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# What Independent Colleges Need to Know About the Forthcoming BDTR Rules

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Before the end of this month, the U.S. Department of Education (ED) is expected to issue a new set of regulations[1] to provide students and former students with expanded rights to avoid having to repay their federal loans based on certain acts or omissions of the institutions they attended. Importantly, the Borrower Defense to Repayment (BDTR) rule will allow ED to recover those funds from the institutions the students attended. Equally significant, the new rules are expected to include sweeping revisions to the financial responsibility standards for participation in the federal student aid (Title IV) programs that will greatly expand the situations under which non-profit institutions will be required to post letters of credit (LOC) of *at least* 10% of their students' total Title IV grants and loans.

While the new BDTR rules have attracted surprisingly little attention outside of the for-profit postsecondary community, they apply in precisely the same manner to independent colleges (public institutions are a little better off as they cannot be required to post letters of credit, a major enforcement component of the new rules). While the precise parameters of the new BDTR rule will not be known until it is issued in final form – and it is possible, although we think unlikely, that issuance may be delayed or the rules may be substantially changed – we believe it is important that all affected institutions be aware of the pending rules, particularly the situations that could trigger substantial institutional repayment liabilities and the obligation to post expensive LOCs, so that they can plan accordingly.

The most obvious risk – the namesake of the rule – is the ability of graduates and others no longer enrolled at an institution to be relieved of paying their student loan debt, with ED having the authority to recover the amount due from the institution. This was the foundation of the rulemaking, and indeed the only part included in the statute upon which the rule is based. Although procedures for students securing debt relief are still unclear even in the draft regulations, as is how or under what circumstances ED may seek recovery from the school, the premise is relatively straightforward: a student's claim that he or she was misled or that the school violated a law, resulting in harm to the student, can result in the student being relieved of repaying his or her loan debt *and* ED can seek recovery of the debt from his or her school.

The changes in financial responsibility standards that were bolted on to the BDTR rules in the course of the rulemaking potentially have far more serious consequences. It is notable that the statutory basis for BDTR is clearly limited to student repayment; it is entirely unrelated to institutional financial responsibility. Below are several scenarios that could result in very significant financial obligations, and except for the first, without regard to loan forgiveness.

**Under the proposed changes to the financial responsibility standards, a non-profit college would be deemed to lack financial responsibility and required to post a 10% letter of credit when certain events occur – only one of which relates to a BDTR claim. The others are regulatory claims – not necessarily determined liabilities – with over $750,000 in *potential* liability. Here are a few examples.**

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## Example of BDTR Claim

### Reliance on a College Brochure about Alumni Placement

A graduate of a master's degree program in public relations files a BDTR claim, asserting that her school misled her about the employability of its graduates because while she based her decision to enroll on a school-issued promotional brochure that described alumni who were employed in big media right after graduation, she could only land a lower-paying job at a non-profit organization with limited communications-related duties. To secure relief, she does not have to demonstrate that the school had any intent to deceive, but only that the program brochure was "misleading under the circumstances." The school has a limited opportunity to provide other evidence about its marketing or placement practices. ED grants the claim and starts a proceeding to collect the graduate's entire federal loan amount from the university. In addition, ED determines on its own initiative that this was a problem for the entire program, so it reaches out to former students – graduates and non-graduates – to collectively secure relief. ED assigns one of its own staff to advocate on behalf of the group and another ED staff member to adjudicate the group claim. Based on this process, ED determines that a group discharge is warranted and takes steps to collect the aggregate sum from the institution.

In addition to the repayment claim, the amount of the loan discharges under the group claim exceeds $750,000, and therefore the school is required to post an LOC equal to at least 10% of the entire university's prior-year federal student aid funding and keep that LOC in place for three years.

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## Examples of Financial Responsibility Triggers *Unrelated* to BDTR Claims Included in the Proposed Rule

### Closing an Extension Campus

For many years, a university has maintained an extension campus in a neighboring city where it offered several graduate certificate programs. As part of efforts to refocus the school's resources on the undergraduate core curriculum, the university decides to close the campus and notifies its accreditor that it is planning to do so. The accreditor requires the university to submit a teach-out plan. The accreditor's requirement to submit a teach-out plan automatically triggers a demand from ED for an LOC equal to at least 10% of the entire university's prior-year federal student aid funding.

### An ED Student Aid Program Review Assesses Liability for Missing Documentation

ED's Regional Case Team conducts a program review that results in several findings related to a university's documentation of academic attendance in distance education courses. The Final Program Review Determination asserts a liability in excess of $750,000. Although the university files a proper appeal, the mere assertion of this liability triggers a demand from ED for an LOC equal to at least 10% of the *entire university's* prior-year federal student aid funding.

### Citation from a State Authorizing Agency

A university offering distance education programs joined a state authorization reciprocity arrangement, but has not kept up to date with the constantly changing requirements in California, which is outside the reciprocity arrangement. The California licensing agency cites the school for failure to meet one of its consumer disclosure requirements and initiates a proceeding. Because of the school's large number of distance education students enrolled in California, ED exercises its discretion and determines that this citation is reasonably likely to have a material adverse effect on institutional operations, triggering a demand from ED for an LOC equal to at least 10% of the entire university's prior-year federal student aid funding.

### An Accreditor Issues a Probation Notice

As part of a comprehensive evaluation for reaffirmation of accreditation, a site visit team finds issues related to institutional governance. The team recommends to the accrediting commission that the school be found non-compliant with three related standards. The accreditor places the school on probation and requires follow-up reporting. Although the first progress report clears up two of the three findings of non-compliance, one is not resolved within six months, enabling ED to require an LOC equal to at least 10% of the entire university's prior-year federal student aid funding.

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**Each separate trigger** authorizes (or requires) ED to secure an LOC equal to 10% of the institution's prior year federal student aid funding. Each of the four LOC requirements is independent of the others, so that the total LOC requirement is the *aggregate* LOC amount arising from multiple trigger events: as described above it could be 40% of the prior years' Title IV disbursements to all the school's students.

**Each separate trigger** independently would result in the placement of the school on *provisional status* and on *heightened cash monitoring* or *reimbursement* for receipt of Title IV funds, compliance with *additional reporting requirements*, and subject to *additional approval requirements for new locations, programs, and other changes*.

The examples above are far from exhaustive. When the draft regulations were issued they contained approximately two dozen triggering events that would impose new LOC requirements on a large cross section of non-profit institutions. And, of course, the obligation for institutions to repay student loan claims will have an even broader impact across all public, non-profit and for-profit institutions. For additional information on what the regulations will mean when they are final and become effective (anticipated July 1, 2017), please contact us.

**Notes**

1. The Proposed Rule was issued on June 16, 2016 (**81 Fed. Reg. 39330**) and the final regulations are expected to be published on or before November 1, 2016 to take effect on July 1, 2017. The draft rule and its explanation required 93 pages.

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