

Issue Paper 3
Session 1: January 12 – 14, 2016

Issue: Developing a regulatory framework for the process of submitting, reviewing, and determining the veracity of Borrower Defense to Repayment (DTR) claims.

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

Regulatory cite: 34 CFR 685.206(c)

Summary of issue:

Current regulations do not describe in detail the process by which a borrower would submit a DTR claim, nor the proceedings the Department of Education (Department) would undertake in considering the forgiveness of some students' loan obligations based on the DTR regulatory provision.

An ideal borrower defense process should be easily understood, facilitate the submittal of sufficient evidence to adjudicate the claim, establish clear expectations for the borrower regarding next steps and timeframes, and assure claims are addressed fairly and equitably. Because the nature of claims may be varied, it is important that the process include considerations for the proper assessment of a specific claim with regard to both the student and the institution.

The DTR process should address the range of specific circumstances that may give rise to a borrower's claim. These include:

- Claims Against a Closed School vs. Claims Against an Open School
- Group Claims vs. Individual Claims

The specific circumstance may inform the most appropriate process for submitting, reviewing, and determining the outcome of such claims.

Questions for consideration by the committee include:

1. What kind of process should the Department use to determine the validity of claims against schools that have closed? Should the process differ depending on whether the claim was presented by an individual or a group?
2. What kind of process should the Department use to determine the validity of claims against schools that have not closed?

- Should the process differ depending on whether the claim is presented by an individual or an existing group? If the latter, what kind of group should the regulation recognize (i.e., a class certified by a Federal or state court? A group represented by a representative, advocate, or attorney selected by the members of the group?)
 - What kind of notice should be given to the school of filed DTR claims? What kind of an opportunity should be provided for the school to respond, and what kind of opportunity should be provided for the borrower to respond to the school's response?
3. Should the Department use a particular process in instances in which several claimants base their claims against a school on the same group of facts (conduct of a particular program, advertising, time period, etc.), even if the individuals themselves have not formed, or sought to form, a group or class? How should such a group be identified? Should the amount of loans owed by the group affect the kind of process used? Should the Department require borrowers to consent to treatment in a group? If so, should that be opt-in or opt-out?
4. Final judgments of administrative agencies, like final judgments of a court, can bar the party against whom a matter is decided from disputing that finding if and when that same party is involved in a separate proceeding—before that agency or another agency—in which the facts resolved by that first finding are in dispute.
- What kind of process should the Department adopt to ensure that findings the Department makes in claim determinations are binding on the same party in subsequent disputes with that party (e.g., findings based on a Program Review)¹?
 - If a particular process is adopted for group claims (as opposed to individual claims), should only findings made in group dispute/hearing cases be binding on the party?

¹ <http://www.ecfr.gov/cgi-bin/text-idx?SID=5b3bb1e1ceaff5fdc8d06986d41a08de&mc=true&node=sp34.3.668.h&rgn=div6>