

# NASFAA's "Off the Cuff" Podcast – Episode 357 Transcript

OTC AskRegs Experts: Borrower Defense Claims and FAFSA Preview Comments

Hugh Ferguson:

Hey everyone. Welcome to another episode of Off the Cuff. I'm Hugh Ferguson with our communications team.

Sarah Austin:

And I'm Sarah Austin with our policy team.

Hugh Ferguson:

Welcome back, Sarah. It's good to have you back on the AskRegs episodes. I feel like it hasn't been that long since we've had you on.

Sarah Austin:

Yeah. I don't know. Time really goes so fast. I think it's several weeks, but it doesn't feel that long.

Hugh Ferguson:

It all tends to just blur together.

Sarah Austin:

True.

Hugh Ferguson:

But yeah, so this week, we've got a couple of topics we wanted to catch listeners up on. One of the first one that has been some comments we've been receiving and wanted to catch listeners up, but it concerns borrower defense updates. And yeah, as I mentioned, we saw some questions and comments coming into some of our Slack channels and emails. And before we kind of get into the issues that some members were facing, Sarah, could you kind of catch us up and talk a little bit about how we've gotten to this point in the saga that is borrower defense?

Sarah Austin:

Yeah. So, borrow defense is one of those things where it's like one of the most complicated things if you're looking at the background, because we have really four sets of rules or four sets of frameworks that are all in some way kind of in play right now. So, it's kind of one of those things that we've seen a little bit of whiplash with when there's a new administration, we get some changes. When there's another new administration, we get some other changes. But it's never quite just like the rules exist and then they don't. The rules exist and they don't. It's always changing a section of loans. And so, that's where it gets kind of complicated.

But basically, we have kind of four different rules at play, some dating back to 1994. Then we had 2016 rules, 2019 rules. And then most recently we had 2022 rules, but those have really been tied up in litigation for years now. And so, they never really fully were implemented. And what we saw even more recently with the One Big Beautiful Bill Act is that they actually pushed off those rules, the 2022 rules,

pushed that off until 2035. So, we're really not having any of those rules right now. So, that's been delayed to 2035. So, instead, we kind of revert back to the 2019 rules currently.

The weird thing that I was mentioning about the dates is that it's not just that now all borrower defense claims have to follow these 2019 rules because it's still based on when the loans were first disbursed. So, if the loans were first dispersed prior to 2017, like July 2017, they follow the actual 1994 rules, which just seems wild. That's so long ago. But then we have the 2016 rule applies to loans between July 2017 and July 2020. And then the 2019 rules are really anything after July 2020, since now we had that other one get pushed off till 2035.

So, even though the 2019 rules are what's technically effective right now, there's still going to be claims that could fall under the 1994 rules or the 2016 rules. So, it really depends on when the loan was dispersed, not what the date is right now.

Hugh Ferguson:

Got it. Yeah. I'm trying to think of other areas we cover that are less complicated or more complicated than this. And I feel like there are few that are more complicated than having these dates.

Sarah Austin:

It always reminds me of gainful employment because that was also that regulatory whiplash of like, "Here's gainful employment. Oh no, it's gone. Oh no, it's back. Oh, now it's FET." But this one's even weirder because of the date issue. It's not just that the rules are there or they're not. It's like which framework are the claims being adjudicated under based on when the loan was dispersed? It's just, yeah, very confusing.

Hugh Ferguson:

Yeah. We could easily have just like a whiplash section of the policy part of our website to update with new topics.

Sarah Austin:

Yes. So, what we really had, why this even, I guess, matters now is that it seems like every once in a while we hear from our members where all of a sudden they're all getting borrowed defense claims and it does feel like it's kind of in batches. And so, a few years back, we had heard from our members that they were getting all these claims. We looked into that. That was actually part of a settlement. I guess that's a whole nother thing to throw in the mix here, is that we also had a lawsuit and there was a settlement called the suit settlement. It was, I guess it's currently called Sweet versus McMahon, but it was previously Sweet versus Cardona, Sweet versus DeVos.

And so, it really depends on who's the secretary at the time. But there's a settlement where certain borrowers loans are actually going to have automatic discharge if they attended certain schools. And then for those that didn't attend those schools, they basically, the settlement said that the department had to review and approve or deny their claims according to a certain schedule. There was really quite a backlog. The settlement really was arguing that the department was purposefully delaying adjudicating those claims. And so, that settlement kind of took care of a whole chunk of borrower defense claims and stuck to a schedule in terms of responding to them and approving or denying.

So, that was a couple years ago when we heard about that. We let our members know, the department put out an EA about it, but then now, more recently, in the last few weeks, we heard from members again that they were getting a bunch of borrower defense claims, I guess some schools a bunch. Some

schools are getting nothing, some schools are getting a few, but some schools were getting pretty significant amounts. And so, they're like, "Why are we getting these? What now? What spurred all of these new claims?" And so, NASFAA had actually reached out to the department to ask about it and we had gotten a little bit of information.

And so, I know Jill, Dejon and our team had actually put together an article maybe two weeks ago now, but I know we put it out in today's news with more information about what the department kind of confirmed for us. But basically they were saying that these claims are now the ones that did not fall under that suit settlement. So, they really had to focus on the ones that were in the suit settlement because they had a very strict timeline of all these deadlines of when they had to review and respond on those. And those deadlines have now passed. And so, now that those are all out of the way, they now are presumably focusing on all the non-suit settlement claims.

And so, we kind of got some information from them at that point in time, but they had said that an electronic announcement would be coming out soon with more information and that is what we got this week. And so, the department put out an electronic announcement. It really had quite a bit of the same information that Jill put in her article recently. I was like, "Good job, Jill." She really covered a lot of it already for our members, but we did at least get a little bit more detail in the electronic announcement things that maybe they couldn't say at the time when we had asked about it, but then since have put it out there.

So, for example, one of the questions we had asked was about the number of claims because we were hearing reports from members that some of them were getting pretty significant amounts. And basically when we had asked, they said, "Oh, schools are getting them in batches." They didn't give us any sort of definitive numbers, but then in this electronic announcement that came out this week, they had actually said that more than 90% of institutions who are receiving notices have fewer than a hundred claims. And then there's a small number of institutions that have more than 500 claims.

So, those are the ones that, yeah, pretty significant amount and that the department would basically be working with those schools to give them their claims in batches. So, not all 500 plus at once. But the other interesting thing they said in there was that for the institutions who have already started getting their notices, the department has already issued approximately 70% of all of the notifications. So, at least we know that we've gotten through a good chunk of them. If schools have already heard, there's a good chance they've already gotten kind of their claims that they will be getting from the department in this batch.

So, the other thing that we got in this electronic announcement that maybe we didn't have when we had kind of just informally reached out was some more specifics on where these claims really fall. When I was talking about those different frameworks in the different years and the different regulations that go with those years. So, we have a bit more detail on these claims. The electronic announcement says that they fall under either the 1994 rule or the 2016 rule, and they specifically said that none of these ones they're sending out right now fall under the 2019 rule. That will be later. And they actually said that they will put out another electronic announcement when those claims are being pushed out.

But for right now, it is just the '94 and the 2016 rules. And some, I guess, pieces of information or they call them key takeaways in there with those sets of rules, there is no requirement for the department to do a substantial review of the claim before sending it to the school. So, even if the claim is completely baseless or maybe seems vague or not enough information, things like that, they will still get sent to the school because the department is not reviewing the information before signing the school. In those rules, it is required that the school gets all of the claims, even if Ed has not reviewed them, or really Ed will not have reviewed them before they send them out.

So, that's one interesting thing. The other part of the '94 and 2016 rules is that schools are not required to respond to any or all claims. And they also specify that if a school chooses not to respond, it's not going to mean that the school is saying that there was any wrongdoing. It's not going to be used against the school in any way. It's just simply non-response. So, that was specified in that EA as well. So, completely optional if you want to respond. In the EA, they have like a Q and A section, which I thought was interesting because in Jill's article, she also had a Q and A section.

I'm not saying they copied her because I think they used the same format back in 2023, but it does put it into a lot easier terms and ways for school to be like, "What actually matters? What do I need to know? Why am I receiving these? What do I need to do?" Kind of thing. But in the Q and A, in the electronic announcement, there was a question about what kind of documentation should the school be sending in response to these claims, or again, questions about if they should respond or not. And the department is very, very clear that they will not be giving any advice on that. They will not be saying what types of documents to submit or examples of things that schools can submit.

It is, they are really not telling the schools anything, and I'm sure that's for legal reasons, but the school themselves really needs to decide first if they're going to respond and then what they would actually provide as a response. I would assume that you're going to be working with your legal counsel on these to know if you want to respond or not, probably not just the financial aid office that's making those decisions, but really the department's not going to give you any sort of guidelines or examples on what you would provide in a response to that claim. So, schools will have to make that decision on their own. A couple other kind of highlights of the electronic announcement.

As I mentioned earlier, that 1994 rule really covers any loans before July 2017. And they did say that some of the claims going out now are under that '94 rule. So, it's quite possible that schools are receiving claims for students who have not attended in a very long time. And it's possible they even could be beyond record retention guidelines. So, maybe schools don't even have records on those students. So, again, the department said up to the school and how they want to respond to those, if they want to say that they don't have records for those students anymore.

So, again, probably suggest working with the legal counsel on things like that, but know that... I know we saw in Slack people were like, "Why am I getting a claim for someone who was here 20 years ago?" And that is why. There's no timeline in these sets of rules on how long... There's not like a, "Oh, you have to submit your BDR claim within five years." There's nothing like that. So, students can submit them even if they attended years and years ago. There's no timeframe on that.

One thing I did want to point out, I think schools at this point in time have had enough BDR claims to know that they typically get 60 days to respond to it, but one difference in all of the suit settlement claims that they were getting back over the last several years is the department really had a strict, strict timeline they had to stick to for those because they had deadlines set by that settlement, by the agreement on when they would respond. And that's no longer the case. These are the ones that are not in the suit settlement. And so, an interesting thing is in the electronic announcement, it has a question on if there's extensions available, if schools need beyond 60 days.

And previously in the suit settlement claims, the answer was basically no. It was like, we're not going to be granting them maybe in extreme cases, that kind of thing. But in this set, in this EA, they had that question in there and they said, "We're willing to work with schools if they need an extension." So, it seems much more like they would be open to providing schools with an extension beyond 60 days, especially I'm assuming those schools that have many, many claims. So, they did provide some information on who to contact if the school needs more than 60 days to respond.

I think that's about it on the highlights of the EA. I will say what I found helpful is that they did provide contact information if you wanted an extension. They provided contact information just in general, the

borrower defense customer support line, which I guess I didn't even realize existed, but it does. So, a phone number specifically for this. And then they did provide some more support style contact information for the COD website, which is where schools actually upload documentation to respond. So, I think all of those were helpful pieces of information in there as well.

Hugh Ferguson:

Awesome. Thanks for all those details, Sarah, and helping to make sense of that timeline and just all the varying parts there. The '90s were quite a while ago.

Sarah Austin:

Were you alive in '94, Hugh?

Hugh Ferguson:

I was just barely. But yeah, not in any school. Yeah, definitely not.

Sarah Austin:

Pre-elementary school even.

Hugh Ferguson:

Yeah. Yeah. But yeah, so like I said, a lot of moving parts, hard to keep track of these things with shifting updates and various timelines of whatnot. But with all of the previous chaos going on with the FAFSA rollout, it actually seems like maybe the FAFSA timeline is something that's easier to follow this cycle. Who

Sarah Austin:

Would've ever thought that FAFSA would be something easy to talk about?

Hugh Ferguson:

Exactly. Yeah. And so, we're actually seeing some predictability to it this time around. I was wondering if you could catch us up on where we're at in the process and what it is that your team's currently working on.

Sarah Austin:

Yeah, of course. It's funny. I was just at a state conference presenting and it's in our kind of federal update presentation that we do in the policy team. For a few years there, FAFSA took over the presentation, right? There was like a million slides on the FAFSA, FAFSA simplification, roll out all that. And now I think there's two slides in that presentation and it's like, who would've ever thought the FAFSA could be summed up in two slides during the federal update, but it's true, which is great, great news. So, you are right. We are down to a fairly predictable timeline with the FAFSA. We of course have the October one launch date now in actual law. Last year, of course, they were able to meet that.

It seems like this year, that will be no problem as well. So, where we're at right now is that we've actually seen the draft '27, '28 FAFSA already. It went out in February now, which like we were talking about, time just really flies, but it got put out as a draft that includes like a draft of the PDF, the incarcerated applicant form, examples of the FAFSA submission summary, all of that. So, they put that out. They also provided a page that was a summary of changes, so you could see what they actually had

changed from '26, '27 to '27, '28, and also opened it up for a 60-day public comment period, which is typical. So, right now we're within that 60 day public comment period.

Comments are actually due the 14th, so I think that's two Tuesdays from now or so, but basically you can review the draft and then submit comments on things you like, things you want to suggest for improvement, things you want changed, all of that. And I know fairly recently, I think Karen talked about kind of the comment process on off the cuff. So, if you didn't listen to that, feel free. But really NASFA, of course, will always comment on anything pertinent to financially, but definitely the FAFSA. We will always comment on the FAFSA. I'd say overall, this year it's like, "Wow, pretty good. Your changes look good."

But of course, we have some ongoing suggestions or areas of concern that we will always bring back up as well. So, we have our comments drafted right now, and we like to put those out in a preview for our membership, typically about a week before we actually submit comments. So, we will put those out early next week, which then gives our members not only time to just review them, but also if members want to submit their own comments, they can kind of see NASFAs first and see if there's anything in there that they also want to highlight in their comments.

So, we do try to get it out about a week in advance so you have time to put together your own comments or make changes to your own comments if you're already writing those in time to then submit by the actual deadline. So, like I said, we'll get our comments out early next week for our members to see that is technically still a draft, but unless there's any changes that our members maybe highlight for us that are like way off base that we want to change, that'll probably be close to what we end up submitting. So, I thought I'd give just like maybe a little summary of what's in there. I will say it's 16 pages long, so I'm not going to talk all about that.

And I also know that that really takes some concentration if you want to read all 16 pages, but I will highlight that there's kind of three sections of the comments. One is our reaction to the proposed changes that they actually put. So, basically what they had in the summary of changes, our reaction to those things, other areas that we suggest for improvement, and then we have a section of just, "Here are all the things we've already told you in previous years, but you still haven't changed, so we're just going to say them again," kind of thing. So, looking at kind of those three sections, like I mentioned, the proposed changes to '27, '28, we were generally happy with.

They made some wording changes to certain questions that I think will make it more clear for applicants. They changed response options to make it more clear for applicants. Things like student year and school or high school completion, which maybe seem like simple questions, but really the wording hangs up applicants quite a bit. So, they changed the wording on that. The question about a student's homelessness status, the word unaccompanied has tripped people up before, not really knowing what that means. So, they actually reworded that to not use the term unaccompanied. So, it's more in like common how we would talk to each other language. So, that I think will be a positive change.

They also announced that there'll be pre-population of data, which we've been pushing for since the major FAFSA overhaul of FAFSA simplification. So, now students that are completing a FAFSA for one year, if they already completed it the prior year, they will have that data prefilled. All the data that can be prefilled, of course, like your tax information can't be from last year, but all of the other stuff can be prefilled. And then seemingly, if you have all that prefilled and you're able to transfer your tax information directly from the IRS, the amount of questions a student actually has to answer could be very small, which is of course the point of FAFSA simplification.

So, maybe we're actually getting there, which is awesome. Also, they announced some pre-population of data for a contributor, like if a parent is contributing to multiple FAFSAs because they have multiple children, they only have to enter their stuff once, which is great. We did ask for a little bit more

clarification on all the situations in which pre-populated data will be used and also like what specific fields, so more to come there, but overall, the proposed changes sound great. We did highlight some areas we think they still could be improving.

One example is the question text on the net worth of businesses and farms, the question texts, the notes and the instructions all seem to say slightly different things. So, we really want consistency on that, making sure that people are actually knowing how to fill it out correctly, and then financial aid administrators also have correct information on kind of the instruction and notes as well. And then we just reiterated that a couple things the department has said is coming. One thing is the fraud detection, the new process for fraud detection, and then one is the ability for tax information be transferred, even if the contributor doesn't have a social.

But if they have an ITEN, that direct transfer, both of those have been announced and said they're coming soon. We reiterated that we want more details and also we want them to stick to that timeline. We really do want those to be coming soon. So, as far as ongoing feedback, there's a whole slew of things we had. I know this one specifically because I'm usually the one that's working on writing this one in our comments, but for several years now, we've had concerns on the definition of a veteran and how it is worded in the FAFSA and how we think that it may be leading to people incorrectly answering that question. So, we pointed that out again.

We have several areas of concern on the incarcerated applicant form, so we highlighted those again. And then of course we are pushing for a demonstration site again. We have not had a true FAFSA demo site in several years. We have a prototype, but it's really not as robust, so we're pushing for a demo site again. And then lastly, I will say this out loud because I know so many of our members have asked about it. Our members want the housing question back on the FAFSA. So, we have again asked for that. When I was reviewing comments that were already submitted on this '27, '28 FAFSA, it was like 90% of the comments were give us the housing question back. So, we put that in our comments as well.

But if you want to read our full comments, if you really love reading 16 pages of FAFSA stuff, that will be out early next week and we hope that they're at least helpful for our members to know what we're advocating for. But also if you do want to write your own comments, you have that available to you to get some ideas.

Hugh Ferguson:

Awesome. That all sounds great, Sarah. And yeah, we'll be running that in today's news very shortly and members can check those out directly. I think we can even get a link in the show notes for a preview of the preview, so you can have that to look at. And yeah, I think that's going to do it for us this week. Thanks, Sarah, for all that helpful information as always really helps me make sense of things and I'm sure is also beneficial to all our members. So, thanks everyone for tuning in. We hope you enjoyed. And if you have any questions or comments, please feel free to send those our way and we will talk to you again really soon.