



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF POSTSECONDARY EDUCATION

Issue Paper #8: Borrower Defense to Repayment
Session 1: October 4-8, 2021

Issue: Borrower Defense to Repayment – Recovery from Institutions

Statutory cites: §455(h) of the Higher Education Act of 1965, as amended

Regulatory cites: 34 CFR 685.206(c) and (e)
34 CFR 685.222
34 CFR 668.87

Summary of issues: Section 455(h) of the Higher Education Act of 1965, as amended (HEA), requires the Secretary to specify in regulation which acts or omissions by an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. This issue paper covers recovery from institutions for the amount of relief granted to borrowers under a successful borrower defense (BD) claim.

The Secretary has the right to recover from institutions the amount of relief granted to borrowers under a successful BD claim. The 2016 rules established the general framework for recovery proceedings, and 2017 regulations [82 FR 6257] detailed the process for the Secretary to initiate recovery proceedings through the Office of Hearings and Appeals (OHA), though the Department has not yet pursued recovery proceedings through this channel.

The original 1995 regulations provided that the Secretary may initiate a proceeding to collect the discharged loan amount from the institution and included a general timeframe that aligned to the record retention period (see 34 CFR 685.309(c)) unless the institution received notice of the claim during that period. The 2016 regulations limited the timeframe to recover from an institution to the later of: three years from when the student last attended, the timeframe permitted under State law, or at any time if the institution received notice of the claim. The 2019 regulations also allowed for institutional recoupment with a limitations period of five years after the date of final determination.

The Department wants to clarify how the recoupment process would work and adopt a clearer limitations period.

Solutions: The Department believes it is critical that a borrower defense rule contain a process for recouping funds from institutions for the cost of approved claims. In doing so, the Department strives to balance reasonable adjudication timeframes for borrowers with sufficient due process for institutions. To accomplish this goal and address the issues identified above, the Department proposes the following initial solutions for discussion with the negotiating committee:

Recovery from institutions. The Department must maintain the ability to recoup funds from institutions with approved borrower defense claims. This serves as an important deterrent and, in some cases, limits the cost to the government as a result of institutions' misconduct.

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The Department proposes separating the process of institutional recoupment from the borrower approval process. This proposed separation balances delivering adjudication decisions for borrowers in a reasonable time period while still affording sufficient time for institutional due process. It also recognizes that collecting from institutions after the fact instead of stronger accountability upfront will often be unsuccessful, because institutions may have closed, settlements may have limited liability, statutes of limitations may have expired, or other factors. The recoupment process would apply to new loans issued after the effective date of the rule.

The Department proposes a recovery process that affords due process to institutions and leverages existing Departmental processes. After approving borrower defense claims, the Department would determine whether to seek recoupment from institutions and the amount it would seek to recoup. This amount could be no greater than the amount of approved discharges but could also be less. If the Department decides to recoup from the institution, it will generate a Program Review Report (PRR) based upon the evidence in its possession, evidence from borrower defense applications, any institutional response, and any other relevant information. This will include a liability amount. The institution will then have the opportunity to respond to that report much as they would for any other program review. The process will then follow the one used for other program reviews. The Department will take the institution's response into account and issue a final program review determination (FPRD). Institutions may then appeal any liabilities from the FPRD to OHA and then to the Secretary, as applicable. In cases where borrower defense claims stem from an already issued FPRD, the Department will not conduct another round of institutional response.

Limitations period. The Department proposes adopting a six-year limitations period. This clock would stop when the institution is notified of claims during the institutional response process.