



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF THE UNDER SECRETARY

August 17, 2017

Honorable Elizabeth Warren  
United States Senate  
Washington, DC 20510

Dear Senator Warren:

Thank you for your letter expressing your concerns about the Department of Education's (Department's) delay of the effective date for selected provisions of the final regulations published in the Federal Register on November 1, 2016 (81 Fed. Reg. 75926), commonly known as the Borrower Defense (BD) regulations. Your letter has been referred to my office, and I am pleased to respond. An identical response has been forwarded to each of your cosigners.

On June 16, 2017, the Department published a final rule under section 705 of the Administrative Procedure Act (APA), 5 U.S.C. § 705, 82 Fed. Reg. 27621 (the delay notice). As described in the delay notice, due to pending litigation<sup>1</sup> challenging the BD regulations, the Department is postponing the effective date of the BD regulations until the completion of the judicial review of the regulations. Under section 705 of the APA, "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." In light of the pending litigation, and for the reasons described in the delay notice, the Department concluded that justice requires it to postpone the effectiveness of certain provisions of the final regulations until the judicial challenges to the final regulations are resolved.

The postponement will preserve the regulatory status quo while the litigation is ongoing. In addition to the delay notice, the Department also published on June 16, 2017, a notice of intent to establish negotiated rulemaking committees under Section 492 of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. § 1098a, 82 Fed. Reg. 27640. In the negotiated rulemaking notice, the Department announced its intention to establish two negotiated rulemaking committees. One of the committees is intended to develop proposed regulations to revise the final borrower defense regulations.

The Department conducted public hearings on the forthcoming BD negotiated rulemaking on July 10, 2017, in Washington, D.C., and July 12, 2017, in Dallas, Texas, and accepted written comments. We will listen closely to the concerns of the community, including veterans organizations. Public input is critical in determining how best to protect borrowers and taxpayers.

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<sup>1</sup> See Complaint and Prayer for Declaratory and Injunctive Relief, *California Association of Private Postsecondary Schools v. DeVos*, No. 1:17-cv-00999 (D.D.C. May 24, 2017).

Even though the Department has delayed the regulations, borrowers continue to have the right to submit a BD claim with the Department under our long-standing, current regulations, and we will continue to evaluate whether a borrower's claim gives rise to a cause of action consistent with the current, State law-based standard.

It is our responsibility to ensure that the Department's regulations not only provide protection for students, but are also fair for schools and fiscally responsible. The Department will convene a negotiated rulemaking committee to consider revisions to the regulations with the goals of protecting students from predatory practices and providing clear, fair, and balanced rules for colleges and universities to follow, while also protecting the fiscal interests of the Federal government.

I hope you find this information helpful. If you have further questions, please contact the Office of Legislation and Congressional Affairs at 202-401-0020.

Sincerely,

A handwritten signature in blue ink that reads "James F. Manning". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

James F. Manning  
Acting Under Secretary