

# **Federal Regulations: What Will Be Enforced?**

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# Will Department of Education Rules Be Rolled Back?

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- On 11/8/2016, Donald Trump won a decisive electoral college victory and, on 1/20/2017, Trump was sworn in as President.
- During the campaign, Trump did not spend much time discussing higher education issues.

# Will Department of Education Rules Be Rolled Back?, cont.

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- Nevertheless, we know that Trump talked about rolling back regulations. Many hope this means rolling back borrower defense to repayment rules, State authorization rules, and gainful employment rules.

Wishful thinking? Not really. How it's done is the question.

# Will Department of Education Rules Be Rolled Back?, cont.

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- There are a number of ways regulations can be eliminated or rolled back:
  - Congress could disapprove the borrower defense rules and any other agency rules published after 5/30/2016, under a 1996 law called the *Congressional Review Act (CRA)* that gives Congress 60 legislative days to reverse regulations with a simple majority vote. Congress has only been successful in overturning one rule. In 2001, newly-inaugurated President George W. Bush overturned a Clinton Department of Labor workplace ergonomics rule. But now there are Republicans in the majority in Congress and a Republican President.

# Will Department of Education Rules Be Rolled Back?, cont.

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- On 3/8/2017, the Senate approved a resolution to repeal the teacher preparation and state accountability rules. The House approved the resolution on 2/7/2017. On 3/27/2017, President Trump signed the resolution.
- If a final rule was not published before President-elect Trump took office, the Trump Administration could halt the development of all rules at any stage of the rulemaking process, which President Obama did on his first day in office in 2009.

# Will Department of Education Rules Be Rolled Back?, cont.

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- While final rules released prior to the 5/30/2016 deadline would not be subject to the CRA, there are other options:
  - Congress has the power to include policy provisions in appropriations bills to block federal funds from going to enforce a regulation, effectively repealing the rules, except it is still on the books for future administrations.
  - Congress has the ability to repeal a regulation simply through a piece of legislation.

# Will Department of Education Rules Be Rolled Back?, cont.

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- The Administration can re-direct resources within ED to limit the ability to enforce a regulation.
- The Administration can issue a new rule repealing or revising the entirety or pieces of old regulations. Since rules are subject to negotiated rulemaking, this alternative would take some time, although the Trump Administration would have the authority to dispense with negotiated rulemaking for good cause. However, good cause exceptions could be subject to legal action.



# Will Department of Education Rules Be Rolled Back?, cont.

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- On 1/30/2017, the Department published a notice in the *Federal Register* delaying 3 regulations issued by the Department: State accountability plans under the *Every Student Succeeds Act*; policy changes under FERPA; and final rules that require that intellectual property created with ED competitive grants be openly licensed. The delay is until 3/21/2017.
  - A small paragraph in the notice said that the Department is planning additional action on other rules: borrower defense to repayment; teacher preparation rules; and state authorization rules. A copy of the notice is found at: <https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02056.pdf>.



# Rolling Back Regulations

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- On 1/20/2017, Reince Priebus, Assistant to the President and Chief of Staff, sent a memo to federal agencies to freeze all pending regulations. See: <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies>.
- On 2/24/2017, President Donald Trump issued an Executive Order to federal agencies to begin identifying regulations for elimination. See: <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>.

# Rolling Back Regulations, cont.

- On 1/31/2017, Trump appointed President of Liberty University, Jerry Falwell, Jr., to lead a presidential task force on reducing college regulations. Mr. Falwell said he sees this as a response to “overreaching” regulation and micro-management in areas of accreditation and policies that affect student recruiting.
  - On 2/23/2017, 6 Senate Democrats asked for answers regarding the task force: “As your agency will be the primary convener of the ‘task force,’ we ask that you provide clarity about how it will operate and how the Department intends to ensure fairness and transparency at every state of the task force’s work.” A copy of the letter is found at: <https://www.scribd.com/document/340105153/Falwell-Task-Force-Letter-2-23-17>.

## Rolling Back Regulations, cont.

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- On 3/6/2017, ED announced that it is allowing additional time, until 7/1/2017, for institutions to submit an alternative earnings appeals to the GE D/E rates and comply with the GE program disclosure requirements. Per the EA, this action will allow ED to further review the GE rules. See: <https://ifap.ed.gov/eannouncements/030617GEAnnounce105AddtlSubTimeA EAandGEDisReq.html>.

# Rolling Back Regulations, cont.

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- On 3/13/2017, Senators Elizabeth Warren (D-MA), Dick Durbin (D-IL), and Sherrod Brown (D-OH) sent a letter to the Secretary asking why there is a delay. Eleven Senators sent another letter expressing their concerns over the delay.

See:

<https://www.durbin.senate.gov/imo/media/doc/Senate%20Gainful%20Employment%203.13.17.pdf>

See:

[https://www.warren.senate.gov/files/documents/2017\\_03\\_3\\_ED\\_IG\\_Letter.pdf](https://www.warren.senate.gov/files/documents/2017_03_3_ED_IG_Letter.pdf)

## Rolling Back Regulations, cont.

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- On 2/28/2017, Senate Budget Chair Mike Enzi (R-WY) asked the Secretary to conduct audits of all student loan-related data citing inaccurate data about the projected cost of income-repayment plans (2016 GAO Report) and repayment rates included in College Scorecard and Financial Aid Shopping Sheet. See: <http://www.budget.senate.gov/imo/media/doc/Letter%20to%20Secretary%20DeVos.pdf>.

# Rolling Back Regulations, cont.

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- On 3/28/2017, 18 Senate Democrats wrote to Secretary DeVos asking her to implement the recommendations of a recent OIG report of 2/24/2017, which reviewed the Federal Student Aid's processes for identifying high-risk Title IV schools to prevent harm to students and taxpayers. They asked if the Secretary will:
  - Implement the OIG recommendations?
  - Enforce the borrower defense regulations?
  - Will you maintain the Student Aid Enforcement Unit?



WICHE Cooperative for  
Educational Technologies

**Federal Regulations:  
What Will be Enforced?**  
State Authorization Regulations  
Accreditation & Alternative Providers

Russ Poulin - April 3, 2017



# State Authorization Regulation

## December 2016

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- Authorization may be obtained through:
  - Each State in which the institution enrolls students.
  - A state to state reciprocity agreement.  
<http://wcet.wiche.edu/sites/default/files/Ted-Mitchell-Reciprocity-Response.pdf>
- Effective date: July 1, 2018.

# State Authorization Regulation

## December 2016

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### **Public Notifications and Disclosures:**

- Authorizations.
- Student complaint processes.
- Adverse actions by a State or accrediting agency.
- Refund policies.
- Program licensure and certification requirements.

# State Authorization Regulation

## December 2016

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### **Direct Notifications and Disclosures:**

- Program licensure and certification requirements.
- New adverse actions.
- Cease to meet licensure or certification requirements in a state.

<https://wcetfrontiers.org/2016/07/22/department-of-education-state-authorization-for-distance-ed-regulations-a-first-look/>

<https://wcetfrontiers.org/2016/12/16/a-lump-of-coal-for-sara-and-other-goodies-in-the-state-authorization-regulations/>

# State Authorization Regulation

## December 2016

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### **What Might Happen?**

- Congressional Review Act?
- Regulatory freeze.
- Congressional action to not enforce.
- Negotiated rulemaking.
- Regulations go into effect July 1, 2018.

# State Authorization Regulation

## December 2016

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### **In Any Case...**

- States will still enforce their laws.
- Department of Defense MOU for Tuition Assistance students.

# Accreditation & Alternative Providers

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## Accreditors...

- Less reliance on accreditors as compliance enforcers?

# Accreditation & Alternative Providers

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## Accreditors...

- Less reliance on accreditors as compliance enforcers?

March 13, 2017

## **Bennet, Rubio Introduce Alternative to Accreditation that Shifts Focus to Student Success**

**Creates Pilot Program for Innovative Quality Assurance Approach**



# Accreditation & Alternative Providers

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## Alternative Providers...

- Expand aid to more providers.
- EQUIP program already experiments with institution/provider partnerships.



# Borrower Defense to Repayment – New Challenges for Institutions

Greg Ferenbach

April 2017

attorney advertisement

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# Borrower Defense to Repayment (BDTR)

- Dept. of Education's new process for granting loan relief to student borrowers and for protecting itself from school failures
- Must be viewed in context of Corinthian meltdown: although applies to all, purpose is to make it easier for students at for-profit institutions to get loan relief (and generally rein them in)
- We'll cover:
  - BDTR statute and regulation
  - New Rule
  - Potential Impact

# Basis for BDTR Statute

- BDTR is rooted in the creation of the Direct Loan (DL) program, 1993-1994.
- The statute and implementing regulations apply to **all institutions that participate in the DL programs.**
- BDTR is not available to borrowers under FFELP.

# The BDTR Statute

- Statutory language in **20 USC § 1087e(h)**, passed in 1994:
  - **Borrower defenses**
  - Notwithstanding any other provision of State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan.
- Between 1995 and 2015, ED states only **five** claims for a BDTR had been made.
- Required regulations to define “acts or omissions,” but the Department did not actually define those terms (just punted to state law).

# Current BDTR Regulatory Language (in pertinent part)

- Instead, ED regulations created processes and added language around seeking recourse against an institution, if a defense is granted.
- **34 CFR § 685.206(c)**. Borrower defenses.
  - (1) In any proceeding to collect on a Direct Loan, the borrower may assert as a defense against repayment, **any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law [...]**
  - (2) If the borrower's defense against repayment is successful, the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances [...]
  - (3) The Secretary may initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment of a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies.

# ED Loan Activity Since June 2015

- After Corinthian meltdown, the FSA Borrower Defense “BD” Unit took over the review, processing and granting of student loan discharges.
- As of October 12, 2016:
  - The Department had received approx. 82,000 BDTR claims
  - The Department had processed 15,694 BDTR claims for Corinthian students comprising of \$247,370,853 in loan relief
  - The Department had also processed 13,010 Closed School Discharge claims for Corinthian students comprising \$103,050,594 in loan relief
  - Much more in process with ITT closure...
- The Department claims it will resolve “all pending eligible” claims by Spring 2017.



# BDTR – Notices of Proposed Rulemaking (NPRM)

- Intense political pressure on ED to speed up process
- ED initiated rulemaking sessions in January, February and March 2016
- Topics far beyond defining the “acts and omissions” required for a BDTR claim
  - Financial responsibility of institutions (including new “triggers” for letters of credit)
- Final Rule officially published in Federal Register on November 1, 2016
- Effective date: July 1, 2017

# BDTR Procedural Rules – January 2017

- Meanwhile, special procedural rules to clarify individual and group claim processes
- Provides additional detail about the process to be used in BDTR claim review and recovery proceedings
- Issued by ED on January 19th, 2017, the last day of the Obama administration (and effective immediately)
- Applies to BDTR claims made under current rule ( § 685.206) and July 1, 2017 rule (amended § 685.206 and new § 685.222)

# Final Rule - Federal Standard for “acts or omissions”

- Clarified the “act or omission” in question must relate to the making of a Direct Loan or the educational services for which the loan was made.
- In order to establish a defense, the borrower must show one of following three things by a preponderance of the evidence:
- **Breach of contract between school and student**
  - Interpreted very broadly to include promises in catalog
  - No materiality; six-year statute of limitations
- **“Contested judgement” against the school**
  - a decision of a court or administrative tribunal in favor of the student (whether as a plaintiff, member of a class, or covered party in a proceeding brought by a government agency)
  - no statute of limitations at all on this type of claim

# Final Rule - Federal Standard for “acts or omissions”

- **“Substantial” misrepresentation**

- ED broadens existing regulations on misrepresentation even further ( § 668.71):
  - removing any possible element of intent (“to deceive”) and shifts to “misleading under the circumstances” test
  - adds “any statement that omits information in such a way as to make the statement false, erroneous, or misleading.”
  - Again, no materiality standard; just need to show detrimental reliance.
- “We believe that an institution is responsible for the harm to borrowers caused by its misrepresentations, even if such misrepresentations cannot be attributed to institutional intent or knowledge and are the result of inadvertent or innocent mistakes.” 81 Fed. Reg. 75948
- Includes misrepresentations about state authorization including whether program leads to professional licensure in a state.
- Borrower may assert a claim to recover funds paid to ED not later than six years after the borrower discovers the “substantial misrepresentation.”

# Final Rule – Financial Responsibility

- The “Triggers” and Composite Score
  - ED will recalculate the school’s most recently submitted composite score to determine the potential financial impact of certain reported triggering events
  - If the expected impact of the event results in a liability that lowers the composite score below 1.0 from the most recently completed year, then the institution is not considered financially responsible for FA purposes.

# Final Rule – Financial Responsibility

- The following triggers result in a composite score recalculation:
  - any debt or liability arising from a final judgment in a judicial or administrative proceeding
  - a lawsuit brought on or after July 1, 2017 by a State or Federal authority on claims related Direct Loan or the provision of educational services, where the lawsuit has been pending for 120 days
  - a lawsuit brought on or after July 1, 2017 related to claims of any kind, where the school either lost on Motion for Summary Judgement (MSJ) or did not file a MSJ within the timeframe set by the court

# Final Rule – Financial Responsibility

- The following triggers result in a composite score recalculation (cont.):
  - accrediting body requires the school to submit a teach-out plan for a reason described in 34 C.F.R. § 602.24(c)(1) that covers the closing of the institution or any of its branches or additional locations
  - GE programs that could become ineligible based on their final D/E rates for the next award year
  - Withdrawal of equity from a school – including issuing a dividend – where the school’s composite score is less than 1.5



# Final Rule – Financial Responsibility

- Triggers without composite score recalculation (i.e. automatic indications that the institution is not financially responsible):
  - failure of 90/10 ratio for one year
  - two most recent official CDRs are 30% or greater
  - for publically traded schools, if the SEC warns the school that it may suspend trading the school's stock; the school failed to file a timely quarterly or annual report; or, the exchange notifies the school that the school is not in compliance with exchange requirements
- Discretionary Triggers - ED discretion to determine ANY event will have a materially adverse effect on the institution's continuing operations.

# Final Rule – Financial Responsibility

- Schools that are not financially responsible can meet alternative standards in order to remain in the T4 program:
  - post a 50% letter of credit; or
  - become provisionally certified, become subject to the zone alternative requirements and post a letter of credit of at least 10%, with the potential for more based on ED's determination of the potential loss that the surety is meant to cover
- If additional triggers are met, or the institution has already posted a letter of credit, ED will re-evaluate surety
- GE-like disclosures to students regarding the trigger event for 12 months following the notice to ED of the trigger.

# What's Next?

- Rule slated for full implementation on July 1, 2017
- Unclear if and how the Trump Administration will delay implementation
- OIG issued final report last month on Corinthian supporting the new financial responsibility tests
- Potentially a new NPRM if “new ED” wants to scale back or re-evaluate aspects of the rule (but would take a couple years)
- Always potential for litigation or Congressional action.

# Key Takeaways

- BDTR= a huge source of new liability for institutions (and U.S. taxpayers) that can only be mitigated, not eliminated.
- Essentially a full employment act for lawyers (no more arbitration and anti-class action clauses in enrollment contracts), particularly consumer advocates.
- Huge new discretion for ED staff to re-visit institutional financial responsibility status (as impacted by new suits under this rule).
- New challenges for SARA —if composite score goes down, institutions may lose ability to participate.

# Mitigating BDTR Risk

- Extra Review of Marketing Materials and Catalogs
  - All marketing and promotional materials should be subject to independent review by persons outside the group that develops the materials.
  - Verify that course and program descriptions are 100% accurate.
  - Clearly distinguish between institutional and programmatic accreditation.
  - Extra attention to professional licensure requirements.
- Strengthen Institutional Policies and Training
  - Consider paraphrasing the ED misrepresentation rule in the Code of Conduct and/or Employee Handbook.
  - Educate employees on these requirements (offer to more than just admissions staff).
  - Include (and take) disciplinary action for violations of the policy.

# Mitigating BDTR Risk

- Vendors
  - Require prior institutional review of all marketing materials used by vendors.
  - Review scripts used in any phone or one-to-one recruiting or enrollment counseling.
  - Include and beef up standard clauses in service contracts:
    - Representations and warranties;
    - Indemnification;
    - Adequate Insurance.

# Further Information

- Check out our new Blog! [www.ed.cooley.com](http://www.ed.cooley.com)
- You can also review client alerts on BDTR and other topics by visiting [www.cooley.com](http://www.cooley.com)
- [Gferenbach@cooley.com](mailto:Gferenbach@cooley.com)

# Reauthorization of the Higher Education Act, cont.

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- Senate Chairman of the HELP Committee, Lamar Alexander, plans to reauthorize the HEA.
- On 2/7/2017, the House Education and Workforce Committee held its first hearing on higher education reauthorization. Chairman Virginia Foxx (R-NC) identified four principles she plans to focus on:
  - Empowering students and families to make informed decisions;
  - Simplifying and improving student aid;
  - Promoting access, innovation, and completion; and
  - Promoting strong accountability and a limited federal role.



# Reauthorization of the Higher Education Act, cont.

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- On 3/21/2017, the House Education and Workforce Training Subcommittee held a hearing to examine proposals to streamline and simplify the federal student aid system. Chairman Brett Guthrie (R-KY) said that the programs have become too complex.
  - Students and families must navigate:
    - 6 different types of student loan programs;
    - 9 different repayment plans;
    - 8 different forgiveness programs; and
    - 32 deferment and forbearance options.
  - Lawmakers and witnesses promoted “one grant; one loan” programs.

# Reauthorization of the Higher Education Act, cont.

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- Areas to be considered in reauthorization:
  - College affordability;
  - Address student loan debt;
  - Risk sharing – “skin-in-the-game”;
  - Accreditation;
  - Streamlining the financial aid process;
  - Streamlining the programs – “one grant; one loan program”;
  - Streamlining the repayment plans;
  - Year-round Pell Grants;
  - Income-share agreements;

# Reauthorization of the Higher Education Act, cont.

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- Areas to be considered in reauthorization (cont.):
  - 90/10 restrictions;
  - Standardizing financial aid award letters;
  - Flexibility in loan counseling;
  - Dual enrollment; and
  - Many other issues, including protection of students and taxpayers:
    - Prohibit use of federal funds for marketing, recruiting, and advertising; and
    - Civil penalties for institutions and chief executive officers with a misrepresentation finding.

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**\*The End\***

Questions?

