

## Rulemaking Panel Proposes Process for Student Debt Forgiveness Under BDTR

June 6, 2016

This memo discusses the proposed process for students to file claims to have their federal loans forgiven, as well as the role of institutions in that process, under the Final Draft of the BDTR Rule. Future Cooley memos will discuss the proposed financial responsibility and letter of credit triggers and the forms of loan discharge that were also addressed during the recent Negotiated Rulemaking.

This is the third in a series of Cooley client alerts that discuss issues raised during the Borrower Defense to Repayment (BDTR) Negotiated Rulemaking. Our first [alert](#) discussed the Negotiated Rulemaking itself, and the second [alert](#) examined the proposed new federal standards for making a BDTR claim. The Department has indicated it plans to issue its Proposed Rule in June and its intent to publish by November 1, 2016 in order to take effect on July 1, 2017. The new rule is currently under review with the Office for Management and Budget (OMB). A number of institutions have met with OMB to present their concerns about the proposals that were discussed during negotiated rulemaking. We expect that the NPRM will be issued in the next few weeks, and no later than the end of June.<sup>1</sup>

Since the Negotiated Rulemaking ended without consensus, the Department has a free hand to draft the NPRM and we encourage you to keep this rulemaking high on your agenda and seriously consider submitting comments when the Department issues the NPRM. The Department's final draft submitted to the negotiating committee (the [Final Draft](#)) will only be the starting point for the upcoming NPRM and therefore it is important that all institutions – regardless of type – understand the scope and potential impact of that Final Draft and expected new rule. (As a reminder: BDTR applies equally to all institutions that participate in the Direct Loan program, regardless of whether they are for-profit, non-profit or public.)

This memo addresses the processes proposed by ED for student borrowers to make claims under BDTR as individuals or as groups, and the role of institutions in the process, both in challenging the claim and facing potential liability to repay ED for any loans that are forgiven.

### Individual borrower claims

The Final Draft recommends two different processes for the filing and evaluating of BDTR claims – one for individual borrowers, and one for groups of borrowers.

For individual claims, the process calls for the borrower to file an application and provide evidence in support of his or her claim. ED is then supposed to investigate the claim using its own records, any response from the institution (which implies that the school the student does or did attend is notified, although the ED proposal does not provide that notice is required, or what the notice or timing procedures would be), and any additional information that ED might request from the borrower. Following its evaluation, ED would inform the borrower in writing of its decision, the basis for the decision, and an explanation of how the student can request reconsideration if desired.

If ED approves the claim, it will notify the borrower of the relief granted, which can include partial or full relief from the obligation to pay the debt and reimbursement for payments made, as well as "further relief," which would include removing a loan from default and updating credit reports.

ED also reserves the right to consolidate similar claims together if the facts are common, and to then apply the "group claim" procedure discussed below.

For institutions, the Final Draft raises critical questions. Notably, the draft rule states that ED "may initiate an appropriate proceeding to collect from the school whose act or omission resulted in the borrower defense the amount of the Secretary's losses arising from such borrower defense"; however, there is no further explanation of what due process will be available or what procedure will be used either during the review process or in the "appropriate proceeding". As noted above, this is particularly troublesome because the draft language does not include a requirement for the school to receive notice and an opportunity to respond, and as written it appears that ED could pursue recovery based solely on its own decision to grant the BDTR claim, without an opportunity for an institution to respond.

## **Group claims**

The proposed group claim process is complex and includes different procedures for claims made against schools that are still open versus schools that are closed.

### **Group process generally**

In the Final Draft, ED reserves broad discretion to initiate group borrower claims based on ED's own judgment of the appropriate process. ED may decide to initiate a group claim based on (1) a number of similar individually filed claims; (2) ED's determination that common facts and claims exist that apply to borrowers who have *not* filed an application; or (3) the written request of a state attorney general, state or federal enforcement agency, or a nonprofit organization that provides legal representation to borrowers.

Once ED designates a group claim, it will assign a Department official to present the group's claim in the fact-finding process. Notice will be sent to each borrower initially assigned to the group allowing him or her to opt out of the proceeding. This means that students will automatically be included *in* the Department's group, and be presumed to have been harmed, unless they affirmatively seek to be removed.

The school's role in this process is again unclear. The draft states that ED is required to notify the school, "as practicable," of the basis for the group claim and any procedure by which to request records and respond. ED has not indicated what it means by "practicable" but it appears that threshold is met if the school is still open and available to respond

### **Group process for a closed school**

When a school has closed, the process assumes that there is no remaining entity and no assets from which ED can seek recovery. However, if the institution, or persons associated with the institution are still available, the Department hearing official is supposed to consider the school's response, as well as all the evidence submitted by the claimants, their representative (whether external or the Department official acting on the group's behalf), and/or by an "interested third party."

If the borrowers' claims are denied in whole or in part, individual borrowers have access to another bite at the apple – if a borrower feels he or she has new evidence that specifically supports an individual claim, he or she may request reconsideration. This is an interesting twist that defeats the purpose of the "opt out" provision. Traditionally, if a group (or class) claim is denied relief, all class members are bound by that decision. By contrast, for BTDR purposes, it appears that ED will offer class members a second

chance to file an individual claim.

## Group process for an open school

***The importance of an institution's participation in this process cannot be overstated.***

The process for an open school provides broader participation by the institution. As part of the "fact-finding" process, ED is instructed to include the institution throughout, allowing the institution to present evidence, request documents and make arguments. The Final Draft does not define the exact process, but simply provides that ED will "establish procedures" for this purpose. As with the closed school process, the ED hearing official will weigh the school's response against the evidence presented by the borrower, his representative and "interested third parties." The hearing official then renders a written decision with an explanation for its basis. Both the borrower and the institution will have 30 days to appeal the decision.

Once the final determination has been issued, *"the Secretary collects from the school any liability to the Secretary for any amounts discharged."* Thus, it appears that the only option for an open institution to defend itself against a group claim will come as part of the fact-finding process. While some sort of appeal would be expected, the Final Draft makes no reference to such a process. This is in contrast to program review or audit findings, which can be appealed under formal procedures set forth at 34 CFR Part 668 Subpart H.

The Final Draft of the BDTR rule leaves many issues undefined and unclear, but leaves no doubt that this rule creates enormous legal and financial risk for institutions.

### Notes

1. The Office for Management and Budget is in the midst of its review and meetings with institutions and other interested parties to discuss their concerns about the upcoming rule, which is one more strong indicator that the Department is getting close to issuing the NPRM.

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