CFR 602.24(c), and the standards of the institution's accrediting agency upon the occurrence of” certain specified events.
- Why not draw important distinctions (e.g., wind-down, teach-out plan, teach-out, teach-out agreement?)

34 CFR § 685.214(31); 34 CFR § 602.24(c).

CSD: Selected Commentary

- Why resist easy distinctions between precipitous closures, orderly, voluntary teach-outs, and wind-downs?
- In fact, regulations already recognize that some institutions will close without a teach-out plan, and that a distinction can be drawn.
 - If an institution the agency accredits or pre-accredits closes without a teach-out plan or agreement, the agency must work with the Department and the appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.

34 CFR § 602.24(d).

CSD: Selected Commentary

Regarding due process, particularly in recovery actions against schools:

We disagree with commenters who stated that closed school discharge procedures may deny schools of due process. The closed school discharge procedures do not currently involve the school in the determination process. The Department currently pursues recovery of the amounts lost through closed school and other discharges under section 437(c) of the HEA through the ordinary audit and program review process. Thus, in the final audit determination or the final program review determination issued upon closure of a school or one of its locations, the Department asserts a claim for recovery of the amounts discharged. **The school may challenge that claim in an appeal under Subpart L of Part 668, as it can with any other audit or program review liability.**

81 Fed. Reg. 76039 (Nov. 1, 2016).

False Certification Discharge



Current False Certification Discharge

ED will discharge a borrower's repayment obligation if the school falsely:

Certified the student's ATB status

Signed the student's name on the loan application

Certified a student with a disqualifying condition

Certified the student's eligibility as a result of identity theft

34 CFR § 685.215.

New False Certification Discharge

ED will discharge a borrower's repayment obligation if the school falsely:

Certified that the student satisfied alternative to graduation requirements

Certified the student's status as a high school graduate

Signed the student's name on the loan application

Certified a student with a disqualifying condition under State law

Certified the student's eligibility as a result of identity theft

Certifies that the students are meeting SAP

New 34 CFR § 685.215.

High School Diploma

When would a discharge be based on falsifying a diploma?

- If a school certified the eligibility of a student who is not a high school graduate based on:
 - A high school graduation status falsified by the school; or
 - A high school diploma falsified by the school **or a third party** to which the school referred the borrower.

New 34 CFR § 685.215(c)(1).

High School Diploma

What must a borrower establish to qualify for the discharge?

- Borrowers must certify, under penalty of perjury, that they:
 - Reported not having a valid high school diploma or its equivalent **at the time** the loan was certified; and
 - Did not satisfy the alternative to graduation from high school eligibility requirements **at the time** the institution certified the loan.

New 34 CFR § 685.215(c)(1).

High School Diploma

What can I do to protect myself against false claims?

- Require specific, signed disclosure from students prior to admission.
- Strengthen agreements with any third parties you use to verify diplomas (e.g., foreign credentials).

High School Diploma

Regarding institutional liability for third-party actions:

If a school is relying on a third party to verify the high school graduation status of a borrower, it is incumbent on the school to ensure that the third-party is providing legitimate verifications... Any school that wishes to participate in the title IV, HEA programs and outsources the determination of high school graduation status to a third party without ensuring that the third party is trustworthy, **is acting irresponsibly**... We do not believe that a school that routinely certifies eligibility of borrowers who graduated from foreign high schools can **credibly claim** to be ignorant of the legitimacy of a third-party verification entity that the school uses for verification purposes.

81 Fed. Reg. 76042 (Nov. 1, 2016).

Disqualifying Condition

When would a discharge be based on falsifying a disqualifying condition?

- If a school certified the eligibility of a student who, **because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary**, would not meet the State requirements for employment (in the student's State of residence when the loan was originated) in the occupation for which the training program supported by the loan was intended.

New 34 CFR § 685.215(a)(1)(iv).

Disqualifying Condition

What must a borrower establish to qualify for the discharge?

- In Dear Colleague Letter (DCL) GEN-95-42, ED clarified that “for a borrower to qualify for a false certification discharge due to a disqualifying condition, a borrower must **provide evidence** that the borrower had a disqualifying condition at the time of enrollment and of ‘a *State prohibition* (in that student's State of residence) against employment’ in that occupation based on the borrower's status.”

81 Fed. Reg. 76044 (Nov. 1, 2016).

Disqualifying Condition

What can I do to protect myself against false claims?

- For any state in which you have (or may have) resident students, ensure you know any State requirements for employment that relate to **physical or mental condition, age, or criminal record.**
- Disclose any such limitations to prospective students prior to enrollment, **but don't ask about possible disabilities.**

Disqualifying Condition

- Remember, institutions are **prohibited** from making pre-admission inquiries regarding disabilities under 34 CFR § 104.42(b)(2).
- Also, refer to ED's *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*, for guidance regarding pre-admission criminal history inquiries.
- Finally, consider requiring students to certify that they satisfy all relevant requirements **following** admission, but **prior** to certifying their loan.

Disqualifying Condition

Regarding institutional responsibility for identifying disqualifying conditions:

[W]e expect schools to be aware of disqualifying conditions for employment in the fields for which the schools are providing training. Schools that offer career-training programs need to be **proactive** in determining whether borrowers who are training for fields that have such employment restrictions do not have a disqualifying condition for that career.

81 Fed. Reg. 76044 (Nov. 1, 2016).

Disqualifying Condition

Regarding the relationship between disability law and discharge based on disqualifying condition:

The [prohibition on pre-admission inquiries regarding disabilities] refers to general postsecondary education **admission** procedures, not eligibility for title IV student financial assistance. While the [discharge laws] do not apply to a school's evaluation of whether to admit a student to a particular program, they do apply to its **certification** of that student's eligibility for title IV...

Therefore, we do not believe that the further limitation suggested by the commenter is necessary.

81 Fed. Reg. 76044 (Nov. 1, 2016).

Satisfactory Academic Progress

When would a discharge be based on falsifying SAP?

- Students cannot file for a discharge based on SAP. This form of discharge can only be initiated by ED based on evidence, in ED's possession, that the school has falsified SAP for its students.
- This is a tool ED might use in conjunction with an audit or program review.

New 34 CFR § 685.215(c)(8).

TC Resources



TC Resources

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Title IX and due process: ED tells Wesley that accused student not treated fairly

[Paul Stoehr](#) [Aaron Lacey](#) [November 2, 2016](#)



In a rare move, the Department of Education announced on October 12, 2016, its determination that Wesley College in Delaware had violated Title IX by failing to provide appropriate procedural protections to a student accused of sexual misconduct. [READ MORE](#)



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