**Issue Paper 1**

**Session 3: February 12-15, 2018**

**2.15.18/9:15am**

**Issue:** Whether to establish a Federal standard for the purpose of determining if a borrower can establish a defense to the repayment of a Direct Loan or recover for amounts already paid on a Direct Loan based on an act or omission of an institution.

**Statutory cite:** Section 455(h) of the Higher Education Act of 1965, as amended

**Regulatory cite:** 34 CFR685.206(c), 685.222, 685.300, 685.308

**Summary of changes:** Creates a regulatory section that establishes, for loans first disbursed on or after July 1, 2019, a new Federal standard applicable to borrower defense claims made by borrowers and for Department recovery actions against institutions. Under the proposed regulations, borrowers with an eligible Direct Loan would be entitled to a discharge (or recover amounts already paid) of all or a portion of the loan if the borrower establishes either: (1) an institutional misrepresentation, (2) a court judgment against an institution, or (3) a final judgment from an arbitrator or administrative tribunal against an institution. The proposed regulations would also describe in detail how a borrower establishes the basis for a claim.

**Changes:** See regulatory text below.

*[Note to negotiators: Section 685.222 is a new section. For ease of readability and editing during negotiated rulemaking, the section is formatted as plain text. Changes made subsequent to the second session of negotiated rulemaking are noted in redlined text. Changes made during Session 3 are highlighted in grey.]*

**Section 685.222 Borrower defense**

(a) *Introduction*.

(1) For the purposes of this section and section 685.206(d), a “borrower defense” refers to an act or omission of an institution at which the borrower enrolled that relates to the making of a Direct Loan or the making of a loan \*refer to the combination through the entire document that was repaid by a Direct Consolidation Loan for enrollment at the institution or the provision of educational services for which the loan was made, and includes one or both of the following:

(i) A defense to the repayment of amounts owed to the Secretary on a Direct Loan, in whole or in part; and

(ii) A right to recover amounts previously collected by the Secretary on the Direct Loan, in whole or in part.

(2) For loans first disbursed prior to July 1, 2019, the borrower may assert a borrower defense claim consistent with section 685.206(c).

(3) For loans first disbursed on or after July 1, 2019, the borrower may assert a borrower defense claim consistent with this section.

(4) For purposes of this section, a borrower may assert a borrower defense claim regarding the “provision of educational services” related to the program of study for an act or omission of an institution when such an act or omission concerns areas such as the nature of the institution’s educational program or related resources, the nature of the institution’s financial charges, the outcomes of graduates of the institution’s educational program, the eligibility of the educational program for licensure or certification, the State agency authorization or approval of the institution or educational program, or an accreditor approval of the institution or educational program, or any other act or omission that is defined in (b)(4)(i).

(b) *Borrower defense*.

(1) For loans first disbursed on or after July 1, 2019, the Secretary will discharge the borrower’s obligation to repay a Direct Loan and will refund amounts paid on the loan, in whole or in part, less any amounts already refunded to the borrower from any source pursuant to section 685.206(d)(8), if the the evidence demonstrates to a degree of certainty that is at least at the midpoint between a preponderance and clear and convicing that -- \*move to the introduction

(i) The institution at which the borrower enrolled made a misrepresentation related to enrollment at the institution or the provision of educational services upon which the borrower reasonably relied under the circumstances in deciding to obtain a Direct Loan to enroll or continue enrollment in a program at the institution that resulted in financial harm to the borrower;

(ii) The borrower has obtained, from a State or Federal court of competent jurisdiction, a final, definitive judgment rendered in a contested proceeding and was awarded monetary damages against the institution relating to enrollment at the institution or the provision of educational services for which the loan was obtained; or

(iii) The borrower has obtained, from an arbitrator or a hearing official in a State or Federal administrative tribunal agreed to by the borrower and the institution, a final, definitive judgment, or equivalent final determination, rendered in a contested proceeding and was awarded monetary damages against the institution relating to enrollment at the institution or the provision of educational services for which the loan was obtained.

(iv) For the purpose of (b)(1)(ii), a “final, definitive judgment rendered in a contested proceeding” includes a Proof of Claim filed against the bankruptcy estate of the institution once the claim is adjudicated in a contested matter or adversary proceeding, such that the claim is no longer contingent, disputed, or unliquidated in a case arising Chapter 11 of the Bankruptcy Code, or allowed by a trustee in a case arising under Chapter 7 of the Bankruptcy Code.

(2) A borrower must file a borrower defense claim under paragraph (b)(1)(i) of this section prior to the termination of a loan. A borrower may assert a defense to collection of outstanding balances so long as the amount remains otherwise collectable~~discovered, or reasonably should have discovered, the misrepresentation~~. \*eliminate time limit for filing a BD claim \*no statue on a borrower initiating a claim but a 5 year statute of limitation on the Secretary’s ability to recover the funds from an institution \*within the first 5 years for both amounts paid and unpaid after 5 years only for amounts unpaid \*revert to original reasonable language

(3) The Secretary may only find that the substantial weight (\* change to mirror edited language above) of the evidence supports the approval of a borrower defense claim when the borrower’s statement is supported by evidence in addition to the application provided by the borrower, other parties, or otherwise in the possession of the Secretary.

(4) For the purposes of this section—

(i) A “misrepresentation” is a statement, act, or omission regarding material fact, opinion, intention, or law by an eligible institution to a borrower that is intentionally false or misleading and that relates to the making of a Direct Loan for enrollment at the institution or the provision of educational services for which the loan was made. Examples of evidence that the department will use to determine that a misrepresentation described in paragraph (b)(1)(i) of this section has occurred include, but are not limited to :

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

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

(C) 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 invalidated or withdrawn;

(D) 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;

(E) 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;

(F) A representation regarding the availability, or nature of any financial assistance available to students to pay the costs of attendance at the institution that is not fulfilled following the enrollment of the borrower;

(G) A representation regarding the amount 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;

(H) 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, the United States armed forces, or other individuals or entities when the institution has no permission to use such an endorsement;

(I) A representation regarding the educational resources provided by the institution that are necessary 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, which may include representations regarding the institution’s size, location, facilities, training equipment, or the number, availability, or qualifications of its personnel;

(J) A representation regarding the nature or extent of prerequisites for enrollment in a course or program that is materially different from the institution’s actual circumstances at the time the representation is made, .

(ii) A violation by the institution of a requirement of the Higher Education Act or the Department’s regulations is not a basis for a borrower defense claim unless the violation would otherwise give rise to a successful borrower defense claim under this section or section 685.206(c), as applicable.

(iii) The Secretary will not approve a borrower defense claim under this section or section 685.206(c) of this Part when the borrower submits a claim based on—

(A) Personal injury;

(B) Sexual harassment;

(C) A violation of civil rights;

(D) Slander or defamation;

(E) Property damage claims;

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

(G) Academic disputes and disciplinary matters.

(iii) Financial harm to the borrower has occurred when the borrower suffers monetary loss as a consequence of a misrepresentation described in paragraph (b)(1)(i) of this section or as found by a court, arbitrator, or hearing official pursuant to a judgment as described in paragraphs (b)(1)(ii) and (b)(1)(iii). Financial harm does not include damages for nonmonetary loss such as inconvenience, aggravation, emotional distress, pain and suffering, or punitive damages,. Financial harm is such monetary loss that is related to the students program of study and not predominantly due to intervening local, regional, or national economic or labor market conditions as demonstrated by evidence before the Secretary. Evidence of financial harm may include, but is not limited to the following circumstances:

(A) A significant difference between the borrower’s earnings after completing the program and the earnings listed for the borrower’s program of study in the institution’s marketing materials, website, or other communication made to the student;

(B) After completing or withdrawing from the program, lost wages, extended periods of involuntary unemployment, , or wages that are lower than the borrower had prior to enrollment and which were listed for the borrower’s program of study in the institution’s marketing materials, website, or other communication made to the student; \* edit wording or strike addition

(C) The cost of obtaining nontransferable credits, if the institution told the student the credits would transfer; \*edit language to reflect widely transferable

\* incurring a federal student loan to attend a shool that the student would not have enrolled in but for the schools misrepresentation by the school to the student

(D) A significant difference in the amount or nature of the tuition and fees represented to the borrower and those actually charged by the institution;

(E) A significant difference in the amount or nature of financial assistance represented to the borrower and the amount or nature of financial assistance actually provided by the institution;

(F) The borrower’s inability to secure employment in the field of study for which the program was designed to prepare students; or

(G) 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.

(F) An insufficient increase in earning potentioal to offset the cost the borrower incurred to attend the institution

 (5) For purposes of this section, the term “institution” includes an eligible institution, its representatives and agents, or any institution, organization, or person with whom the eligible institution has a written agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services.

(c) Nothing in this section shall be construed or deemed to preempt, inform, or otherwise modify any right, cause of action, relief, or remedy arising under any State or Federal law available to the borrower or the attorney general of any state.