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## U.S. Department of Education Delays Final Rule on Borrower Defense to Repayment; Announces New Rulemaking Processes for both Borrower Defense and Gainful Employment

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Thursday, June 15, 2017

In Federal Register notices scheduled for publication on June 16, 2017, the U.S. Department of Education (“the Department”) announced an indefinite delay to implementing its November 1, 2016 final rule concerning Borrower Defenses to Repayment (the “BDTR Regulations”) and related matters, and further announced new negotiated rulemaking processes on both BDTR and the Department’s previous final rule of October 31, 2015 concerning gainful employment regulations (the “GE Regulations”).

The BDTR Regulations, which were scheduled to take effect on July 1, 2017, established new standards and procedures under which federal student loan borrowers could obtain relief from repayment, prohibited postsecondary institutions from using pre-dispute arbitration clauses and class-action waivers, and substantially revised the Department’s financial responsibility and administrative capability requirements including circumstances for which postsecondary institutions would be required to provide the Department with an irrevocable letter of credit.

The BDTR Regulations also included a new loan repayment rate disclosure requirement affecting only proprietary institutions of higher education. (For a full summary of the BDTR Regulations, please see our November 7, 2016 alert available [here](#).)

In its notice delaying the BDTR Regulations from taking effect, the Department cites a recent lawsuit against the regulations brought by the California Association of Private Postsecondary Schools, and concludes that section 705 of the federal Administrative Procedure Act requires resolution of the judicial challenge before the regulations become effective. A copy of this Department notice in its pre-publication format is available [here](#).

The postponement of the BDTR Regulations does not, however, prevent student borrowers from obtaining relief from repayment, as the Department will continue to process borrower defense claims under pre-existing regulations that remain in effect.

In a separate notice, the Department announced its intent to establish two negotiated rulemaking committees. One of these committees will be tasked with developing proposed revisions to the BDTR Regulations. The other committee will be tasked with developing proposed revisions to the GE Regulations. Prior to the convening of these committees, the Department will hold two public hearings for interested parties to discuss the rulemaking agenda, the first on July 10, 2017, in Washington, D.C., and the second on July 12, 2017, in Dallas. A copy of this Department notice in its pre-publication format, which also includes procedures for participation in the public hearings, is available [here](#).

Importantly, these two particular notices do not contain any changes to the effective dates of various requirements under the GE Regulations, including no additional extension of time beyond July 1, 2017, for institutions to submit “alternate earnings appeal” data to the Department or to implement the revised Gainful Employment Disclosure Template. (See “[Gainful Employment Electronic Announcement #105](#)” as issued by the Department on March 6, 2017, concerning those matters.) Unless and until the Department takes additional action concerning the GE Regulations, institutions should proceed as though they will remain in effect until any changes

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come about from the new negotiated rulemaking process.

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