

Session 2

§685.222 Borrower defense and Department recovery actions against institutions

(a) Introduction.

(1) For the purposes of this section and § 685.206(c), 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 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, and

Deleted: , in whole or in part

(ii) A right to recover amounts previously collected by the Secretary on the Direct Loan,

Deleted: , in whole or in part

(2) A borrower may assert borrower defense of Direct Consolidation Loan that repaid Direct Loan, FFEL Program Loan, Federal Perkins Loan, Health Professions Student Loan, or Loan for Disadvantaged Students under subpart II of part A of title VII of the Public Health Service Act; or Health Education Assistance Loan, or Nursing Loan made under part E of the Public Health Service Act on which the borrower had a basis for a borrower defense claim prior to the consolidation.

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

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

(5) The Department may initiate a recovery action against an institution consistent with paragraph (c) of this section.

(b) Borrower defense.

(1) For loans first disbursed on or after July 1, 2019, the Secretary shall discharge the borrower’s obligation to repay a Direct Loan and shall refund amounts paid on the loan, less any amounts already refunded to the borrower from any source pursuant to section 685.206(d)(8), if the borrower establishes a defense based on state law consistent with the standard set forth in 685.206(c)(1) or establishes by a preponderance of the evidence that--

Deleted: (6) The Department administers this section consistent with the procedures described in section 685.206(c) and 34 CFR Part 668, Subpart G.

Deleted: will

Deleted: will

Deleted: in whole or in part,

Comment [1]: Temperature check: should we continue to permit claims based on state laws that schools are already subject to under the new standard?

Comment [2]: Temperature check: should we use a preponderance of the evidence standard? Please see footnote 1 for additional rationale and context.

Deleted: clear and convincing

Formatted: Font:10 pt

<sup>1</sup> Preponderance of the evidence places the burden on the borrower to demonstrate, with supporting evidence, that it is more likely than not that their claims are true. A higher evidentiary burden would result in denials of relief to many borrowers with credible evidence that they were scammed into taking out loans simply due to the difficulty of gathering overwhelming evidence. According to February 2017 protocols, the Department interprets the preponderance of the evidence standard to require more than a “single uncorroborated claim.” Office of

(i) There has been an act or omission on the part of the institution at which the borrower enrolled that was unfair, deceptive, abusive, or unlawful that relates to a borrower's acceptance of loans, or the educational or career services the loans are intended to pay for, or the borrower's initial or continued enrollment in the school, and that resulted in, or was reasonably likely to result in, detriment to the borrower;

**Deleted:** T

**Comment [3]:** Temperature check: should we include more bases than just "misrepresentation," such as other categories of conduct that violate state and federal consumer protection statutes and that have been at issue in recent enforcement actions?

**Deleted:** unfair,

**Deleted:** acted

**Formatted:** Font:(Default) Times New Roman, 12 pt

(ii) The institution at which the borrower enrolled has made a misrepresentation upon which the borrower reasonably relied under the circumstances that relates to a borrower's acceptance of loans, or the educational or career services the loans are intended to pay for, or the borrower's initial or continued enrollment in the school, and that resulted in detriment to the borrower;

**Comment [4]:** Temperature Check: Should the borrower have to prove the intent, knowledge or other "state of mind" standard in order to obtain relief?

(iii) There has been, from a court of competent jurisdiction, a judgment against the institution relating to the loan or the provision of educational services for which the loan was obtained; or

**Deleted:** )with an intent to deceive, knowledge of the falsity of a misrepresentation, or a reckless disregard for the truth in making a misrepresentation of material fact, opinion, intention, or law

(iv) An arbitrator or a hearing official in a State or Federal administrative tribunal has promulgated a judgment, or equivalent final determination against the institution relating to the loan or the provision of educational services for which the loan was obtained.

**Deleted:** 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, and which resulted in financial harm to the borrower

(2) "Misrepresentation" for the purpose of this section means a false, erroneous or misleading statement an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services makes directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to the Secretary. A misleading statement is a statement that has a reasonable likelihood or tendency to mislead under the circumstances. A statement is any communication made in writing, visually, orally, or through other means. Misrepresentation includes the dissemination of a student endorsement or testimonial that a student gives either under duress or because the institution required the student to make such an endorsement or testimonial to participate in a program.

**Deleted:** The borrower has obtained,

**Deleted:** nondefault contested State or Federal

**Deleted:** and borrowers were awarded monetary damages

**Deleted:** ii

**Deleted:** There has been The borrower has obtained, from a

(ii) A violation by the institution of a requirement of the Higher Education Act or the Department's regulations may constitute corroborating evidence but 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. (3) The Secretary may determine that a borrower defense claim should not be approved based on evidence that rebuts the borrower's claim, including evidence provided by the institution at which the borrower enrolled. (4) For purposes of this section, the term "institution" includes an eligible institution, its representatives and agents, or any institution,

**Deleted:** agreed to by the borrower and the institution,

**Deleted:** nondefault contested

**Deleted:** , and was awarded monetary damages

**Formatted** ... [1]

**Deleted:** For the purposes of this section—

**Deleted:** (i) A misrepresentation is a ... [2]

**Deleted:** regarding the nature of the ... [3]

**Deleted:** The Secretary will not appr ... [4]

**Deleted:** at any time

**Deleted:** any

**Deleted:** Such evidence may include, ... [5]

**Formatted:** Font:10 pt

Inspector Gen., U.S. Dep't of Educ., Federal Student Aid's Borrower Defense Loan Discharge Process 36 (2017), available here (citing p.7 of February 2017 protocols). A heightened standard of proof is particularly inappropriate to an administrative proceeding that does not include evidence discovery rights for the plaintiff that would be available in court, and in which the vast majority of borrowers will not be represented by lawyers. The Department recognized as such in 2016, and found that the "preponderance of the evidence" standard "is appropriate" for borrower defense claims and "strikes a balance between ensuring borrowers who have been harmed are not subject to an overly burdensome evidentiary standard and protecting the Federal Government, taxpayers, and institutions from unsubstantiated claims." 81 Fed. Reg. 75,936.

organization, or person with whom the eligible institution has an agreement to provide educational programs, or to provide marketing, advertising, recruiting or admissions services.

(c) *Department recovery actions against institutions* The Secretary may initiate a recovery action against an institution when the Secretary determines that the borrower has asserted a successful borrower defense against the institution as described in this section or section 685.206(c) of this Part.

**Deleted:** (d) *Limitations period* A borrower must file a claim under paragraph (b)(1) of this section within three years of the date the borrower discovered, or reasonably should have discovered, the misrepresentation.

**§685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.**

(a) *General* Participation of a school in the Direct Loan Program means that eligible students at the school may receive Direct Loans. To participate in the Direct Loan Program, school must—

\* \* \*

(8) Accept responsibility and financial liability stemming from its failure to perform its functions pursuant to the agreement;

**Deleted:** Provide that the school will accept

\* \* \*

(11) Accept responsibility and financial liability stemming from losses incurred by the Secretary for repayment of amounts discharged by the Secretary pursuant to sections 685.206, 685.214, 685.216, and 685.222;

**§685.308 Remedial actions.**

(a) *General* The Secretary may require the repayment of funds and the purchase of loans by the school if the Secretary determines that the school is liable as a result of-- --

**Deleted:** the unenforceability of a loan or loans, or the disbursement of loan amounts for which the borrower was ineligible, resulted in whole or in part from

(1) The school's violation of a Federal statute or regulation;

(2) The school's negligent or willful false certification under section 685.215; or

**Deleted:** or

(3) The school's actions that gave rise to a successful claim for which the Secretary discharged a loan, in whole or in part, pursuant to sections 685.206, 685.214, 685.216, and 685.222. In determining whether to seek repayment of funds based on a successful borrower defense claim, the Secretary may consider factors relating to the public benefits of seeking such repayment, including but not limited to the amount of the claim at issue and the likely cost to the Department of seeking recoupment, the number of other successful claims made against the school, whether the school's actions that gave rise to the claim were inconsistent with or prohibited by the institution's policies, procedures and training, and whether the school's actions that gave rise to the claim were made without intent, knowledge, or recklessness of their falsity, deceptiveness, unfairness, or abusiveness.

**Deleted:** [

**Comment [5]:** Temperature check: Should the factor of whether an employee acted contrary to school policy be moved to the determination of liability of the school.