



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF POSTSECONDARY EDUCATION

**Proposed Regulatory Text for Issue Papers #6, 7, and 8: Borrower Defense to Repayment
Session Three: December 6-10, 2021**

§600.41 Termination and emergency action proceedings.

(a) If the Secretary believes that a previously designated eligible institution as a whole, or at one or more of its locations, does not satisfy the statutory or regulatory requirements that define that institution as an eligible institution, the Secretary may -

(1) Terminate the institution's eligibility designation in whole or as to a particular location -

(i) Under the procedural provisions applicable to terminations contained in 34 CFR 668.81, 668.83, 668.86, ~~668.87~~ 668.88, 668.89, 668.90 (a)(1), (a)(4), and (c) through (f), and 668.91; or

Commented [A1]: The Department has added technical and conforming changes to other areas. The borrower defense text now begins on page 24.

Commented [A2]: Technical changes and cross references to relevant sections of the regulations.

BD proposed regulatory text session three 2

§668.81 Scope and special definitions.

(a) This subpart establishes regulations for the following actions with respect to a participating institution or third-party servicer:

(1) An emergency action.

(2) The imposition of a fine.

(3) The limitation, suspension, or termination of the participation of the institution in a title IV, HEA program.

(4) The limitation, suspension, or termination of the eligibility of the servicer to contract with any institution to administer any aspect of the institution's participation in a Title IV, HEA program.

(5) The determination of -

(i) Borrower defense to repayment claims that are brought by the Department against an institution under § 685.206, ~~or~~ § 685.222 or 34 CFR part 685, Subpart D; and

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§668.87 ~~Borrower defense and recovery proceedings [RESERVE]~~

~~(a) Procedures:~~

~~(1) A designated department official begins a borrower defense and recovery proceeding against an institution by sending the institution a notice by certified mail, return receipt requested. This notice—~~

~~(i) Informs the institution of the Secretary's intent—~~

~~(A) To determine the validity of borrower defense claims on behalf of a group under § 685.222(h), to demonstrate the validity of borrower defense claims already approved, or both, as applicable; and~~

~~(B) To recover from the institution by offset, by claim on a letter of credit or other protection provided by the institution, or otherwise, for losses on account of borrower defense claims asserted on behalf of the group and borrower defense claims already approved, as applicable;~~

~~(ii) Includes a statement of facts and law sufficient to show that the Department is entitled to grant any borrower defense relief asserted within the statement, and recover for the amount of losses to the Secretary caused by the granting of such relief;~~

~~(iii) Specifies the date on which the Secretary intends to take action to recover the amount of losses arising from the granting of such relief, which date will be at least 20 days from mailing of the notice of intent and informs the institution that the Secretary will not take action to recover the amount of such loss on the date specified if the designated department official receives, by that date, a written response from the institution indicating why the Secretary should not recover. The notice shall also inform the institution that if it wishes to request a hearing pursuant to this subpart, the institution must include such a request with its written response; and~~

~~(iv) Informs the institution whether the designated Department official intends to proceed with—~~

~~(A) A single action; or~~

~~(B) An action in two phases—~~

~~(1) The determination whether the institution's act or omission gave rise to valid borrower defense claims; and~~

~~(2) The determination of the amount of borrower defense relief.~~

~~(2) Although the hearing official shall have the discretion to bifurcate proceedings with, or without, a motion of either party, any decision by the designated department official to bifurcate the proceeding in accordance with paragraph (a)(1)(iv)(B) of this section may only be modified on motion with good cause shown.~~

~~(3) A hearing official conducts a hearing in accordance with § 668.89.~~

~~(b) Effect of a response by the institution:~~

~~(1) If the institution submits a written response, but does not therein request a hearing, the designated department official, after considering that material, notifies the institution whether the~~

BD proposed regulatory text session three 4

~~Secretary will take the proposed recovery action for borrower defense claims and, if so, the date of such action and the amount of losses.~~

~~(2) If the institution submits a response and requests a hearing by the time specified in the notice under paragraph (a)(1)(iii) of this section, the designated department official may, in that official's sole discretion, withdraw the notice or transmit the response and request for hearing to the Office of Hearings and Appeals, which sets the date and the place for the hearing. The date of the hearing is at least 15 days after the designated department official receives the request. No liability shall be imposed on the institution prior to the hearing.~~

~~(c) Limitations on participation. The parties in any borrower defense and recovery proceeding are the Department and the institution(s) against which the Department seeks to recover losses caused to the Department as a result of borrower defense relief. Borrowers are not permitted to intervene or appear in this proceeding, either on their own behalf or on behalf of any purported group, except as witnesses put forth by either party. However, nothing in this section limits the rights available to borrowers under other regulations, including 34 CFR 685.206 and 685.222.~~

~~(d) Effect on the borrower. No proceeding under this subpart imposes liability on any borrower who has already obtained a discharge in an individual proceeding under 34 CFR 685.206(c) or 34 CFR 685.222(e). A borrower defense and recovery proceeding may determine whether and how much relief is due to, and whether and how much of a loan remains owing by, a borrower participating in a group process proceeding as defined in 34 CFR 685.222(f) through (h).~~

§668.89 Hearing.

(iii) For borrower defenses under 685.206(c), (e), and 685.222, the designated department official has the burden of persuasion in a borrower defense and recovery action; however, for a borrower defense claim based on a substantial misrepresentation under § 682.222(d), the designated department official has the burden of persuasion regarding the substantial misrepresentation, and the institution has the burden of persuasion in establishing any offsetting value of the education under § 685.222(i)(2)(i).

§668.91 Initial and final decisions.

(2)(~~ii~~) The hearing official's initial decision states whether the imposition of the fine, limitation, suspension, or termination or recovery sought by the designated department official is warranted, in whole or in part. If the designated department official brought a termination action against the institution or servicer, the hearing official may, if appropriate, issue an initial decision to fine the institution or servicer, as applicable, or, rather than terminating the institution's participation or servicer's eligibility, as applicable, impose one or more limitations on the institution's participation or servicer's eligibility.

~~(iii) In a borrower defense and recovery proceeding conducted in two phases under § 668.87(a)(1)(iv)(B), the hearing official's initial decision determines whether the institution is liable for the act or omission described in the notice of intent to recover, and the hearing official issues an initial decision on liability only.~~

(4) The hearing official bases findings of fact only on evidence considered at the hearing and on matters given judicial notice.

(b) *****

(c)(1) In a fine, limitation, or termination proceeding, the hearing official's initial decision automatically becomes the Secretary's final decision 30 days after the initial decision is issued and received by both parties unless, within that 30-day period, the institution or servicer, as applicable, or the designated department official appeals the initial decision to the Secretary.

(2)(i) A party may appeal the hearing official's initial decision by submitting to the Secretary, within 30 days after the party receives the initial decision, a brief or other written statement that explains why the party believes that the Secretary should reverse or modify the decision of the hearing official.

(ix) If the hearing official finds that a termination is warranted pursuant to paragraph (a)(3) of this section, the Secretary may affirm, modify, or reverse the initial decision, or may remand the case to the hearing official for further proceedings consistent with the Secretary's decision. If the Secretary affirms the initial decision without issuing a statement of reasons, the Secretary adopts the opinion of the hearing official as the decision of the Secretary. If the Secretary modifies, remands, or reverses the initial decision, in whole or in part, the Secretary's decision states the reasons for the action taken.

BD proposed regulatory text session three 7

~~(x) In a borrower defense and recovery proceeding conducted in two phases under § 668.87(a)(1)(iv)(B), if a party appeals an initial decision of the hearing official in the first phase, the Secretary may affirm, modify, or reverse the initial decision, or may remand the case to the hearing official for further proceedings consistent with the Secretary's decision.~~

BD proposed regulatory text session three 8

§685.103 Applicability of subparts.

(a) Subpart A contains general provisions regarding the purpose and scope of the Direct Loan Program.

(b) Subpart B contains provisions regarding borrowers in the Direct Loan Program.

(c) Subpart C contains certain requirements regarding schools in the Direct Loan Program.

(d) Subpart D contains provisions regarding ~~school eligibility for participation and origination in the Direct Loan Program~~ borrower defense to repayment in the Direct Loan Program.

§685.205 Forbearance.

(b) Administrative forbearance. In certain circumstances, the Secretary grants forbearance without requiring documentation from the borrower. These circumstances include but are not limited to

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(6) Periods necessary for the Secretary to determine the borrower's eligibility for discharge -

(i) Under 685.206(c), (d) and (e);

(ii) Under § 685.214;

(iii) Under § 685.215;

(iv) Under § 685.216;

(v) Under § 685.217;

(vi) Under § 685.222; ~~or~~

(vii) Under 34 CFR part 685, Subpart D; or

~~(viii)~~ Due to the borrower's or endorser's (if applicable) bankruptcy;

Commented [A3]: Cross reference to forbearance regulations.

§685.206 Borrower responsibilities and defenses.

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(e) Borrower defense to repayment for loans first disbursed on or after July 1, 2020 and before July 1, 2023. This paragraph (e) applies to borrower defense to repayment for loans first disbursed on or after July 1, 2020 and before July 1, 2023.

(1) Definitions. For the purposes of this paragraph (e), the following definitions apply:

(i) A “Direct Loan” under this paragraph (e) means a Direct Subsidized Loan, a Direct Unsubsidized Loan, or a Direct PLUS Loan.

(ii) “Borrower” means

(A) The borrower; and

(B) In the case of a Direct PLUS Loan, any endorsers, and for a Direct PLUS Loan made to a parent, the student on whose behalf the parent borrowed.

(iii) A “borrower defense to repayment” under this paragraph (e) includes—

(A) A defense to repayment of amounts owed to the Secretary on a Direct Loan, or a Direct Consolidation Loan that was used to repay a Direct Loan, FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act, Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act; and

(B) Any accompanying request for reimbursement of payments previously made to the Secretary on the Direct Loan or on a loan repaid by the Direct Consolidation Loan.

(iv) The term “provision of educational services” under this paragraph (e) refers to the educational resources provided by the institution that are required by an accreditation agency or a State licensing or authorizing agency for the completion of the student’s educational program.

(v) The terms “school” and “institution” under this paragraph (e) may be used interchangeably and include an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services.

(2) Federal standard for loans first disbursed on or after July 1, 2020 and before July 1, 2023. For a Direct Loan or Direct Consolidation Loan first disbursed on or after July 1, 2020 and before July 1, 2023, a borrower may assert a defense to repayment under this paragraph (e), if the borrower establishes by a preponderance of the evidence that—

(i) The institution at which the borrower enrolled made a misrepresentation, as defined in § 685.206(e)(3), of material fact upon which the borrower reasonably relied in deciding to obtain a Direct Loan, or a loan repaid by a Direct Consolidation Loan, and that directly and clearly relates to:

(A) Enrollment or continuing enrollment at the institution or

(B) The provision of educational services for which the loan was made; and

(ii) The borrower was financially harmed by the misrepresentation.

(3) Misrepresentation. A “misrepresentation,” for purposes of this paragraph (e), is a statement, act, or omission by an eligible school to a borrower that is false, misleading, or deceptive; that was made with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth; and that directly and clearly relates to enrollment or continuing enrollment at the institution or the provision of educational services for which the loan was made. Evidence that a misrepresentation defined in this paragraph (e) may have occurred includes, but is not limited to:

(i) Actual licensure passage rates materially different from those included in the institution’s marketing materials, website, or other communications made to the student;

(ii) Actual employment rates materially different from those included in the institution’s marketing materials, website, or other communications made to the student;

(iii) Actual institutional selectivity rates or rankings, student admission profiles, or institutional rankings that are materially different from those included in the institution’s marketing materials, website, or other communications made to the student or provided by the institution to national ranking organizations;

(iv) The inclusion in the institution’s marketing materials, website, or other communication made to the student of specialized, programmatic, or institutional certifications, accreditation, or approvals not actually obtained, or the failure to remove within a reasonable period of time such certifications or approvals from marketing materials, website, or other communication when revoked or withdrawn;

(v) The inclusion in the institution’s marketing materials, website, or other communication made to the student of representations regarding the widespread or general transferability of credits that are only transferrable to limited types of programs or institutions or the transferability of credits to a specific program or institution when no reciprocal agreement exists with another institution or such agreement is materially different than what was represented;

(vi) A representation regarding the employability or specific earnings of graduates without an agreement between the institution and another entity for such employment or sufficient evidence of past employment or earnings to justify such a representation or without citing appropriate national, State, or regional data for earnings in the same field as provided by an appropriate Federal agency that provides such data. (In the event that national data are used, institutions should include a written, plain language disclaimer that national averages may not accurately reflect the earnings of workers in particular parts of the country and may include earners at all stages of their career and not just entry level wages for recent graduates.);

(vii) A representation regarding the availability, amount, or nature of any financial assistance available to students from the institution or any other entity to pay the costs of attendance at the institution that is materially different in availability, amount, or nature from the actual financial assistance available to the borrower from the institution or any other entity to pay the costs of attendance at the institution after enrollment;

(viii) A representation regarding the amount, method, or timing of payment of tuition and fees that the student would be charged for the program that is materially different in amount, method, or timing of payment from the actual tuition and fees charged to the student;

(ix) A representation that the institution, its courses, or programs are endorsed by vocational counselors, high schools, colleges, educational organizations, employment agencies, members of a particular industry, students, former students, governmental officials, Federal or State agencies, the United States Armed Forces, or other individuals or entities when the institution has no permission or is not otherwise authorized to make or use such an endorsement;

(x) A representation regarding the educational resources provided by the institution that are required for the completion of the student's educational program that are materially different from the institution's actual circumstances at the time the representation is made, such as representations regarding the institution's size; location; facilities; training equipment; or the number, availability, or qualifications of its personnel; and

(xi) A representation regarding the nature or extent of prerequisites for enrollment in a course or program offered by the institution that are materially different from the institution's actual circumstances at the time the representation is made, or that the institution knows will be materially different during the student's anticipated enrollment at the institution.

(4) Financial harm. ~~Under this paragraph (e), F~~financial harm is the amount of monetary loss that a borrower incurs as a consequence of a misrepresentation, as defined in § 685.206(e)(3). Financial harm does not include damages for nonmonetary loss, such as personal injury, inconvenience, aggravation, emotional distress, pain and suffering, punitive damages, or opportunity costs. The Department does not consider the act of taking out a Direct Loan or a loan repaid by a Direct Consolidation Loan, alone, as evidence of financial harm to the borrower. Financial harm is such monetary loss that is not predominantly due to intervening local, regional, or national economic or labor market conditions as demonstrated by evidence before the Secretary or provided to the Secretary by the borrower or the school. Financial harm cannot arise from the borrower's voluntary decision to pursue less than full-time work or not to work or result from a voluntary change in occupation. Evidence of financial harm may include, but is not limited to, the following circumstances:

(i) Periods of unemployment upon graduating from the school's programs that are unrelated to national or local economic recessions;

(ii) A significant difference between the amount or nature of the tuition and fees that the institution represented to the borrower that the institution would charge or was charging and the actual amount or nature of the tuition and fees charged by the institution for which the Direct Loan was disbursed or for which a loan repaid by the Direct Consolidation Loan was disbursed;

(iii) The borrower's inability to secure employment in the field of study for which the institution expressly guaranteed employment; and

(iv) The borrower's inability to complete the program because the institution no longer offers a requirement necessary for completion of the program in which the borrower enrolled and the institution did not provide for an acceptable alternative requirement to enable completion of the program.

(5) Exclusions. The Secretary will not accept the following as a basis for a borrower defense to repayment under this paragraph (e)—

(i) A violation by the institution of a requirement of the Act or the Department’s regulations for a borrower defense to repayment under paragraph (c) or (d) of this section or under § 685.222, unless the violation would otherwise constitute the basis for a successful borrower defense to repayment under this paragraph (e); or

(ii) A claim that does not directly and clearly relate to enrollment or continuing enrollment at the institution or the provision of educational services for which the loan was made, including, but not limited to—

(A) Personal injury;

(B) Sexual harassment;

(C) A violation of civil rights;

(D) Slander or defamation;

(E) Property damage;

(F) The general quality of the student’s education or the reasonableness of an educator’s conduct in providing educational services;

(G) Informal communication from other students;

(H) Academic disputes and disciplinary matters; and

(I) Breach of contract, unless the school’s act or omission would otherwise constitute the basis for a successful defense to repayment under this paragraph (e).

(6) Limitations period ~~and tolling of the limitations period for arbitration proceedings.~~ (i) A borrower must assert a defense to repayment under this paragraph (e) within three years from the date the student is no longer enrolled at the institution. A borrower may only assert a defense to repayment under this paragraph (e) within the timeframes set forth in § 685.206(e)(6) ~~(i) and (ii)~~ and (e)(7).

~~(ii) For pre-dispute arbitration agreements, as defined in § 668.41(h)(2)(iii), the limitations period will be tolled for the time period beginning on the date that a written request for arbitration is filed, by either the student or the institution, and concluding on the date the arbitrator submits, in writing, a final decision, final award, or other final determination, to the parties.~~

(7) Extension of limitation periods and reopening of applications. For loans first disbursed on or after July 1, 2020 and before July 1, 2023, the Secretary may extend the time period when a borrower may assert a defense to repayment under § 685.206(e)(6) or may reopen a borrower’s defense to repayment application to consider evidence that was not previously considered only if there is:

(i) A final, non-default judgment on the merits by a State or Federal Court that has not been appealed or that is not subject to further appeal and that establishes the institution made a misrepresentation, as defined in § 685.206(e)(3); or

(ii) A final decision by a duly appointed arbitrator or arbitration panel that establishes that the institution made a misrepresentation, as defined in § 685.206(e)(3).

(8) Application and Forbearance. To assert a defense to repayment under this paragraph (e), a borrower must submit an application under penalty of perjury on a form approved by the Secretary and sign a waiver permitting the institution to provide the Department with items from the borrower's education record relevant to the defense to repayment claim. The form will note that pursuant to [§ 685.205 paragraph \(b\)\(6\)\(i\) of this section](#), if the borrower is not in default on the loan for which a borrower defense has been asserted, the Secretary will grant forbearance and notify the borrower of the option to decline forbearance. The application requires the borrower to—

(i) Certify that the borrower received the proceeds of a loan, in whole or in part, to attend the named institution;

(ii) Provide evidence that supports the borrower defense to repayment application;

(iii) State whether the borrower has made a claim with any other third party, such as the holder of a performance bond, a public fund, or a tuition recovery program, based on the same act or omission of the institution on which the borrower defense to repayment is based;

(iv) State the amount of any payment received by the borrower or credited to the borrower's loan obligation through the third party, in connection with a borrower defense to repayment described in paragraph (e)(2) of this section;

(v) State the financial harm, as defined in paragraph (e)(4) of this section, that the borrower alleges to have been caused and provide any information relevant to assessing whether the borrower incurred financial harm, including providing documentation that the borrower actively pursued employment in the field for which the borrower's education prepared the borrower if the borrower is a recent graduate (failure to provide such information results in a presumption that the borrower failed to actively pursue employment in the field); whether the borrower was terminated or removed for performance reasons from a position in the field for which the borrower's education prepared the borrower, or in a related field; and whether the borrower failed to meet other requirements of or qualifications for employment in such field for reasons unrelated to the school's misrepresentation underlying the borrower defense to repayment, such as the borrower's ability to pass a drug test, satisfy driving record requirements, and meet any health qualifications; and

(vi) State that the borrower understands that in the event that the borrower receives a 100 percent discharge of the balance of the loan for which the defense to repayment application has been submitted, the institution may, if allowed or not prohibited by other applicable law, refuse to verify or to provide an official transcript that verifies the borrower's completion of credits or a credential associated with the discharged loan.

(9) Consideration of order of objections and of evidence in possession of the Secretary [under this paragraph \(e\)](#). (i) If the borrower asserts both a borrower defense to repayment and any other objection to an action of the Secretary with regard to a Direct Loan or a loan repaid by a Direct Consolidation Loan [under this paragraph \(e\)](#), the order in which the Secretary will consider objections, including a borrower defense to repayment [under this paragraph \(e\)](#), will be determined as appropriate under the circumstances.

(ii) With respect to the borrower defense to repayment application submitted under this paragraph (e), the Secretary may consider evidence otherwise in the possession of the Secretary, including from the Department's internal records or other relevant evidence obtained by the Secretary, as practicable, provided that the Secretary permits the institution and the borrower to review and respond to this evidence and to submit additional evidence.

(10) School response and borrower reply [under this paragraph \(e\)](#). (i) Upon receipt of a borrower defense to repayment application under this paragraph (e), the Department will notify the school of the pending application and provide a copy of the borrower's request and any supporting documents, a copy of any evidence otherwise in the possession of the Secretary, and a waiver signed by the student permitting the institution to provide the Department with items from the student's education record relevant to the defense to repayment claim to the school, and invite the school to respond and to submit evidence, within the specified timeframe included in the notice, which shall be no less than 60 days.

(ii) Upon receipt of the school's response, the Department will provide the borrower a copy of the school's submission as well as any evidence otherwise in possession of the Secretary, which was provided to the school, and will give the borrower an opportunity to submit a reply within a specified timeframe, which shall be no less than 60 days. The borrower's reply must be limited to issues and evidence raised in the school's submission and any evidence otherwise in the possession of the Secretary.

(iii) The Department will provide the school a copy of the borrower's reply.

(iv) There will be no other submissions by the borrower or the school to the Secretary, unless the Secretary requests further clarifying information.

(11) Written decision [under this paragraph \(e\)](#). (i) After considering the borrower's application and all applicable evidence [under this paragraph \(e\)](#), the Secretary issues a written decision—

(A) Notifying the borrower and the school of the decision on the borrower defense to repayment [under this paragraph \(e\)](#);

(B) Providing the reasons for the decision; and

(C) Informing the borrower and the school of the relief, if any, that the borrower will receive, consistent with paragraph (e)(12) of this section, and specifying the relief determination.

(ii) If the Department receives a borrower defense to repayment application that is incomplete and is within the limitations period in § 685.206(e)(6) or (7), the Department will not issue a written decision on the application and instead will notify the borrower in writing that the application is incomplete and will return the application to the borrower.

(12) Borrower defense to repayment relief [under this paragraph \(e\)](#). (i) If the Secretary grants the borrower's request for relief based on a borrower defense to repayment under this paragraph (e), the Secretary notifies the borrower and the school 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 or will be reimbursed for amounts paid toward the loan voluntarily or through enforced collection. The amount of relief that a borrower receives [under this paragraph \(e\)](#) may exceed the

amount of financial harm, as defined in § 685.206(e)(4), that the borrower alleges in the application pursuant to § 685.206(e)(8)(v). The Secretary determines the amount of relief and awards relief limited to the monetary loss that a borrower incurred as a consequence of a misrepresentation, as defined in § 685.206(e)(3). The amount of relief under this paragraph (e) cannot exceed the amount of the loan and any associated costs and fees and will be reduced by the amount of refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation, compromise, or any other financial benefit received by, or on behalf of, the borrower that was related to the borrower defense to repayment under this paragraph (e). In awarding relief under this paragraph (e), the Secretary considers the borrower's application, as described in § 685.206(e)(8), which includes information about any payments received by the borrower and the financial harm alleged by the borrower. In awarding relief under this paragraph (e), the Secretary also considers the school's response, the borrower's reply, and any evidence otherwise in the possession of the Secretary, which was previously provided to the borrower and the school, as described in § 685.206(e)(10). The Secretary also updates reports to consumer reporting agencies to which the Secretary previously made adverse credit reports with regard to the borrower's Direct Loan or loans repaid by the borrower's Direct Consolidation Loan under this paragraph (e).

(ii) The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include ~~one or both of the following, if applicable:~~

~~(A) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act, and~~

~~(B) For loans first disbursed before July 1, 2021, eliminating or recalculating the subsidized usage period that is associated with the loan or loans discharged pursuant to former § 685.200(f)(4)(iii).~~

(13) Finality of borrower defense to repayment decisions under this paragraph (e). The determination of a borrower's defense to repayment by the Department included in the written decision referenced in paragraph (e)(11) of this section is the final decision of the Department and is not subject to appeal within the Department.

(14) Cooperation by the borrower under this paragraph (e). The Secretary may revoke any relief granted to a borrower under this section who refuses to cooperate with the Secretary in any proceeding under paragraph (e) of this section or under 34 CFR part 668, subpart G. Such cooperation includes, but is not limited to—

(i) Providing testimony regarding any representation made by the borrower to support a successful borrower defense to repayment under this paragraph (e); and

(ii) Producing, within timeframes established by the Secretary, any documentation reasonably available to the borrower with respect to those representations and any sworn statement required by the Secretary with respect to those representations and documents.

(15) Transfer to the Secretary of the borrower's right of recovery against third parties under this paragraph (e). (i) Upon the grant of any relief under this paragraph (e), the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the

provision of educational services for which the loan was received, against the school, its principals, its affiliates and their successors, or its sureties, and any private fund, including the portion of a public fund that represents funds received from a private party. If the borrower asserts a claim to, and recovers from, a public fund, the Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense to repayment and for the same loan for which the discharge was granted under this section.

(ii) The provisions of this paragraph (e)(15) apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(iii) Nothing in this paragraph (e)(15) limits or forecloses the borrower's right to pursue legal and equitable relief arising under applicable law against a party described in this paragraph (e)(15) for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

(16) Recovery from the school under this paragraph (e). (i) The Secretary may initiate an appropriate proceeding to require the school whose misrepresentation resulted in the borrower's successful borrower defense to repayment under this paragraph (e) to pay to the Secretary the amount of the loan to which the defense applies in accordance with 34 CFR part 668, subpart G. This paragraph (e)(16) would also be applicable for provisionally certified institutions.

(ii) Under this paragraph (e) of this section, the Secretary will not initiate such a proceeding more than five years after the date of the final determination included in the written decision referenced in paragraph (e)(11) of this section. The Department will notify the school of the borrower defense to repayment application within 60 days of the date of the Department's receipt of the borrower's application.

§685.212 Discharge of a loan obligation.

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(k) Borrower defenses.

(1) If a borrower defense is approved under § 685.206(c) or under § 685.206(d) and § 685.222 -

(i) The Secretary discharges the obligation of the borrower in whole or in part in accordance with the procedures in §§ 685.206(c) and 685.222, respectively; and

(ii) The Secretary returns to the borrower payments made by the borrower or otherwise recovered on the loan that exceed the amount owed on that portion of the loan not discharged, if the borrower asserted the claim not later than -

(A) For a claim subject to § 685.206(c), the limitation period under applicable law to the claim on which relief was granted; or

(B) For a claim subject to § 685.222, the limitation period in § 685.222(b), (c), or (d), as applicable.

(2) In the case of a Direct Consolidation Loan, a borrower may assert a borrower defense under § 685.206(c) or § 685.222 with respect to a Direct Loan, FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act, Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act that was repaid by the Direct Consolidation Loan.

(i) The Secretary considers a borrower defense claim asserted on a Direct Consolidation Loan by determining -

(A) Whether the act or omission of the school with regard to the loan described in this paragraph (k)(2), other than a Direct Subsidized, Unsubsidized, or PLUS Loan, constitutes a borrower defense under § 685.206(c), for a Direct Consolidation Loan made before July 1, 2017, or under § 685.222, for a Direct Consolidation Loan made on or after July 1, 2017, and before July 1, 2020; or

(B) Whether the act or omission of the school with regard to a Direct Subsidized, Unsubsidized, or PLUS Loan made on after July 1, 2017, and before July 1, 2020, that was paid off by the Direct Consolidation Loan, constitutes a borrower defense under § 685.222.

(ii) If the borrower defense is approved, the Secretary discharges the appropriate portion of the Direct Consolidation Loan.

(iii) The Secretary returns to the borrower payments made by the borrower or otherwise recovered on the Direct Consolidation Loan that exceed the amount owed on that portion of the Direct Consolidation Loan not discharged, if the borrower asserted the claim not later than -

(A) For a claim asserted under § 685.206(c), the limitation period under the law applicable to the claim on which relief was granted; or

(B) For a claim asserted under § 685.222, the limitation period in § 685.222(b), (c), or (d), as applicable.

(iv) The Secretary returns to the borrower a payment made by the borrower or otherwise recovered on the loan described in this paragraph (k)(2) only if -

(A) The payment was made directly to the Secretary on the loan; and

(B) The borrower proves that the loan to which the payment was credited was not legally enforceable under applicable law in the amount for which that payment was applied.

(3) If a borrower's application for a discharge of a loan based on a borrower defense is approved under § 685.206(e), the Secretary discharges the obligation of the borrower, in whole or in part, in accordance with the procedures described in § 685.206(e).

(4) If a borrower's application for a discharge of a loan based on a borrower defense is approved under 34 CFR part 685, Subpart D, the Secretary discharges the obligation of the borrower, in whole or in part, in accordance with the procedures described in 34 CFR part 685, Subpart D.

BD proposed regulatory text session three 20

§685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.

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(k)(12) Accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts discharged by the Secretary pursuant to §§ 685.206, 685.214, 685.215, 685.216, ~~and 685.222~~, and 34 CFR part 685, Subpart D.

§685.308 Remedial actions.

(a) General. The Secretary may require the repayment of funds and the purchase of loans by the school if the Secretary determines that the school is liable as a result of -

(1) The school's violation of a Federal statute or regulation;

(2) The school's negligent or willful false certification under § 685.215; or

(3) The school's actions that gave rise to a successful claim for which the Secretary discharged a loan, in whole or in part, pursuant to § 685.206, § 685.214, § 685.216, ~~or~~ § 685.222, or 34 CFR part 685, Subpart D.

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BD proposed regulatory text session three 22

SUBPART D: Borrower Defense to Repayment

§685.400 Scope and Purpose

This subpart sets forth the provisions under which a borrower defense to repayment may be asserted and applies to borrower defense applications received on or after July 1, 2023 and to applications pending with the Secretary on July 1, 2023.

§685.401 Borrower Defense-General

(a) Definitions. For the purposes of this subpart, the following definitions apply:

(1) “Borrower” means

(i) The borrower; and

(ii) In the case of a Direct PLUS Loan, any endorsers, and for a Direct PLUS Loan made to a parent, the student on whose behalf the parent borrowed.

(2) A “borrower defense to repayment” means an act or omission of the school attended by the student that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided, and includes one or both of the following:

(i) A defense to repayment of amounts owed to the Secretary on a Direct Loan, or a Direct Consolidation Loan that was used to repay a Direct Loan, FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act, Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act; and

(ii) Any accompanying request for reimbursement of payments previously made to the Secretary on the Direct Loan or on a loan repaid by the Direct Consolidation Loan. The Secretary does not limit the period on a borrower’s ability to receive a reimbursement of payments previously made that are associated with a fully or partially approved claim.

(3) The “Department official” means the individual who administers the group process as described in section 685.402 and the institutional response process in § 685.405.

(4) A “Direct Loan” means a Direct Subsidized Loan, a Direct Unsubsidized Loan, a Direct PLUS Loan, or a Direct Consolidation Loan.

(5) The term “provision of educational services” means the educational resources provided by the institution that are required by an accreditation agency or a State licensing or authorizing agency for the completion of the student’s educational program.

(6) The terms “school” and “institution” may be used interchangeably and include an eligible institution as defined in section 600.2, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services. “School” or “institution” also includes persons affiliated with the institution as described in § 668.174(b).

(7) The term “third-party requestor” means

(i) A State as defined in § 600.2, a State attorney general, a State oversight or regulatory agency with the authority from that State, or

(ii) A legal assistance organization that

(A) employs attorneys who:

(1) Are full-time employees,

Commented [A4]: Addition of third-party requestors.

The definition of legal assistance draws from Section 428 of the HEA—the civil legal assistance attorney loan cancellation provision.

(2) Provide civil legal assistance on a full-time basis; and

(3) Are continually licensed to practice law, and,

(B)-Is a nonprofit organization that provides legal assistance with respect to civil matters to low-income individuals without a fee;

(b) Federal standard for borrower defense applications received on or after July 1, 2023 and for applications pending with the Secretary on July 1, 2023. A borrower with a balance due on a Direct Loan or other federal student loan that could be consolidated into a Federal Direct Consolidation Loan may assert a defense to repayment under this subpart, at any time, if the borrower establishes by a preponderance of the evidence that -

(1) The institution, any of its representatives, or any institution, organization, or person with whom the institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services, made a misrepresentation as defined in 34 CFR part 668, Subpart F, in connection with the borrower's decision to attend, or to continue attending, the institution or decision to take out a Direct Loan or other federal student loan that could be consolidated into the Federal Direct Consolidation Loan Program;

(2) The institution, any of its representatives, or any institution, organization, or person with whom the institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services, made an omission of fact, as defined in 34 CFR part 668, Subpart F, in connection with the borrower's decision to attend, or to continue attending, the institution or decision to take out a Direct Loan or other federal student loan that could be consolidated into the Federal Direct Consolidation Loan Program;

(3) The institution that the borrower received the Direct Loan or other federal student loan that could be consolidated into the Federal Direct Consolidation Loan Program to attend failed to perform its obligations under the terms of a contract with the student and such failure to perform the obligations under the terms of contract with the student was in connection with the borrower's decision to attend, or to continue attending, the institution or decision to take out a Direct Loan or other federal student loan that could be consolidated into the Federal Direct Consolidation Loan Program;

(4) The institution, any of its representatives, or any institution, organization, or person with whom the institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services, engaged in aggressive and deceptive recruitment tactics as defined in ~~section 685.401(e)~~34 CFR part 668, Subpart R, in connection with the borrower's decision to attend, or to continue attending, the institution or decision to take out a Direct Loan or other federal student loan that could be consolidated into the Federal Direct Consolidation Loan Program; or,

(5)(i) The borrower, whether as an individual or as a member of a class, or a governmental agency, has obtained against the institution a favorable judgment based on State or Federal law in a court or administrative tribunal of competent jurisdiction in connection with the borrower's decision to attend, or to continue attending, the institution or decision to take out a Direct Loan or other federal student loan that could be consolidated into the Federal Direct Consolidation Loan Program;⁷

(ii) The Secretary sanctioned or otherwise took adverse action against the institution at which the borrower enrolled; or,

(iii) The institution's institutional or programmatic accrediting agency took corrective action, sanctioned, or otherwise took adverse action against the institution at which the borrower enrolled.

(c)-[RESERVE]

(d) Violation of State law. A borrower has a borrower defense to repayment under this subpart if the Secretary identifies an act or omission of the school attended by the student that relates to the making of the loan for enrollment at the school or the provision of educational services for which the loan was provided that would give rise to a cause of action against the school under applicable State law.

(e) Exclusions. An institution's violation of an eligibility or compliance requirement in the Act or its implementing regulations is not a basis for a borrower defense under this subpart unless the violation would otherwise constitute a basis for a borrower defense under this subpart.

Commented [A5]: Inclusion of violation of State law.

§685.402 Group Process for Borrower Defense

(a) Group process, generally. Upon consideration of factors including, but not limited to, common facts and claims, fiscal impact, and the promotion of compliance by an institution or other title IV, HEA program participant, the Secretary may initiate a process to determine whether a group of borrowers identified by the Secretary has a borrower defense under this subpart.

(b) Secretary initiated group process. The Secretary may create a group based upon information from sources that include but are not limited to--

(1) Actions by the federal government, State attorneys general, other State agencies or officials, or other law enforcement activity;

(2) Lawsuits related to educational programs filed against institutions or judgments rendered against institutions; or,

(3) Individual borrower defense claims pursuant to § 685.403.

(c) ~~Third-party requestor~~ initiated group process. The Secretary shall consider a request to form a group from ~~a third-party requestor~~ in which they

(1) Submit an application to the Secretary, on a form approved by the Secretary—

(i) Identifying the requested group, including at minimum:

(A) The name of the institution;

(B) Campuses or programs, if applicable;

(C) A description of the conduct that forms the basis for the borrower defense claim under the federal standard in section 685.401(b);

(D) An analysis of why the requestor believes the conduct should result in an approved borrower defense claim under the federal standard in section 685.401(b); and,

(E) The period under which the activity in (c)(1)(C) of this section occurred;

(ii) Providing evidence beyond sworn borrower statements that supports each element ~~the~~ claims made in paragraph (c)(1) of this section;

(iii) Names and other identifying information of borrowers in the group to the extent available;
and,

(2) Provide any other information or supporting documentation reasonably requested by the Secretary.

(3) There shall be a rebuttable presumption that the Secretary will form a group based upon a request received under paragraph (c) of this section unless the Secretary already has formed a similar group under paragraph (b) of this section.

(4) The Secretary may consolidate multiple group applications related to the same institution or institutions.

(5) The Secretary shall provide a response to any materially complete third-party requestor group request under paragraph (c) within 270 days of receipt. That response shall include:

(i) Whether the Secretary will choose to form a group and a definition of the group formed;

(ii) If the Secretary chooses not to form a group, the reasons for not doing so, including rebuttal of the presumption in favor of group formation; and

(iii) Any additional information needed from the third-party requestor to continue the third-party initiated group process.

(6)(i) A third-party requestor submitting a group claim may request that the Secretary reconsider the group formed under this third-party requestor initiated group process if the Secretary denies the request to create a group in whole or in part for reasons other than that the Department Secretary has already formed a group that includes the members of the proposed group upon the identification of new evidence that was not previously available to the Secretary in forming the group.

(ii) The third-party requestor submitting the group claim must request reconsideration in forming the group under subsection (c) of this section no later than 90 days from the date of the Secretary's initial decision regarding formation of the group.

(iii) The Secretary shall provide a response to the third-party requestor submitting the group claim's reconsideration request to form the group within 90 days of receipt of the reconsideration request to form the group. ~~That response must include a definition of the group formed.~~

(d) Borrower status after group formation. (1) Upon formation of a group of borrowers under this section, the Secretary—

(i) Designates a Department official to present the group's claim in the institutional response process described in § 685.405;

(ii) For borrowers who have an application pending with the Secretary prior to the formation of the group, notifies those borrowers that they are an identified member of the group formed under this section and follows 685.403(d) or 685.403(e) as appropriate;

~~(iii) For borrowers submitted by the third-party requestor that can be identified by the Secretary, if the borrower is not in default and does not have an application pending with the Secretary, follows the procedures under 685.403(d) except that interest on the forbearance will shall stop accumulating immediately;~~

~~(iv) For borrowers submitted by the third-party requestor that can be identified by the Secretary, if the borrower is in default and does not have an application pending with the Secretary, follows the procedures under 685.403(e) except that the interest on the forbearance will shall stop accumulating immediately;~~

(v) For possible group members that the Department cannot identify the Department will take reasonable steps to identify and notify potential members of a group then it shall follow the process under subparagraphs (iii) and (iv) of this section on an opt in basis; and,

BD proposed regulatory text session three 28

(vi) If the Department later identifies a borrower that should have received the benefits as described under paragraph (ii) or (iii) either prior to the adjudication of the group or after an adjudication that results in the approval of a group, the Secretary shall retroactively apply the benefits available to the borrower under those paragraphs and no other consequences shall apply.

§685.403 Individual Process for Borrower Defense

(a) Individual process, generally. If § 685.402 does not apply to an individual borrower who has submitted a borrower defense application, the Secretary shall initiate a process to determine whether an individual borrower has a borrower defense under this subpart.

(b) Individual process. (1) The Secretary shall consider a request from an individual borrower in which the borrower--

(i) Submits an application to the Secretary, on a form approved by the Secretary; and,

(ii) Provides evidence that supports the application claims made in paragraph (b)(1)(i);

(2) The individual must provide any other information or supporting documentation reasonably requested by the Secretary.

(c) Individual borrower status. Upon receipt of a materially complete application under this section, the Secretary—

(1) Designates a Department official to present the individual's claim in the institutional response process described in § 685.405;

(2) Notifies the borrower that it will adjudicate the claim under § 685.406(a)(3); and

(3) Places all the borrower's loans under forbearance in accordance with subsection (d) of this section or stopped enforcement collections in accordance with subsection (e) of this section, as applicable.

(d) If the borrower is not in default on the loan for which a borrower defense has been asserted, grants forbearance on all of the borrower's Title IV loans in accordance with § 685.205(b)(6)(i) and—

(1) Notifies the borrower of the option to decline the forbearance and to continue making payments on the loan and the availability of the income-contingent repayment plans under § 685.209 and the income-based repayment plan under § 685.221; and,

(2) Ceases charging the borrower interest on the borrower's loans 180 days from the date the borrower was initially granted forbearance in accordance with subsection (d) of this section, if the Department official has failed to make a determination on the borrower's claim.

(e) If the borrower is in default on the loan for which a borrower defense has been asserted, the Secretary—

(1) Suspends collection activity on all loans until the Secretary issues a decision on the borrower defense claim;

(2) Ceases charging the borrower interest on the borrower's loans 180 days from the date the Secretary initially suspended collection activity in accordance with (e)(1)(i) of this section;

(3) Notifies the borrower of the suspension of collection activity and explains that collection activity will resume no earlier than 90 days following final adjudication of the borrower defense claim if the Secretary determines that the borrower does not qualify for a full discharge; and

BD proposed regulatory text session three 30

| (4) Notifies the borrower of the option to continue making payments under a rehabilitation agreement or other repayment agreement on the defaulted loan.

§685.404 Group Process Based on Prior Secretarial Final Actions

(a) For purposes of forming a Secretary group process in accordance with § 685.402(b), the Department official may consider final actions imposed by the Secretary that directly relate to section 685.401(b). Such final actions include but are not limited to:

- (1) Actions arising from a final program review determination or final audit determination defined under § 668.112(a) or (b), respectively;
- (2) An institution's failure to meet its administrative capability requirements that relate to the education provided by the institution, in accordance with § 668.16;
- (3) An institution's loss of eligibility due to its cohort default rates, in accordance with 34 CFR part 668, subpart N;
- (4) Fines, limitations, suspension, or other emergency actions taken by the Secretary that relate to misrepresentation, aggressive recruitment, or omissions of fact to borrowers;
- (5) Other final actions as determined by the Secretary.

(b) For groups based on prior Secretarial final actions in accordance with this section, section 685.405 shall not apply to the affected institutions.

§685.405 Institutional Response

(a) The Department official notifies the institution of the basis for the group's borrower defense under section 685.402 or individual borrower defense under § 685.403 for purposes of adjudicating the borrower defense claim and to request a response from the school.

(b)(1) The notification in subsection (a) of this section waives any limitation period by which the Secretary may recover from the institution under § 685.409.

(2) The Department official requests a response from the institution within 60 days from the Department official's notification.

(c) The institution must submit an affidavit to the Department official, on a form approved by the Secretary, certifying under penalty of perjury that the information submitted to the Department official is true and correct.

(d) If the institution does not respond to the information request, the Department official shall presume that the institution does not contest the borrowers' defense to repayment claim.

§685.406 Adjudication of borrower defense applications

(a) The Department official adjudicates the borrower defense claim in accordance with this section.

(b)(1) Group process, adjudication. For a group formed under § 685.402, the Department official considers any evidence related to the claim, including materials submitted as part of the group application, individual claims that are part of the group, evidence in the Secretary's possession, evidence provided during the institutional response process described in § 685.405, and any other relevant information.

(2) For a group of borrowers under § 685.402, for which the Department official determines that there may be a borrower defense under § 685.401(b) there is a rebuttable presumption that each member of the group was affected by the act or omission or reasonably relied on such act or omission.

(c) Individual process, adjudication. For an individual process under § 685.403, the Department official adjudicates the borrower defense using the information available to it. The Department official considers any evidence related to the claim, including materials submitted as part of the individual application, evidence in the Secretary's possession, evidence provided during the institutional response process described in § 685.405, and any other relevant information.

(d) If the Department official requires additional information from the school, the school must respond to the Department official's information request within a reasonable timeframe.

(e) State standard review for group claims prior to denial. (1) Before issuing a written decision denying some or all the allegations in a borrower defense claim under section 685.402(c), the Department official may conduct a second adjudication process using any State standards requested by a third-party requestor under 685.401(a)(7)(i).

(2) A third-party requestor as defined under 685.401(a)(7)(i)-that requests a second adjudication process may request the Department official conduct an analysis under standards from that third-party requestor's State in the case of a partial approval or denial under 685.401(d) and shall also submit-

(i) The specific State standard to be considered;

(ii) Legal analysis supporting why the third-party requestor under 685.401(a)(7)(i) believes that the claims should be approved under that State standard; and

(iii) Any additional information reasonably requested by the Secretary for the purposes of adjudicating claims under the State standard.

(fe) The Department official issues a written decision as follows:

(1)(i) If the Department official approves some or all of the allegations in the borrower defense, the written decision states that determination and the relief provided on the basis of that claim as determined under § 685.408.

(ii) If the Department official approves some or all of the allegations in the borrower defense, the Secretary places the borrower's Direct Loans associated with the group borrower defense claim under an interest-free forbearance until the Secretary discharges the loan obligations under § 685.212(k).

Commented [A6]: State standard review for group claims prior to denial.

(2)(i) Full denial, group. If the Department official denies the borrower defense in full, the written decision states the reasons for the denial, the evidence that was relied upon, the portion of the loans that are due and payable to the Secretary, and whether reimbursement of amounts previously collected is granted, and informs the borrowers that if any balance remains on the Direct Loans associated with the group borrower defense claim, those loans will return to their status prior to the group claim process. The Secretary resumes collection activities on those Direct Loans associated with the group borrower defense claim no earlier than 90 days from the date the Department official issues a written decision. The Department official also informs members of the group of the opportunity to request reconsideration of the claim pursuant to § 685.407.

(ii) Denial, individual. If the Department official denies the borrower defense in full, the written decision states the reasons for the denial, the evidence that was relied upon, the portion of the loans that are due and payable to the Secretary, and whether reimbursement of amounts previously collected is granted, and informs the borrowers that if any balance remains on the Direct Loans associated with the borrower defense claim, those loans will return to their status prior to the claim process. The Secretary resumes collection activities on those Direct Loans associated with the borrower defense claim no earlier than 90 days from the date the Department official issues a written decision. The Department official also informs the borrower of the opportunity to request reconsideration of the claim pursuant to § 685.407.

(3) The Secretary provides copies of the written decision in this subsection to:

- (i) An individual who was adjudicated under § 685.406(b)(3), as applicable;
- (ii) The members of the group who were adjudicated under § 685.406(b)(1), as applicable; and,
- (iii) To the school, to the extent practicable.

(g) Adjudication, timelines. (1) The Secretary shall adjudicate a group or individual borrower defense claim under the following timelines:-

(2) For a group claim under 685.402-

(i) Two years from the date the Department official notified the third-party requestor under 685.402(c)(5) or the final adjudication of any group reconsideration process under 685.402(c)(6), whichever is later.

(ii) ~~The Department~~ Secretary may extend the timeline by one additional year for any additional review under a State standard as outlined in pParagraph (e) of this section.

(3) For an individual claim under 685.403-

(i) Two years from the date the Department determines the borrower submitted a materially complete application.

(4) The timelines in paragraph (2) or (3) shall not apply for additional adjudications carried out as part of the reconsideration process in 685.407.

Commented [A7]: Adjudication timeframes.

(5) The ~~Department~~ Secretary shall provide an interim update to the individual borrower submitting a claim under 685.403 or to the third-party requestor requesting a group under 685.402 no later than one year after the dates in paragraphs (2) and (3) of this subsection. Such notification shall-

(i) Indicate the Secretary's progress in adjudicating the claim or claims; and,

(ii) Provide an expected timeline for rendering a decision on the claim.

(6) Any loans covered by claims on which the ~~Department~~ Secretary has not yet issued a written decision under paragraph (f) of this subsection by the dates identified in paragraph (2) or (3) shall be deemed unenforceable.

§685.407 Reconsideration

(a) The decision of the Department official is final as to the merits of the group borrower defense and any relief that may be granted on the group claim. Notwithstanding the foregoing—

(1) If the borrower defense is denied in full or in part, an individual or a borrower from the group may request that the Secretary reconsider the borrower defense for reasons including:

(i) Administrative or technical errors;

(ii) Consideration under an otherwise applicable State law standard under § 685.401(d) in lieu of the federal standard; or,

(iii) Identification of evidence that was not previously provided by the borrower and that the final decision did not identify as a basis for the final decision;

(2) Request by a third-party requestor under 685.401(a)(7)(i) that the Secretary reconsider the borrower defense in accordance with subsection (a)(1)(~~ii~~) of this section.

~~(i)~~ Any ~~such~~ request made in accordance with subsection (a)(1)(ii) must provide:

(i) The applicable State law standard;

(ii) Why the third-party requestor under 685.401(a)(7)(i) requests use of such applicable State law standard;

(iii) Why application of the State law standard would result in a different outcome for the group than adjudication under the federal standard; and

(iv) Why the applicable State law standard would lead to a borrower defense; and

(v) If the Department official already reviewed the State law standard under 685.406(e) prior to issuing a denial why that denial was incorrect;

(3) The borrower must request reconsideration under this section no later than 90 days from the date of the Department official's written decision, for any decisions issued on or after the effective date of these regulations.

(b) The Secretary designates a Department official for the reconsideration process that is different from the Department official that conducted the initial adjudication.

(c) The Department official follows the procedures in § 685.405 to notify the institution of the basis for the group's borrower defense under § 685.402 or individual borrower defense under § 685.403 for purposes of adjudicating reconsideration of the borrower defense claim and to request a response from the school to the reconsideration request;

~~(d)~~ If accepted for reconsideration by the Secretary, the Department official follows the procedures in §§ 685.402(d)(2) or 685.403(d) for granting forbearance and §§ 685.402(d)(3) or 685.403(e) for defaulted loans, as applicable; and,

~~(e)~~ The Department official adjudicates the borrower's reconsideration request under § 685.406 and provides notice of the final decision upon reconsideration in accordance with § 685.406(e).

(fe) The Secretary may reopen a borrower defense application that was partially or fully denied at any time to consider evidence that was not considered in making the previous decision. If a borrower defense application is reopened by the Secretary, the Secretary follows the procedures in §§ 685.402(d)(2) or 685.403(d) for granting forbearance and for §§ 685.402(d)(3) or 685.403(e) for defaulted loans, as applicable.

§685.408 Relief/Discharge amount

(a) Discharge amounts. There is a ~~rebuttable~~ presumption that a borrower with an approved claim under § 685.406(c) or § 685.406(b) is eligible for full discharge of the federal student loans associated with an approved borrower defense claim relief unless the Department official is presented with clear and convincing countervailing evidence ~~to the contrary.~~

(b) The Department official may rebut the presumption that the borrower or borrowers are eligible for full discharge relief under the following conditions if —

(1) The conduct that resulted in the approved borrower defense claim relates to an easily quantifiable sum and was not the reason or an enticement for a borrower to enroll in that program or institution, in which case the relief is equal to that sum; or

(2) The conduct that resulted in the approved borrower defense claim related to misrepresentations that did not involve the outcomes or quality of educational services. In that case, the amount of discharge provided would be tied to the level of harm experienced by the borrower as a result of the misrepresentation.

~~(i) The borrower or borrowers' borrower defense claim did not cover systemic problems at the school; or,~~

~~(ii) The level of harm incurred by the borrower or borrowers was of a *de minimis* value or of a value clearly below that of full relief.~~

~~(c) In rebutting the presumption that the borrower or borrowers are eligible for full relief under (b) of this section, the Department official may consider the examples in Table A to this subpart.~~

~~(d) The Department official recommends an appropriate amount of relief/discharge to the Secretary, which may include a discharge of all amounts owed to the Secretary on the loan at issue and the reimbursement of amounts previously collected by the Secretary on the loan, an easily quantifiable amount, or 25 percent if the amount is not easily quantifiable but less than the full amount of the loan or loans related to the claim. ~~or some lesser amount.~~~~

(e) The Secretary renders a final decision after taking into account the Department official's recommendation and the record compiled under §§ 685.402, 685.403, 685.404, 685.405, and 685.407, as applicable.

(f) The Secretary issues a written decision setting forth the relief/amount of discharge granted, after which the designated Department official deciding the claim notifies the borrower of the relief/discharge provided and—

(i) Specifies the discharge amount relief determination;

(ii) Advises that there may be tax implications; and

(iii) If the borrower does not receive a full discharge of all loans covered by the claim, advises the borrower of the requirements to file a request for reconsideration in accordance with section 685.407.

(g) Consistent with the determination of discharge amount relief under this section, the Secretary discharges the borrower's obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay and, if applicable, reimburses the borrower for amounts paid toward the loan voluntarily or through enforced collection.

(h) The Secretary affords the borrower such further relief as appropriate under the circumstances. Such further relief includes, but is not limited to, one or both of the following:

(1) Determining that the borrower is not in default on the loan and is eligible to receive assistance under title IV of the Act.

(2) Updating or deleting reports to consumer reporting agencies to which the Secretary previously made adverse credit reports regarding the borrower's Direct Loan.

(i) The total amount of relief discharge granted with respect to a borrower defense cannot exceed the amount of the loan and any associated costs and fees, and will be reduced by the amount of any refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, discharge, cancellation, compromise, or any other financial benefit received by, or on behalf of, the borrower that was related to the borrower defense. The relief to the borrower may not include non-pecuniary damages such as inconvenience, aggravation, emotional distress, or punitive damages.

TABLE A:

SCENARIO	EXAMPLE	APPROPRIATE RELIEF
<p><u>The conduct that resulted in the approved borrower defense claim related to misrepresentations that were not made directly to the student and did not involve the outcomes or quality of educational services. Issues that do not speak to systemic problems</u></p>	<p><u>A school represents in its marketing materials that one of its faculty members in a particular course received the highest award in their field. That course is not foundational or a core part of the academic program. A borrower enrolls in that program in reliance on the representation about this renowned faculty member. The school failed to update the marketing materials to reflect the fact that the award-winning faculty is on sabbatical for the next two years. A school intentionally reports false statistics about the incoming test scores of students in one of its selective graduate programs to an organization that publishes a national ranking of those programs. The incorrect</u></p>	<p>Appropriate relief: The borrower <u>may be entitled to a partial loan discharge. The higher ranking could reasonably be expected to encourage the borrower to apply to and then attend that program. But the misrepresentation did not speak to the actual education delivered. Accordingly, the appropriate discharge amount would be the extent to which the student took on greater debt to attend that program than they would have compared to other similarly selective programs. For example, if typical debt at the program with the misrepresentation was \$75,000 and at similar programs it was \$50,000 then borrowers should receive \$25,000 in loan discharges. If the Department</u></p>

	<u>information causes the program to be ranked higher than it would have been otherwise.</u>	<u>cannot calculate the typical debt at a similar program then borrowers would receive a 25 percent discharge. should receive no relief. Although the borrower reasonably relied on a misrepresentation about the faculty in deciding to enroll at this school, she still received the value of the program and that course was not foundational or a core part of the academic program. Furthermore, the faculty member's absence in one course does not speak to systemic problems at the institution. Therefore, no relief is appropriate.</u>
	<u>A school misrepresents the bar passage rate of students in its law school program to a national ranking of legal programs. The actual bar passage rate is significantly lower.</u>	<u>The borrower should receive a complete loan discharge. Though not directly provided to the student, the misrepresentation inaccurately reflected the likelihood that a borrower would be able to pass the bar exam and thus work in the profession for which they are trained.</u>
	<u>A moderately selective institution reports inaccurate acceptance rates, graduation rates, incoming test scores, and alumni donations to a well-regarded school ranking organization, which causes it to obtain a higher ranking. A student enrolls in that institution because of its higher ranking but has no other claims raised about the quality of the educational program or its outcomes.</u>	<u>The borrower should receive a partial discharge.</u>
Easily quantifiable <i>de minimis</i> levels of harm	A school represents to current and prospective students, in widely disseminated materials, that its required books and materials to complete the program cost \$1,200 and can	Appropriate relief: This borrower should receive partial relief of \$300. Although the Department presumes that students and prospective students all rely on widely

	<p>only be purchased from the institution. It then charges student \$1,500 to purchase the materials.</p>	<p>disseminated published materials, the harm is a quantifiable <i>de minimis</i> amount. The school provided the education that the student was seeking but misrepresented the cost of books and materials and it set the price that students were required to pay.</p>
	<p>An institution promises a borrower a free set of materials valued at \$150. The institution ultimately provides the materials, but not for free. The borrower takes out \$5,000 in loans to attend the institution.</p>	<p>Appropriate relief: This borrower should receive partial relief equal to the total cost of materials, which is \$150. The institution promised to provide a specific item with a clear value and did not do so.</p>

§685.409 Recovery from Institution

(a) For loans first disbursed on or after July 1, 2023, the Secretary shall collect from the school, or in the case of a closed school, a person affiliated with the school as described in § 668.174(b), any liability to the Secretary for any amounts discharged or reimbursed to borrowers under the relief process as described under § 685.408.

(b) Notwithstanding the foregoing subsection (a), the Secretary may choose not to collect from the school, or in the case of a closed school, a person affiliated with the school as described in § 668.174(b), any liability to the Secretary for any amounts discharged or reimbursed to borrowers under the relief process as described under § 685.408 under the following conditions:

- (1) The cost of collecting would exceed the amounts received;
- (2) The claims were approved outside of the limitations period in subsection (c) of this section;
- (3) A pre-existing settlement agreement determined by a court or administrative tribunal of competent jurisdiction precludes seeking additional financial recoveries; or
- (4) The Secretary previously collected on the claim in a separate proceeding.

(c)(1) Limitations period to recover from school. The Secretary shall initiate a proceeding to collect from the school the amount of relief resulting from a borrower defense under § 685.408 no later than six years after the borrower's last date of attendance at the institution;

(2) The limitations period described in paragraph (c)(1) of this section shall not apply if the Department official notifies the school of the borrower's claim in accordance with § 685.405(b) prior to the end of the limitations period.

BD proposed regulatory text session three 43

§685.410 Cooperation by the Borrower

To obtain relief under this subpart, a borrower must reasonably cooperate with the Secretary in any proceeding under this subpart.

§685.411 Transfer to the Secretary of the Borrower's Right of Recovery Against Third Parties

(a) Upon the granting of any relief under this subpart, the borrower is deemed to have assigned to, and relinquished in favor of, the Secretary any right to a loan refund (up to the amount discharged) that the borrower may have by contract or applicable law with respect to the loan or the contract for educational services for which the loan was received, against the school, its principals, its affiliates, and their successors, its sureties, and any private fund. If the borrower asserts a claim to, and recovers from, a public fund, the Secretary may reinstate the borrower's obligation to repay on the loan an amount based on the amount recovered from the public fund, if the Secretary determines that the borrower's recovery from the public fund was based on the same borrower defense and for the same loan for which the discharge was granted under this subpart.

(b) The provisions of this section apply notwithstanding any provision of State law that would otherwise restrict transfer of those rights by the borrower, limit or prevent a transferee from exercising those rights, or establish procedures or a scheme of distribution that would prejudice the Secretary's ability to recover on those rights.

(c) Nothing in this section limits or forecloses the borrower's right to pursue legal and equitable relief against a party described in this section for recovery of any portion of a claim exceeding that assigned to the Secretary or any other claims arising from matters unrelated to the claim on which the loan is discharged.

BD proposed regulatory text session three 45

§685.499 Severability

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

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