

June 6, 2022

The following bullet points summarize CECU's more comprehensive presentation of points regarding the U.S. Department of Education's (ED) contemplated Borrower Defense to Repayment Rule (RIN: 1840-AD53) addressed during CECU's June 6, 2022, Executive Order 12866 OIRA meeting, also with other staff from the Office of Management and Budget and ED.

The Borrower Defense to Repayment (BDR) Rule must not be adopted in its current form

The BDR Rule's proposed changes contravene the Higher Education Act of 1965, as amended

The BDR Rule's proposed adjudication process undermines core due process principles:

- Fails to provide fair notice
- Abandons long-held standards of proof
- Allows ED to make untested legal conclusions
- Allows ED to make state law determinations without any meaningful and consistent guidance for doing so
- Presumes liability of institutions for discharge of a full loan amount
- ED would be the prosecutor, judge, jury, and court of last resort in the proposed "recoupment" proceedings

The proposed BDR Rule would be applied in an unfair way that also undermines core due process principles:

- 12 members of Congress sent a letter to the Department of Justice on May 27, 2022, arguing the proposed regulatory changes "are inconsistent with the norms of due process"
- Contemplates claims being brought without regard to statutes of limitations
- Would retroactively impose obligations on institutions
- Would disproportionately cause financial and reputational harm to institutions

There is no indication that ED has undertaken any meaningful analysis prior to submitting its proposed BDR Rule:

- Any studies that ED conducts or has conducted and the resulting data on which it relies also must comply with the Data Quality Act
- For significant rules, the APA contemplates that ED will weigh the costs and benefits of its contemplated rules

CONCLUSION: The Department should not proceed in adopting the BDR Rule as currently presented