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TOPIC:

Reporting Litigation and other Triggering Events to the U.S. Department of Education under the Borrower Defense to Repayment (BDTR) Rule[1]

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INTRODUCTION:

Congress introduced the “borrower defense to repayment” concept in 1993, when it directed the U.S. Department of Education (the “Department”) to “specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a [federal student loan.]”[3] In response to this directive, the Department promulgated a concise borrower defense to repayment (“BDTR”) standard in 1994, followed by brief, clarifying guidance in 1995.[4]

Over the next two decades, only a handful of borrower defense claims were asserted. Then, following the rapid closures of Corinthian Colleges and ITT Technical Institute, the number of claims skyrocketed. By June 2016, the Department had received over 26,000 borrower defense claims, and by November 2017, it had more than 118,000.[5] With tens of thousands of claims filed, and billions of dollars in play, the Obama administration carried out a negotiated rulemaking in 2016 to significantly revise and enhance the BDTR framework. Dissatisfied with the results of the 2016 effort (the “2016 Rule”), the Trump administration held a second negotiated rulemaking in 2018 to revise the BDTR rule yet again, and published its own final rule on September 23, 2019 (the “2019 Rule”).[6]

While the borrower defense claim process was (and is) at the heart of the BDTR rulemaking, the regulatory reforms carried out by the rule are far more extensive. In 2016, and then again in 2018, the negotiated rulemaking committees tasked with overhauling the rule also considered material changes to the regulations governing financial responsibility, closed school discharge, false certification discharge, misrepresentation, student grievance processes, the reporting of litigation and arbitration proceedings, the use of pre-dispute arbitration agreements and class action waivers in agreements with students, and the publication of repayment rates.[7]

This NACUANOTE examines the Financial Responsibility ("FR") reporting requirements introduced as part of the BDTR rulemaking. One of the more onerous elements of the rule, these requirements obligate institutions of higher education to report certain "triggering events" to the Department within prescribed timeframes, including qualifying litigation, agency proceedings, and financial actions. If an institution fails to make a required notification, the Department is empowered to take action against the institution, including by initiating a proceeding to fine, limit, suspend, or terminate the institution's participation in the federal financial aid programs.[8]

DISCUSSION:

I. Effective Periods for the 2016 Rule and 2019 Rule

To effectively comply with the FR reporting requirements, it is important to understand the effective periods for each version of the rule. This is not a simple task, given the irregularities that have accompanied the BDTR rule's development.

The 2016 Rule, published in final form on November 1, 2016, was slated to become law on July 1, 2017. However, the Trump administration delayed its implementation in June 2017, citing a pending lawsuit as the basis for the action.[9] The delay was challenged in the U.S. District Court for the District of Columbia (the "Court"), and in an order dated September 17, 2018, the Court found it to be unlawful.[10] Shortly thereafter, the Court also decided against the parties seeking to enjoin the 2016 Rule.[11] As a result, the 2016 Rule was quietly instated in October 2018, with its July 1, 2017 effective date intact.

Contemporaneous to the events described above, the Trump administration continued its efforts to replace the 2016 Rule with its own version of the BDTR regulation. On September 23, 2019, following a protracted negotiated rulemaking, and significant adjustments to account for the fall 2018 decisions of the Court, the Department promulgated the 2019 Rule with an effective date of July 1, 2020.

Institutions of higher education thus are required to comply (and to have complied) with the 2016 Rule from July 1, 2017 to June 30, 2020, and to comply with the 2019 Rule from July 1, 2020 forward. Because the 2016 Rule was not deemed "good law" until October 2018, institutions also are required to follow nuanced guidance from the Department regarding the reporting of events that occurred prior to the Court's decisions, but subsequent to July 1, 2017 (discussed in more detail below).

II. Financial Responsibility Reporting under the 2016 Rule

In order to qualify and maintain eligibility to participate in the federal financial aid programs administered by the Department, institutions of higher education must, among other things, demonstrate that they are financially responsible. Historically, the Department has monitored institutions' financial responsibility primarily through its review of their annual audited financial statements. Following the collapse of Corinthian Colleges, however, the Department concluded that it required more frequent and robust updates from schools to sufficiently track their financial stability.

For this reason, the 2016 Rule significantly revised the financial responsibility framework to specify certain triggering events, and to require that they be timely reported to the Department. It was believed that these new requirements would permit the Department to identify, as early as possible, events that might impact an institution's financial health.

The triggering events included in the 2016 Rule are spread across 34 C.F.R. §§ 668.171(c) through (g), and the associated reporting requirements are set out at 34 C.F.R. § 668.171(h). In all, the 2016 Rule details 17 distinct triggering events, 10 of which must be reported to the Department upon their occurrence. In a small number of cases, an institution is presumed to no longer be financially responsible when the triggering events occurs.[12] In most cases, however, no determination is made until the Department measures the materiality of the event by recalculating the institution's federal composite score, or by otherwise considering whether the event "is reasonably likely to have a material adverse effect on the financial condition, business, or results of operations of the institution . . . ."[13]

The 2016 Rule affords institutions an opportunity, when reporting an event to the Department, to demonstrate that "the action or event . . . no longer exists or has been resolved or the institution has insurance that will cover part or all of the debts and liabilities that arise at any time from that action or event."[14] Should an institution report an event that the Department deems material to the institution's financial health, and be unable to establish that through insurance or other means it can mitigate the impact of the event, the Department can require that the institution provide some form of surety (*e.g.*, a letter of credit posted in favor of the Department), require the institution to participate in the Title IV programs on a provisional status, or take action with regard to the institution's eligibility.[15]

A. Reporting Events that Occurred Prior to March 15, 2019

When the 2016 Rule was deemed law in October 2018, it was entirely unclear how the new financial responsibility framework, effective as of July 1, 2017, would be implemented. Of particular concern was how institutions would go about reporting events that may have occurred between July 2017 and October 2018. Five months later, on March 15, 2019, the Department finally offered guidance discussing how the agency would carry out the FR reporting requirements and detailing how institutions should go about notifying the Department of past and future triggering events (the "March 2019 Guidance").[16]

Significantly, the Department did not offer a blanket waiver of the reporting obligations for events that occurred prior to October 2018, or offer up a one-size-fits-all approach for reporting. Instead, the agency set forth specific and varying reporting guidelines for each type of triggering event, based on whether the event occurred prior to the date of the March 2019 Guidance (March 15, 2019), or after. Institutions were generally afforded 60 days to report events that occurred prior to March 15, 2019 (until May 15, 2019).

Following significant follow-up from the regulated community, an additional "Questions and Answers" document was issued by the Department on June 3, 2019 (the "June 2019 Q&A").[17] The Department advised that institutions were "expected to submit any necessary supplemental reporting as a result of any information included in this Q&A document within 10 calendar days of the date that the information was posted."[18]

Institutions attempting to determine whether a past event should be reported should carefully consult the March 2019 Guidance and the June 2019 Q&A. They also are welcome to consult the reporting guide referenced in the Resources section, below. If an institution determines that it has not yet notified the Department of an event that occurred prior to March 15, 2019, it should consult counsel regarding the best path forward.

B. Reporting "Settlements"

Pursuant to 668.171(c)(1)(i)(A), an institution is required to notify the Department if it is required to "pay any debt or incur any liability arising from a final judgment in a judicial proceeding or from an administrative proceeding or determination, or from a settlement."[19] Even before the March 2019 Guidance was issued, institutions were pressing the Department to clarify whether settlements must be reported if they were not precipitated by a "final judgment in a judicial proceeding or from an administrative proceeding or determination." The plain language of the rule places no clear limitation on the requirement, raising the possibility that it might include settlements in any amount, and extend to agreements designed to resolve minor student, employee, or vendor disputes.

In the June 2019 Q&A, the Department posed the question, "Are institutions required to report all debts and liabilities under 34 C.F.R. § 668.171(c)(1)(i) & (h)(1)(i), such as those arising from settlements reached prior to legal action?"[20] In responding to this question, the Department flatly stated that "[a]ll settlements fall under this requirement."[21]

While the Department's response makes clear that institutions must report "settlements" without regard to whether there was prior legal action, institutions still must determine how broadly to define the term. It seems clear that institutions must report agreements reached to resolve threatened legal action, particularly where the legal action was threatened in writing and by an attorney representing the complainant. Institutions could differ, however, on whether to report agreements entered into to resolve simple or routine student or employee matters (*e.g.*, billing disputes, severance agreements).

C. Reporting "Other Litigation"

Of the FR reporting requirements articulated in the 2016 Rule, the obligation to report litigation has likely caused the most consternation.[22] Pursuantto the regulation, institutions must notify the Department of the following:

- Agency-Initiated, Borrower Defense Lawsuits[23]. Institutions must report to the Department if (a) the school is being sued in an action brought on or after July 1, 2017, (b) by a federal or state authority for financial relief on claims related to the making of the Direct Loan for enrollment at the school or the provision of educational services and (c) the suit has been pending for 120 days.

- Other Litigation[24]. Institutions must report any litigation that is not an Agency-Initiated, Borrower Defense Lawsuit, if the action was brought on or after July 1, 2017 and:

  - The institution has filed a motion for summary judgment or summary disposition and that motion has been denied or the court has issued an order reserving judgment on the motion;

- The institution has not filed a motion for summary judgment or summary disposition by the deadline set for such motions by the court or agreement of the parties; or
- If the court did not set a deadline for filing a motion for summary judgment and the institution did not file such a motion, the court has set a pretrial conference date or trial date and the case is pending on the earlier of those two dates.

The latter of these two requirements, referred to here as the "Other Litigation" standard, is the primary source of concern. Significantly, the Other Litigation standard makes no reference to venue, the nature of the underlying claim, the amount of the claim, the party bringing the claim, or the materiality of the claim to the institution's financial health. The 2016 Rule simply states that if an institution "is being sued in an action brought on or after July 1, 2017" and that action is not an Agency-Initiated, Borrower Defense Lawsuit, the litigation must be reported as soon as it also satisfies any one of the three summary-judgment related standards detailed above. In the June 2019 Q&A, the Department confirmed the absence of any materiality threshold, observing that the rule does not "limit the types of litigation that must be reported by the amount at issue or the type of claim that is brought . . . Therefore, all litigation, regardless of the type of legal action or the size of the claim, must be reported."[25]

Institutions also should be aware that under the 2016 Rule, they must report Other Litigation on a go-forward basis before it actually becomes a "triggering event" under the law. In the regulation, triggering events are defined at 34 C.F.R. § 668.171(c), and the reporting timeframes for these events are set out at 34 C.F.R. § 668.171(h). In the case of Other Litigation, the rule at 668.171(h)(1)(i), expounded by the March 2019 Guidance, requires institutions to report as follows:

- By May 14, 2019, an institution is required to report any Other Litigation that occurred after July 1, 2017, if any one of the summary judgment-related standards set out in 668.171(c)(1)(ii) has been met, and the matter was still pending as of March 15, 2019.

- Going forward, an institution is required to report any Other Litigation:
  - 10 days after the institution is served with the complaint;
  - 10 days after the court sets the dates for the earliest of the three summary-judgment related standards, provided that, if the deadline is set by procedural rules, notice of the applicable deadline must be included with notice of the service of the complaint; and
  - 10 days after the earliest of the triggering events occurs.

Thus, pursuant to the 2016 Rule and March 2019 Guidance, any lawsuit brought by any party against the school that is not an Agency-Initiated, Borrower Defense Lawsuit must, at a minimum, be reported within 10 days of the institution receiving the complaint, and within 10 days of the court setting a date for one of the three summary-judgment related standards. In fact, the 2016 Rule actually requires an institution to make the first and second notices before the point at which the litigation could even qualify as a "triggering" event under 668.171(c), and without regard to whether it in fact becomes one. For example, if an institution timely files a motion for summary judgment or summary disposition and that motion is granted, the litigation will never qualify as a triggering event under 668.171(c), but the institution will already have made at least two notices, one within 10 days of the claim, and one within 10 days of the deadline for filing summary judgment.

Institutions might rightly question why an institution would be required to report litigation under 668.171(h) when that litigation has not yet ripened into a triggering event under 668.171(c). Whether this incongruence in the 2016 Rule was intentional, or a drafting oversight, is unknown.

The current administration has simply taken the view that institutions must comply with the letter of the law. This approach is again evidenced in the Department's decision to apply the FR reporting requirements to public institutions, which is discussed in the next section.

D. Application of Reporting Requirements to Public Institutions

In the weeks following the release of the March 2019 Guidance, whether the FR reporting requirements were applicable to public institutions became a topic of considerable discussion. Public institutions establish their financial responsibility under a different set of standards, located at 668.171(i), with the result that the triggering events listed at 668.171(c) have no identifiable relevance to public schools. In the commentary that accompanied the 2016 Rule, the Obama administration confirmed this point, observing that

> [u]nder the current regulations in §§ 668.171(b) and (c), a public institution is not subject to the general standards of financial responsibility and is considered financially responsible as long as it does not violate any past performance provision in § 668.174 . . . . We would like to clarify that we are not changing long-standing policy for public institutions with these final regulations. In other words, the triggering events in § 668.171(c) through (g) of these regulations do not apply to public institutions.[26]

However, while there was agreement that the triggering events at 668.171(c) do not apply to public institutions, there arose some question regarding whether they nonetheless were required to comply with the FR reporting requirements at 668.171(h). Though the two would seem to be inextricably linked, there was no explicit exemption spelled out in the 2016 Rule. The Department articulated its position in the June 2019 Q&A, reflecting its view that schools must comply with the letter of the law:

> Although public institutions of higher education are considered to be financially responsible under 34 C.F.R. § 668.171(i), the reporting requirements in 34 C.F.R. § 668.171(h) do not distinguish between institutions based on their public or private nature or their tax status, and they exist independently of any determination of whether the reported actions or events are failures of financial responsibility under 34 C.F.R. § 668.171. As a result, the reporting requirements apply to all schools participating in the Title IV, HEA programs.[27]

E. Determining How Much Detail to Report

In the March 2019 Guidance, the Department directed institutions to submit FR notifications via email to FSAFRN@ed.gov. There is no required form or reporting format for making a required notice. In the June 2019 Q&A, the Department affirmed that no reporting template exists, but also offered "examples of what institutions might include in their notifications of financial responsibility events, conditions, and actions . . . ."[28]

As a general rule, institutions may want to refrain from providing significant discussion regarding the nature of the claim or the claim's merit. Detailed reporting is not required under the law or in the guidance that has been issued to date. Given that the basis for the requirement is to determine whether an event has occurred that implicates the school's financial stability, institutions may wish to include some statement regarding the relationship between the triggering event and the school's financial health, as well as any information concerning whether the triggering event has been or may soon be resolved or whether the institution has insurance that will cover part or all of any debts or liabilities that have arisen or might arise.

III. Financial Responsibility Reporting under the 2019 Rule

As noted above, the 2019 Rule was published in final form on September 23, 2019, and will become effective on July 1, 2020. The 2019 Rule does not abandon the revised financial responsibility framework established by the 2016 Rule—both triggering events and reporting timeframes remain. However, the 2019 Rule meaningfully simplifies the FR reporting requirements and affords institutions additional opportunity to dialogue with the Department regarding the materiality of a reported event.

The triggering events included in the 2019 Rule are set forth in 34 C.F.R. §§ 668.171(c) and (d), and the associated reporting requirements are detailed at 668.171(f). The 2019 Rule reduces the total number of triggering events to nine, down from seventeen in the 2016 version. Of these nine events, only seven must be reported to the Department, and of these seven, only four might occur at a public or private non-profit institution. Perhaps most significantly, institutions are no longer required to report Agency-Initiated Borrower Defense Lawsuits, Other Litigation, or any other form of threatened or pending action.[29]

A. Revising the Approach to Materiality

Significantly, the 2019 Rule also revises the manner in which the materiality of triggering events is determined. When NACUA member institutions report triggering events under the new rule, the Department will always measure the materiality of the event by either recalculating the institution's composite score, or considering whether the event is "likely to have a material adverse effect on the financial condition . . . of the institution."[30] There no longer is an event applicable to public or private non-profit institutions that, upon its occurrence, would cause the Department to presume that the school is not financially responsible.

The 2019 Rule also affords institutions increased opportunity to dialogue with the Department regarding the materiality of a reported event. Under the 2019 Rule, either in its initial notification to the Department or in its response to the Department's preliminary determination, an institution is afforded the opportunity to "[e]xplain or provide information about the conditions or circumstances that precipitated [the event] that demonstrates that the triggering event has not or will not have a material adverse effect on the institution."[31] Under the 2016 Rule, the Department did not issue a preliminary determination, and no opportunity to respond or address materiality was guaranteed, apart from the option to include pertinent information with the initial notice.

B. Continuing Issues

While the 2019 Rule is, in many respects, an improvement over its predecessor, not every riddle has been solved. Under the 2019 Rule, institutions are only required to report a "liability from a settlement, final judgment, or final determination," if the settlement, final judgment, or final determination arises from "an administrative or judicial action or proceeding initiated by a Federal or State entity."[32] This should significantly reduce the volume of reportable items, and eliminate the concern, created by the 2016 Rule, that routine, low stakes, contractual settlements must be reported (*e.g.*, releases of liability, severance agreements, tuition refunds).

On the other hand, as with the 2016 Rule, this language continues to require that institutions notify the Department of all qualifying settlements, without regard to their materiality. Commentary accompanying the 2019 Rule suggests that this is indeed the Department's intent. In the preamble, the agency observes:

> [I]t is important for the Department to know that an institution has incurred liabilities arising from settlements, final judgments, and final determinations by Federal or State agencies. Although the amount of each liability arising from such instances may be a minor amount, the cumulative effect of numerous settlements, final judgments, and final Federal or State agency determinations could damage the institution's financial stability . . . . Regarding the comments about the burden associated with reporting all incurred liabilities, we considered this burden in establishing the reporting process in these final regulations and believe it adequately balances the burden on schools with the Department's ability to obtain necessary information.[33]

Somewhat curiously, the Department also declined to include language in the 2019 Rule that specifically excludes public institutions from the FR reporting requirements. Because the issue was not addressed in the proposed rule, and thus not presented for public comment, the Department may have felt that it was inappropriate to address the matter in the final rule. This having been said, for all the reasons discussed above, it seems that an explicit exclusion for public institutions would be appropriate and consistent with the regulatory framework. We understand that several of the trade associations representing public institutions have raised this issue with the Department and continue to press for a resolution.

CONCLUSION:

As institutions work to comply with the FR reporting requirements, we offer the following parting thoughts and observations:

- Make every effort to comply with the 2016 Rule until it is replaced on July 1, 2020. Given its complexity, and its relatively short shelf life, it may be tempting to compromise on compliance. But even after July 1, 2020 has passed, the Department, or an external auditor, could test whether your institution complied during the effective period. Indeed, a failure to report litigation may be fairly easy to identify in an annual audit or program review. Historically, the Department has not looked favorably upon institutions that completely fail to comply with reporting and disclosure requirements. A cursory survey of the fines levied for Clery Act non-compliance readily illustrate this point[34]. And under both the 2016 Rule and 2019 Rule, the Department is empowered to take administrative action against an institution that fails to make a required notification, including the initiation of a proceeding to fine, limit, suspend, or terminate the institution's participation in the Title IV programs[35].

- Keep a keen eye out for updated guidance from the Department. The agency has indicated that it will continue to update the June 2019 Q&A. And we think it probable that the Department will provide additional guidance regarding implementation of the 2019 Rule in the coming months, likely through an Electronic Announcement posted on its Information for Financial Aid Professionals (IFAP) website.

- Begin preparations now for compliance with the 2019 Rule. The implementation of the 2016 Rule was unorthodox, given the delays and legal challenges. But institutions have an opportunity to prepare well in advance of the 2019 Rule's effective date of July 1, 2020[36].

- Finally, it is critical that counsel coordinate closely with the financial aid staff, compliance officers, or other administrators with responsibility for these reporting requirements to assist them in determining whether and when the triggering events concerning final determinations and settlements have occurred.

RESOURCES:

Thompson Coburn LLP, *Borrower Defense to Repayment Rulemaking Timeline* (Nov. 1, 2019).

Thompson Coburn LLP, *Financial Responsibility Reporting Under the 2016 Borrower Defense to Repayment Rule* (Nov. 1, 2019) (chart outlining reporting obligations and associated timelines).

Thompson Coburn LLP, *Financial Responsibility Reporting Under the 2019 Borrower Defense to Repayment Rule* (Nov. 1, 2019) (chart outlining reporting obligations and associated timelines).

Aaron D. Lacey and Rachael M. Dockery, "What General Counsel Should Know About the U.S. Department of Education's New Rules" (NACUA Annual Conference 2019).

END NOTES:

[1] Elements of this NACUANOTE originally appeared in "What General Counsel Should Know about the U.S. Department of Education's New Rules," a whitepaper prepared for NACUA's 2019 Annual Conference by the author and Rachael M. Dockery, General Counsel, Missouri State University.

[2] Aaron D. Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular Higher Education Webinar Series, and editorial director of REGucation, the firm's higher education law and policy blog. In October 2017, Aaron was selected by the U.S. Department of Education to serve as one of 17 primary negotiators charged with overhauling the Borrower Defense to Repayment rule. The Department designated Aaron to represent and negotiate on behalf of general counsels, attorneys, and compliance officers at institutions of higher education nationwide. He served in this capacity through March 2018, when the negotiations concluded.

[3] 20 U.S.C. § 1087e(h).

[4] *See* 34 C.F.R. § 685.206(c)(1994); *see also* Notice of Interpretation from the First Meeting of the Borrower Defenses Regulations Negotiated Rulemaking Advisory Committee, 60 Fed. Reg. 37,768 (Jul. 21, 1995).

[5] *See* United States Department of Education, *Fourth Report of the Special Master for Borrower Defense to the Under Secretary* (June 29, 2016); *see also* Letter from U.S. Department of Education to Sen. Richard Durbin, (July 7, 2017).

[6] For a timeline that details the BDTR rule's development over the years, see Thompson Coburn LLP, *Borrower Defense to Repayment Rulemaking Timeline* (Nov. 1, 2019).

[7] Much of the public discussion regarding the BDTR rule has been focused on its application to proprietary schools. There is no question that this was a primary focus of the prior administration and many of the negotiators who participated in the rulemaking processes. The vast majority of the regulatory reforms introduced by the BDTR rule, however, apply to all institutions of higher education.

[8] *See* 34 C.F.R. § 668.171(h)(2) (2017).

[9] *See Cal. Ass'n of Private Postsecondary Schs. v. DeVos*, No. 1:17-cv-00999 (D.D.C. May 24, 2017).

[10] *Bauer v. DeVos*, No. 17-cv-01330 (D.D.C. September 12, 2018), ECF No. 87. Judge Moss gave Secretary DeVos 30 days to make the case as to why the delay should remain in force. *Bauer, et al. v. DeVos, et al.*, No. 17-cv-01330 (D.D.C. September 12, 2018), ECF No. 19. Surprisingly, Secretary DeVos declined the offer, indicating that while she believed the 2016 Rule to be bad policy, the Department would move forward with its implementation.

[11] *Cal. Ass'n of Private Postsecondary Schs. v. DeVos*, No. 1:17-cv-00999 (D.D.C. Oct. 16, 2018), ECF No. 76.

[12] The three triggering events that involve this presumption concern the 90/10 Rule (34 C.F.R. § 668.171(d)), exchange actions against publicly traded companies (34 C.F.R. § 668.171(e)), and high cohort default rates (34 C.F.R. § 668.171(f)).

[13] *See* 34 C.F.R. 668.171 (g).

[14] 34 C.F.R. § 668.171(g)(3)(iv).

[15] For a chart outlining reporting obligations and associated timelines, see Thompson Coburn LLP, *Financial Responsibility Reporting Under the 2016 Borrower Defense to Repayment Rule* (Nov. 1, 2019).

[16] U.S. Dep.'t of Educ. Office of Post-Secondary Education, Federal Student Aid, *Guidance Concerning Some Provisions of the 2016 Borrower Defense to Repayment Regulations* (March 15, 2019) (hereinafter, the "March 2019 Guidance").

[17] U.S. Dep.'t of Educ. Office of Post-Secondary Education, Federal Student Aid, *Compliance with the 2016 Borrower Defense to Repayment Regulations Questions and Answers* (June 3, 2019) (hereinafter, "June 2019 Q&A"). The Department indicated that it would update the June 2019 Q&A on "an ongoing basis," and indeed added guidance on June 19, 2019. Institutions should note that the currency of each specific "answer" provided in June 2019 Q&A is indicated by the date following that specific answer.

[18] June 19 Q&A at 1.

[19] 34 C.F.R. § 668.171(c)(1)(i)(A).

[20] June 19 Q&A, Question 2.

[21] June 2019 Q&A, Answer 2.

[22] Institutions should keep in mind that there are additional reporting obligations that apply where an institution is sued and the dispute is based on a "borrower defense" claim. These reporting obligations are not located in the section of the regulations concerning financial responsibility. In such cases, 34 C.F.R. § 685.300 (July 1, 2017) obligates institutions to provide actual copies of specified judicial and arbitral records to the Department as a condition of participating in the federal financial aid programs. *See* Thompson Coburn LLP, *Financial Responsibility Reporting Under the 2016 Borrower Defense to*

Repayment Rule (Nov. 1, 2019), which details these obligations and the associated reporting requirements.

[24] *See id*. § 668.171(c)(1)(ii).

[23] *See* 34 C.F.R. § 668.171(c)(1)(i)(B).

[25] June 2019 Q&A, Answer 3.

[26] Student Assistance General Provisions, 81 Fed. Reg. 75926, 76006 (November 1, 2016).

[27] June 2019 Q&A, Answer 1.

[28] June 2019 Q&A, Answer 5.

[29] *See* Student Assistance General Provisions, 84 Fed. Reg. 49788, 49864 (September 23, 2019). The 2019 Rule also eliminates from 34 C.F.R. § 685.300 the provisions of the 2016 Rule that obligated institutions to provide actual copies of specified judicial and arbitral records to the Department as a condition of participating in the federal financial aid programs. For a reporting guide that details the 2019 Rule's various reporting obligations and associated timelines, see Thompson Coburn LLP, *Financial Responsibility Reporting Under the 2019 Borrower Defense to Repayment Rule* (Nov. 1, 2019).

[30] 34 C.F.R. § 668.171(d).

[31] 84 Fed. Reg. at 49913 (to be codified at 34 C.F.R. § 668.171).

[32] 34 C.F.R. §668.171 (c)(1).

[33] 84 Fed. Reg. at 49863.

[34] *See* United Educators, *Clery Act Violations That Result in Fines* (July 26, 2019).

[35] *See* 34 C.F.R. § 668.171(h)(2) (effective July 1, 2017) and 34 C.F.R. § 668.171(f)(2) (effective July 1, 2020).

[36] It certainly is possible that an effort could be made to delay the 2019 Rule through litigation. Legislation introduced in October 2019 to reauthorize the Higher Education Act also takes aim at the 2019 Rule. *See* College Affordability Act, H.R. 4674, 116th Cong. (2019). It is impossible to know whether such efforts will materialize or bear fruit. But given the controversy surrounding the BDTR rule, institutions should recognize the possibility for change and monitor for developments.

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