

LEGAL UPDATES

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## May 14 Deadline: Borrower Defense Reporting – Short Answers to Your Questions

*Update: On August 30, 2019, the U.S. Department of Education released extensive final regulations addressing, among other topics, Borrower Defense to Reporting requirements. We are continuing to analyze these new regulations, and will provide updates as practicable.*

### **Help! Do we have to report *every* pending lawsuit to the U.S. Department of Education by May 14?**

No. But, under newly effective regulations and guidance, (private and maybe public) institutions of higher education must report a number of events (including certain lawsuits) by May 14, 2019 if they participate in Title IV Federal Student Aid programs. And, soon, they will need to report all lawsuits and other designated events, some multiple times.

On March 15, 2019, the U.S. Department issued significant guidance implementing its long-delayed “Borrower Defense to Repayment” final regulations and providing a method for required reporting.

### **What do we need to report?**

The March 15 guidance, read in conjunction with the now-effective 34 C.F.R. § 668.171, provides that institutions must report lawsuits, debts, various noncompliance items, and even violations of any provision of a loan agreement. Additional detail is provided in our one-page summary.

### **Who needs to report?**

Private institutions must report.

As written, the regulation and accompanying comments create ambiguity about whether public institutions must report. The reporting requirements in the regulation are aimed at informing the Department in reevaluating financial responsibility—but, without qualification, the regulation states that a public institution is considered financially responsible if a government authority confirms its public status. At the same time, neither Section 668.171 nor the March 15 guidance expressly states that public institutions are exempt from reporting.

Some events only need to be reported by proprietary or publicly-traded institutions.

The regulation and guidance do not designate an institutional reporting official.

## **What should the notices say?**

There's no template (yet). Neither Section 668.171 nor the March 19 guidance details what the required notices need to say. Section 668.171(h)(3) provides that institutions may submit specific information in their notices to show that they remain financially responsible, including information demonstrating that insurance will cover potential debts or liabilities. The Department will not have time to scrutinize each report, but there will likely be public records requests for submitted versions.

## **How do we file our notices?**

Notifications should be sent via email to [FSAFRN@ed.gov](mailto:FSAFRN@ed.gov).

## **What this means to you**

Providing notice of these events may impact your institution's financial responsibility standing or flag compliance concerns. Failure to meet financial responsibility thresholds can lead to letter of credit requirements and impact participation in Federal Student Aid programs. Institutions should monitor reportable events, provide notice as demanded by the Department, and create systems for ongoing compliance.

## **Contact us**

If you have questions about this impending deadline, contact Anne Cartwright, Julie Miceli or your Husch Blackwell attorney.

**Update: Official answers to your borrower defense reporting questions ... are coming. Comply in the meantime.**

On May 20, 2019, the U.S. Department of Education (ED) announced that it will, in the future, be answering questions surrounding earlier guidance and borrower defense reporting regulations. In the short May 20 post, ED says, “Until such time as additional answers can be provided in response to ... inquiries, the Department reiterates that the 2016 regulations are in effect, that the Department and institutions are bound by the plain language of those regulations, and that the Department will apply them accordingly.” ED also states that it will release a timeline for amending/supplementing earlier reports. We will continue to monitor for further developments.

**Update as of June 4, 2019.**