

Compliance with the 2016 Borrower Defense to Repayment Regulations Questions and Answers

The questions and answers below relate to the [final regulations](#) (the “2016 borrower defense to repayment regulations”) published by the Department in the *Federal Register* on November 1, 2016, concerning borrower defense to repayment and other related matters. 81 Fed. Reg. 75,926. This information supplements the [electronic announcement](#) issued on March 15, 2019, with the subject heading “Guidance Concerning Some Provisions of the 2016 Borrower Defense to Repayment Regulations” and the [electronic announcement](#) issued on May 20, 2019, with the subject heading, “Questions Regarding the Financial Responsibility Provisions of the 2016 Borrower Defense Regulations.” This information supersedes any previous information that may have been provided on the issues below.

Institutions are expected to submit any necessary supplemental reporting as a result of any information included in this Q&A document within 10 calendar days of the date that the information was posted. The Department anticipates updating these questions and answers on an ongoing basis.

New Financial Responsibility Triggers and Reporting, 34 C.F.R. § 668.171

- *Public Institutions and Reporting*

Q1: Do the reporting requirements in 34 C.F.R. § 668.171(h) apply to public institutions?

A1: Yes, the reporting requirements in the 2016 borrower defense to repayment regulations apply to public institutions, with certain exceptions. Although public institutions of higher education are considered to be financially responsible under 34 C.F.R. § 668.171(i), the reporting requirements in 34 C.F.R. § 668.171(h) do not distinguish between institutions based on their public or private nature or their tax status, and they exist independently of any determination of whether the reported actions or events are failures of financial responsibility under 34 C.F.R. § 668.171. As a result, the reporting requirements apply to all schools participating in the Title IV, HEA programs.

Some of the events, conditions, or situations described in the financial responsibility standards (or “triggers”) added by the 2016 borrower defense to repayment regulations describe trigger events that are not relevant to some institutions. Such events, conditions, or situations include the withdrawal of owner’s equity, 34 C.F.R. § 668.171(c)(1)(v), and stock exchange or U.S. Securities Exchange Commission (SEC) actions for publicly traded institutions, 34 C.F.R. § 668.171(e). As a result, institutions that are not subject to such triggers are not required to report those events unless the event occurs with a related party that is included in the public institution’s annual audit submission to the Department pursuant to 34 C.F.R. § 668.23(d).

June 3, 2019

- *Debts and Liability Triggers*

Q2: Are institutions required to report all debts and liabilities under 34 C.F.R. § 668.171(c)(1)(i) & (h)(1)(i), such as those arising from settlements reached prior to legal action?

A2: 34 C.F.R. § 668.171(c)(1)(i) only applies to debts and liabilities “arising from a final judgment in a judicial proceeding or from an administrative proceeding or determination, or from a settlement.” Such judicial and administrative proceedings include those initiated by a government entity. All settlements fall under this requirement. The reporting requirement in 34 C.F.R. § 668.171(h)(1)(i) follows the same principles.

June 3, 2019

Q3: Does the category of “Other Litigation” described in 34 C.F.R. § 668.171(c)(1)(ii) and referenced in 34 C.F.R. § 668.171(h)(1)(ii) include all lawsuits meeting the requirements regardless of their subject matter or amount? Is there any claim type or materiality limitation to the requirement?

A3: 34 C.F.R. § 668.171(c)(1)(ii) and the corresponding reporting requirement in 34 C.F.R. § 668.171(h)(1)(ii) do not limit the types of litigation that must be reported by the amount at issue or the type of claim that is brought. These requirements apply in every instance where an institution “is being sued in an action brought on or after July 1, 2017.” For example, lawsuits related to personal injury claims or fraud must be reported under 34 C.F.R. § 668.171(h)(1)(ii). The language of the regulation does not include any materiality threshold for litigation that must be reported under this requirement. Therefore, all litigation, regardless of the type of legal action or the size of the claim, must be reported.

June 3, 2019

Q4: If a lawsuit is a “borrower defense lawsuit,” should an institution send notice to both FSAFRN@ed.gov and borrowerdefense@ed.gov?

A4: 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 loan was issued (in other words, claims that could potentially become borrower defense claims) are subject to two different reporting requirements under the 2016 final regulations.

First, copies of certain judicial records as described in 34 C.F.R. § 685.300(h) for lawsuits with a claim concerning a borrower defense claim (one that is or could be asserted as a borrower defense claim) should be sent to borrowerdefense@ed.gov.

Second, lawsuits brought by a Federal or State authority after July 1, 2017, on claims related to the making of a Direct Loan or the provision of educational services (in other words, potential borrower defense claims), which have been pending for more than 120 days and which were still pending as of the March 20, 2019 electronic announcement, notifications under 34 C.F.R. § 668.171(h)(1)(i) should be sent to FSAFRN@ed.gov. Because these lawsuits would also meet the requirements of 34 C.F.R. § 685.300(h), copies of the judicial records for such lawsuits should also be sent to borrowerdefense@ed.gov.

June 19, 2019

- *Information in Institutional Notifications*

Q5: Is there a template that institutions should use for financial responsibility reporting?

A5: Currently, there is no template. However, the items listed below provide examples of what institutions might include in their notifications of financial responsibility events, conditions, and actions (“triggering events”) in 34 C.F.R. § 668.171(c)–(g), under the notification deadlines in 34 C.F.R. § 668.171(h), to the Department. Institutions’ submissions may vary based upon the facts and circumstances of individual triggering events. In providing any information to the Department, institutions should indicate if the information being submitted is confidential and/or proprietary and provide any updates to the Department if the confidential and/or proprietary status of the information changes. An institution may also want to send information in an encrypted format, if the information is confidential or proprietary:

General Information

- Institution Name
- OPEID
- Triggering Event Type
- Triggering Event Date
- Status of Triggering Event
- Point of contact for the institution (name, email address, telephone number) for any Department follow-up inquiries

Debts, Liabilities, and Losses, 34 C.F.R. §§ 668.171(c) and 668.171(h)(1)(i)

- Copies of relevant documentation, such as judicial filings, orders, or papers demonstrating that a complaint has been filed in Federal or State court or in an administrative proceeding, that a liability such as through a settlement or as a result of a court order was incurred, and court procedural rules if applicable. Under the regulations, an institution will need to provide submissions related to the same matter at different points of the proceedings.
- Insurance information
 - Information about any insurance an institution has that will cover a liability from a reported lawsuit, such as a copy of the insurance policy, with highlighting of the sections that identify the type of coverage and dollar amount
 - Information about any liability from a reported lawsuit that has already been paid by the institution’s insurer; for example, documentation of that payment, and the amount
 - Information about an insurer’s final decision; for example, documentation of the amount of the liability covered, or not covered, by the insurer

Accreditation (Teach-out Plan), 34 C.F.R. §§ 668.171(c)(1)(iii) and 668.171(h)(1)(iii)

- Information about why a teach-out plan was required by the institution’s accreditor and the date that the institution must submit the plan to the accreditor

Withdrawal of Owner's Equity, 34 C.F.R. §§ 668.171(c)(1)(v) and 668.171(h)(1)(iv)

- Information about the amount withdrawn, the reason for the withdrawal, and any supporting documentation

Non-Title IV Revenue, 34 C.F.R. §§ 668.171(d) and 668.171(h)(1)(v)

- A copy of the institution's computation and any supporting documentation

SEC and Stock Exchange Actions, 34 C.F.R. §§ 668.171(e) and 668.171(h)(1)(vi)

- Copies of the warning or documentation of the action taken by the U.S. Securities Exchange Commission (SEC) or by the stock exchange

State Licensing Agency Citation, 34 C.F.R. §§ 668.171(g)(2) and 668.171(h)(1)(vii)

- Copies of the citations, such as letters or other notifications, issued by a state licensing agency

Accreditor Show-Cause or Probation Action, 34 C.F.R. §§ 668.171(g)(5), 668.171(h)(1)(viii)

- Documentation of the accreditor's show-cause order or of the probation status

Loan Agreement Violation, 34 C.F.R. §§ 668.171(g)(6), 668.171(h)(1)(ix)

- A copy of the loan agreement at issue and any letter or documentation from the creditor citing the nature and consequences of that violation
- In cases where a waiver is granted by the creditor in response to the loan agreement violation, documentation of that waiver
- A copy of any new loan agreements entered into as a result of the loan agreement violation, revisions or amendments of the existing loan agreement as a result of the violation, and/or a copy of any revised operating plans it may have that are related to the debt at issue in the original loan agreement

June 19, 2019

- *Teach-Out Plans*

Q6: Does the requirement to notify the Department of an accreditor-approved teach-out plan exclude programmatic teach-out plans for individual programs?

A6: The reporting requirement in 34 C.F.R. § 668.171(h)(1)(iii) relates to the trigger in 34 C.F.R. § 668.171(c)(1)(iii). 34 C.F.R. § 668.171(c)(1)(iii) refers to when an institution is required by its accrediting agency to submit a teach-out plan, for reasons described in 34 C.F.R. § 602.23(c)(1) that covers the closing of an institution or any of its branches or additional locations. If the programmatic teach-out

would lead to the closure of the institution or any of its branches or additional locations, the accreditor-required teach-out must be reported.

June 19, 2019

- *State Licensing or Authorizing Agency Citations*

Q7: Under 34 C.F.R. § 668.171(g)(2) and 34 C.F.R. § 668.171(h)(1)(vii), an institution is required to notify the Department if “[t]he institution has received a citation by a state licensing or authorizing agency for failing state or agency requirements.” Is there a materiality threshold for the types of citations that must be reported to the Department?

A7: Under 34 C.F.R. § 668.171(h)(1)(vii), a school is required to provide notice of the citation no later than “10 days after the institution is cited for violating a State or agency requirement. . . .” The regulation does not impose a materiality threshold for the citation at issue before the school is required to report it to the Department. Thus, the school must notify the Department of any citation, regardless of the nature of the citation or the impact of the citation for the school.

June 19, 2019