

Issue Paper 4
Session 3: February 12-15, 2018

Issue: **Pre-dispute Arbitration Agreements, Class Action Waivers, and Internal Dispute Processes**

Statutory cites: §§455(a)(6) and 455(h) of the Higher Education Act, as amended

Regulatory cites: §§ 668.41 and 685.304

Summary of Changes: To facilitate transparency and fully inform prospective, enrolled, and departing students:

- Amend “Reporting and disclosure of information” [§ 668.41] to (1) require schools that use pre-dispute arbitration agreements and/or class action waivers to disclose that information in an easily accessible format for students, prospective students, and the public, and (2) require these schools to provide an annual notification of this information to enrolled students.
- Amend ‘Counseling borrowers’ [§ 685.304] to include a requirement (similar to the current requirement that schools provide information regarding the FSA Ombudsman) that schools that use pre-dispute arbitration agreements and/or class action waivers ~~the school~~ review with the student borrower information on the availability of the school’s internal dispute resolution process and provide to the student a written disclosure explaining any internal dispute process; and
- Amend ‘Counseling borrowers’ [§ 685.304] to include a requirement for schools using pre-dispute arbitration agreements and/or class action waivers, that the school review with the student borrower the pre-dispute arbitration and/or class action waiver process.

Changes: See regulatory text below.

§ 668.41 Reporting and disclosure of information.

(a) Definitions. The following definitions apply to this subpart:

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Undergraduate students, for purposes of §§ 668.45 and 668.48 only, means students enrolled in a bachelor's degree program, an associate degree program, or a vocational or technical program below the baccalaureate level.

(b) Disclosure through internet or intranet websites. Subject to paragraphs (c)(2), (e)(2) through (4), or (g)(1)(ii) of this section, as appropriate, an institution may satisfy any requirement to disclose information under paragraph (d), (e), or (g) of this section for—

(1) Enrolled students or current employees by posting the information on an internet website or an intranet website that is reasonably accessible to the individuals to whom the information must be disclosed; and

(2) Prospective students or prospective employees by posting the information on an internet website.

(c) Notice to enrolled students. (1) An institution annually must distribute to all enrolled students a notice of the availability of the information required to be disclosed pursuant to paragraphs (d), (e), ~~and~~ (g), ~~and~~ (h) of this section, and pursuant to 34 CFR 99.7 (§ 99.7 sets forth the notification requirements of the Family Educational Rights and Privacy Act of 1974). The notice must list and briefly describe the information and tell the student how to obtain the information.

(2) An institution that discloses information to enrolled students as required under paragraphs (d), (e), ~~or~~ (g), ~~or~~ (h) of this section by posting the information on an Internet website or an Intranet website must include in the notice described in paragraph (c)(1) of this section—

(i) The exact electronic address at which the information is posted; and

(ii) A statement that the institution will provide a paper copy of the information on request.

(d) General disclosures for enrolled or prospective students. An institution must make available to any enrolled student or prospective student through appropriate publications, mailings or electronic media, information concerning—

(1) Financial assistance available to students enrolled in the institution (pursuant to §668.42).

(2) The institution (pursuant to §668.43).

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(h) Enrolled students, prospective students, and the public -- disclosure of an institution's use of pre-dispute arbitration agreements and/or class action waivers for students receiving Title IV Federal student aid. (1) An institution of higher education must make available to enrolled students, prospective students, and the public ~~information regarding any~~ easily accessible information regarding any class action waiver or pre-dispute arbitration agreement ~~in~~ that is included in any agreements between the institution and students receiving ~~t~~itle IV Federal student aid. ~~The school must make the information easily accessible to students, prospective students, and the public.~~ The institution may not use an intranet website for the purpose of providing this notice to prospective students or the public.

(2) The institution must provide an annual notice to all enrolled students, pursuant to paragraph (c)(1) of this section, of the information described in paragraph (h)(1). If the institution chooses to make the disclosure available by posting the disclosure on an internet website or an intranet website, such disclosure must include the exact electronic address at which the disclosure is posted, a brief description of the disclosure, and a statement that the institution will provide a paper copy of the disclosure upon request.

(3) For the purposes of this paragraph (h), the following definitions apply:

(i) Class action means a lawsuit or an arbitration proceeding in which one or more parties seek class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23.

(ii) Class action waiver means any agreement or part of an agreement, regardless of its form or structure, between a school, or a party acting on behalf of a school, and a student that prevents an individual from filing or participating in a class action lawsuit.

(iii) Pre-dispute arbitration agreement means any agreement or part of an agreement, regardless of its form or structure, between a school, or a party acting on behalf of a school, and a student requiring arbitration of any future dispute between the parties.

(Authority: 20 U.S.C. 1092)

§ 685.304 Counseling borrowers.

(a) Entrance counseling. (1) Except as provided in paragraph (a)(8) of this section, a school must ensure that entrance counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan student borrower prior to making the first disbursement of the proceeds of a loan to a student borrower unless the student borrower has received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized or Unsubsidized Federal Stafford Loan, or Federal SLS Loan ~~from that school~~.

(2) Except as provided in paragraph (a)(8) of this section, a school must ensure that entrance counseling is conducted with each graduate or professional student Direct PLUS Loan borrower prior to making the first disbursement of the loan unless the student borrower has received a prior student Direct PLUS Loan or student Federal PLUS Loan ~~from that school~~.

(3) Entrance counseling for Direct Subsidized Loan, Direct Unsubsidized Loan, and graduate or professional student Direct PLUS Loan borrowers must provide the borrower with comprehensive information on the terms and conditions of the loan and on the responsibilities of the borrower with respect to the loan. This information may be provided to the borrower—

(i) During an entrance counseling session, conducted in person;

(ii) On a separate written form provided to the borrower that the borrower signs and returns to the school; or

(iii) (A) Online or by interactive electronic means, with the borrower acknowledging receipt of the information.

(B) If a standardized interactive electronic tool is used to provide entrance counseling to the borrower, the school must provide to the borrower any elements of the required information that are not addressed through the electronic tool:

(1) In person; or

(2) On a separate written or electronic form provided to the borrower that the borrower signs and returns to the school.

(4) If entrance counseling is conducted online or through interactive electronic means, the school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the entrance counseling, which may include completion of any interactive program that tests the borrower's understanding of the terms and conditions of the borrower's loans.

(5) A school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence, distance education, program or a study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials before the loan proceeds are disbursed.

(6) Entrance counseling for Direct Subsidized Loan and Direct Unsubsidized Loan borrowers must—

(i) Explain the use of a Master Promissory Note (MPN);

(ii) Emphasize to the borrower the seriousness and importance of the repayment obligation the student borrower is assuming;

(iii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(iv) Emphasize that the student borrower is obligated to repay the full amount of the loan even if the student borrower does not complete the program, does not complete the program within the regular time for program completion, is unable to obtain employment upon completion, or is otherwise dissatisfied with or does not receive the educational or other services that the student borrower purchased from the school;

(v) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels of indebtedness of Direct Subsidized Loan and Direct Unsubsidized Loan borrowers, or student borrowers with Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school as the borrower;

(vi) To the extent practicable, explain the effect of accepting the loan to be disbursed on the eligibility of the borrower for other forms of student financial assistance;

(vii) Provide information on how interest accrues and is capitalized during periods when the interest is not paid by either the borrower or the Secretary;

(viii) Inform the borrower of the option to pay the interest on a Direct Unsubsidized Loan while the borrower is in school;

(ix) Explain the definition of half-time enrollment at the school, during regular terms and summer school, if applicable, and the consequences of not maintaining half-time enrollment;

(x) Explain the importance of contacting the appropriate offices at the school if the borrower withdraws prior to completing the borrower's program of study so that the school can provide exit counseling, including information regarding the borrower's repayment options and loan consolidation;

(xi) Provide information on the National Student Loan Data System and how the borrower can access the borrower's records;

(xii) Provide the name of and contact information for the individual the borrower may contact if the borrower has any questions about the borrower's rights and responsibilities or the terms and conditions of the loan;

(xiii) If the school requires borrowers to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), provide a description of the school's internal dispute resolution process, including the name and contact information for the individual or office at the school that the borrower may contact if the borrower has a dispute relating to the borrower's Federal student loans or to the educational services for which the loans were provided;

(xiv) If the school requires borrowers to enter into a pre-dispute arbitration agreement, as defined in § 668.41(h), to enroll in the institution, explain how and when the agreement applies, how the borrower enters into the arbitration process, and who to contact if the borrower has any questions;

(xv) If the school requires borrowers to sign a class-action waiver, as defined in § 668.41(h), to enroll in the institution, explain how and when the waiver applies, alternative processes the borrower may pursue to seek redress, and who to contact if the borrower has any questions; and

(xvi) For first-time borrowers as defined in § 685.200(f)(1)(i), explain the limitation on eligibility for Direct Subsidized Loans and possible borrower responsibility for accruing interest described in § 685.200(f), including—

(A) The possible loss of eligibility for additional Direct Subsidized Loans;

(B) How a borrower's maximum eligibility period, remaining eligibility period, and subsidized usage period are calculated;

(C) The possibility that the borrower could become responsible for accruing interest on previously received Direct Subsidized Loans and the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan during in-school status, the grace period, authorized periods of deferment, and certain periods under the Income-Based Repayment and Pay As You Earn Repayment plans; and

(D) The impact of borrower responsibility for accruing interest on the borrower's total debt.

(7) Entrance counseling for graduate or professional student Direct PLUS Loan borrowers must—

(i) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels or indebtedness of graduate or professional student PLUS loan borrowers, of student borrowers with Direct PLUS Loans and Direct Subsidized Loans or Direct Unsubsidized Loans, depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school;

(ii) Inform the borrower of the option to pay interest on a PLUS Loan while the borrower is in school;

(iii) For a graduate or professional student Direct PLUS Loan borrower who has received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan from that school, provide the information specified in § 685.301(a)(3)(i)(A) through (a)(3)(i)(C); and

(iv) For a graduate or professional student Direct PLUS Loan borrower who has not received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan from that school, provide the information specified in paragraph (a)(6)(i) through paragraph (a)(6)(xii) of this section.

(v) If the school requires borrowers to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), for a graduate or professional student Direct PLUS Loan borrower who has not received a prior Direct Subsidized Loan, Direct Unsubsidized Loan, Subsidized Federal Stafford Loan, or Unsubsidized Federal Stafford Loan from that school, provide the information specified in paragraph (a)(6)(xiii) through (a)(6)(xv) of this section.

(8) A school may adopt an alternative approach for entrance counseling as part of the school's quality assurance plan described in § 685.300(b)(9). If a school adopts an alternative approach, it is not required to meet the requirements of paragraphs (a)(1) through (a)(7) of this section unless the Secretary determines that the alternative approach is not adequate for the school. The alternative approach must—

(i) Ensure that each student borrower subject to entrance counseling under paragraph (a)(1) or (a)(2) of this section is provided written counseling materials that contain the information described in paragraphs (a)(6)(i) through (a)(6)(v) of this section;

(ii) Be designed to target those student borrowers who are most likely to default on their repayment obligations and provide them more intensive counseling and support services; and

(iii) Include performance measures that demonstrate the effectiveness of the school's alternative approach. These performance measures must include objective outcomes, such as levels of borrowing, default rates, and withdrawal rates.

(9) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.

(b) Exit counseling. (1) A school must ensure that exit counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan borrower and graduate or professional student Direct PLUS Loan borrower shortly before the student borrower ceases at least half-time study at the school.

(2) The exit counseling must be in person, by audiovisual presentation, or by interactive electronic means. In each case, the school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence program or a study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials within 30 days after the student borrower completes the program.

(3) If a student borrower withdraws from school without the school's prior knowledge or fails to complete the exit counseling as required, exit counseling must, within 30 days after the school learns that the student borrower has withdrawn from school or failed to complete the exit counseling as required, be provided either through interactive electronic means, by mailing written counseling materials to the student borrower at the student borrower's last known address, or by sending written counseling materials to an email address provided by the student borrower that is not an email address associated with the school sending the counseling materials.

(4) The exit counseling must—

(i) Inform the student borrower of the average anticipated monthly repayment amount based on the student borrower's indebtedness or on the average indebtedness of student borrowers who have obtained Direct Subsidized Loans and Direct Unsubsidized Loans, student borrowers who have obtained only Direct PLUS Loans, or student borrowers who have obtained Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans, depending on the types of loans the student borrower has obtained, for attendance at enrollment in the same school or in the same program of study at the same school;

(ii) Review for the student borrower available repayment plan options including the standard repayment, extended repayment, graduated repayment, income-contingent repayment, and income-based repayment plans, including a description of the different features of each plan and sample information showing the average anticipated monthly payments, and the difference in interest paid and total payments under each plan;

(iii) Explain to the borrower the options to prepay each loan, to pay each loan on a shorter schedule, and to change repayment plans;

(iv) Provide information on the effects of loan consolidation including, at a minimum—

(A) The effects of consolidation on total interest to be paid, fees to be paid, and length of repayment;

(B) The effects of consolidation on a borrower's underlying loan benefits, including grace periods, loan forgiveness, cancellation, and deferment opportunities;

(C) The options of the borrower to prepay the loan and to change repayment plans; and

(D) That borrower benefit programs may vary among different lenders;

(v) Include debt-management strategies that are designed to facilitate repayment;

(vi) Explain to the student borrower how to contact the party servicing the student borrower's Direct Loans;

(vii) Meet the requirements described in paragraphs (a)(6)(i), (a)(6)(ii), and (a)(6)(iv) of this section;

(viii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(ix) Provide—

(A) A general description of the terms and conditions under which a borrower may obtain full or partial forgiveness or discharge of principal and interest, defer repayment of principal or interest, or be granted forbearance on a title IV loan; and

(B) A copy, either in print or by electronic means, of the information the Secretary makes available pursuant to section 485(d) of the HEA;

(x) Review for the student borrower information on the availability of the Department's Student Loan Ombudsman's office;

(xi) If the school required the borrower to enter into a pre-dispute arbitration agreement or to sign a class-action waiver, as defined in § 668.41(h), Review for the student borrower the school's internal dispute resolution process, including the name and contact information for the individual or office at the school that the borrower may contact if the borrower has a dispute relating to the borrower's Federal student loans or to the educational services for which the loans were provided;

(xii) If the school required the borrower to enter into a pre-dispute arbitration agreement, as defined in § 668.41(h), to enroll in the institution, explain how and when the agreement applies, how the borrower enters into the arbitration process, and who to contact if the borrower has any questions;

(xiii) If the school required the borrower to sign a class-action waiver, as defined in § 668.41(h), to enroll in the institution, explain how and when the waiver applies, alternative processes the borrower may pursue to seek redress, and who to contact if the borrower has any questions;

(xiv) Inform the student borrower of the availability of title IV loan information in the National Student Loan Data System (NSLDS) and how NSLDS can be used to obtain title IV loan status information;

(xv) Explain to first-time borrowers, as defined in § 685.200(f)(1)(i)—

(A) How the borrower's maximum eligibility period, remaining eligibility period, and subsidized usage period are determined under § 685.200(f);

(B) The sum of the borrower's subsidized usage periods, as determined under § 685.200(f)(1)(iii), at the time of the exit counseling;

(C) The consequences of continued borrowing or enrollment, including--

(1) The possible loss of eligibility for additional Direct Subsidized Loans; and

(2) The possibility that the borrower could become responsible for accruing interest on previously received Direct Subsidized Loans and the portion of a Direct Consolidation Loan that repaid a Direct Subsidized Loan during in-school status, the grace period, authorized periods of deferment, and certain periods under the Income-Based Repayment and Pay As You Earn Repayment plans;

(D) The impact of the borrower becoming responsible for accruing interest on total student debt;

(E) That the Secretary will inform the student borrower of whether he or she is responsible for accruing interest on his or her Direct Subsidized Loans; and

(F) That the borrower can access NSLDS to determine whether he or she is responsible for accruing interest on any Direct Subsidized Loans as provided in § 685.200(f)(3);

(xvii) A general description of the types of tax benefits that may be available to borrowers; and

(xviii) Require the student borrower to provide current information concerning name, address, social security number, references, and driver's license number and State of issuance, as well as the student borrower's expected permanent address, the address of the student borrower's next of kin, and the name and address of the student borrower's expected employer (if known).

(5) The school must ensure that the information required in paragraph (b)(4)(xviii) of this section is provided to the Secretary within 60 days after the student borrower provides the information.

(6)(A) If exit counseling is conducted through interactive electronic means, a school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the exit counseling.

(B) If a standardized interactive electronic tool is used to provide exit counseling to the borrower, including the electronic interactive exit counseling offered by the Secretary, the school must provide to the borrower any elements of the required information that are not addressed through the electronic tool:

(1) In person; or

(2) On a separate written or electronic form provided to the borrower that the borrower signs and returns to the school.

(7) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.

(8)(i) For students who have received loans under both the FFEL Program and the Direct Loan Program for attendance at enrollment in a school, the school's compliance with the exit counseling requirements in paragraph (b) of this section satisfies the exit counseling requirements in 34 CFR 682.604(a) if the school ensures that the exit counseling also provides the borrower with the information described in 34 CFR 682.604(a)(2)(i) and (ii).

(ii) A student's completion of electronic interactive exit counseling offered by the Secretary satisfies the requirements of paragraph (b) of this section and, for students who have also received FFEL Program loans for ~~attendance at enrollment in~~ the school, 34 CFR 682.604(a).

(Authority: 20 U.S.C. 1087a et seq.)