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Third time's the charm? – U.S. Department of Education issues additional Q&A on implementation of 2016 "borrower defense to repayment" regulations

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The U.S. Department of Education (ED) has issued additional guidance in the form of several supplemental "questions and answers" related to implementation of ED's 2016 "borrower defense to repayment" regulations (BDTR Regulations). The BDTR Regulations took effect as of October 16, 2018, in accordance with a court's decision in related litigation.

This most recent guidance, which is dated June 19, 2019, is the third time ED has provided institutions some instructions about how to comply with the BDTR Regulations. Under the BDTR Regulations, institutions are required to report certain events to ED and ED is authorized to reassess an institution's compliance with ED's financial responsibility standards when certain events occur. For a detailed summary of the BDTR Regulations, please see our previous alert. For information about ED's March 15 Electronic Announcement, please see our related alert. Similarly, for information about ED's June 3 Electronic Announcement containing a first set of questions and answers, please see our related alert.

ED's newest guidance expands on the June 3 questions and answers by embedding additional items into the attachment to that Electronic Announcement – so institutions may not be aware that the list of questions and answers has grown to address the following topics:

- **Format of a report about the occurrence of a reportable event:** ED explains that currently there is no template, and therefore institutions' submissions "may vary based upon the facts and circumstances of the individual events." Nonetheless, ED provides examples of the general information institutions might include in their notifications, including: institution name; Office of Postsecondary Education identification (OPEID); event type; event date; status of event; and point of contact at the institution for any follow-up inquiries from ED.
- **Confidentiality considerations:** ED encourages institutions to indicate whether the information being submitted is confidential and/or proprietary and to update ED if the confidential and/or proprietary status of the information changes. ED states that an institution may choose to send its report to ED "in an encrypted format."

- **Suggested information to include in notice about a reportable event:** Having acknowledged that institutions' submissions may vary based upon the facts and circumstances, ED provides some guidance about information that might be provided along with notice of various types of reportable events, including:
  - Debts, liabilities, and losses – Copies of judicial filings, orders, or papers; documentation related to payment of a liability through a settlement or as the result of a court order; copies of a court's procedural rules. An institution may also provide information about any insurance that will cover a liability (e.g., copy of an insurance policy with sections related to type of coverage and amount highlighted) or has already been paid by an insurer (e.g., documentation of an amount paid), or information about the insurer's decision to cover a liability.
  - Teach-out plans – Information about why a teach-out plan was required and the date that such plan must be submitted.
  - Withdrawal of owner's equity – Information about the amount withdrawn, the reason for the withdrawal, and related documentation.
  - Non-Title IV revenue – Copy of the institution's computation and any supporting documentation.
  - U.S. Securities and Exchange Commission and stock exchange actions – Copies of the warning or documentation of the action taken.
  - State licensing agency citation – Copies of the citation (e.g., letters or other notification).
  - Accrediting agency show-cause or probation action – Documentation of the order or other notification.
  - Loan agreement violation – Copy of loan agreement and letter or other documentation from the creditor explaining the nature and consequence of the violation; or, if a waiver is granted, documentation of that waiver. If the loan agreement is revised or amended as a result of the violation, a copy of the new agreement or operating plan.
- **When a programmatic teach-out plan must be reported:** ED explains that if a teach-out of a particular education program would lead to the closure of the institution or any of its branches or additional locations, an institution must report any accreditor-required program-related teach-out plan under 34 C.F.R. 668.171(h)(1)(iii).
- **Clarification regarding whether there is a materiality threshold for state licensing agency citations:** ED explains that because the regulatory language includes no materiality threshold for a citation from a state licensing or authorizing agency, ED expects institutions to notify ED of any such citation, regardless of the nature of the citation or the effect of the citation on the institution.
- **Notice to ED in case of a "borrower defense lawsuit":** ED clarifies that if a lawsuit being reported under the BDTR Regulations is a lawsuit brought on the basis of claims related to the making of a Direct Loan or the provision of educational services for which the Direct Loan was issued – in other words, if the lawsuit raises claims that could potentially become borrower defense claims – then the institution must (1) send notice to borrowerdefense@ed.gov in order to comply with the requirement to submit to ED copies of

certain judicial records under 34 C.F.R. 685.300(h) and (2) send notice to FSAFRN@ed.gov in order to comply with the reporting requirements under 34 C.F.R. 668.171(h)(1)(i).

As institutions continue to work to comply with the BDTR Regulations, they should continue to monitor sources of guidance from ED, such as ED's Electronic Announcements and in particular, the June 3 set of questions and answers, which could be updated with further guidance going forward.

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