

HIGHER EDUCATION INFORMATION MEMO

NOVEMBER 10, 2023

ED Statement Clarifies Cause of Recent Borrower Defense Activity

The U.S. Department of Education (ED) released a [statement](#) on Nov. 8, 2023, saying that the scores of borrower defense to repayment (BDR) application notifications that institutions of higher education (IHE) have received in recent months are part of its response to the [Sweet v. Cardona](#) litigation. This statement confirms much of our prior understanding regarding the causes of recent BDR activity by ED, but also provides some additional insights.

Important points that the statement confirms include:

- The batches that IHE are receiving mostly include BDR applications that were submitted in the latter half of 2022. These notifications are part of the [Sweet v. Cardona](#) settlement agreement and will be processed in accordance with the 2016 BDR regulations.
- IHE can choose to respond within a 60-day period. There is no presumption against those who opt not to respond, but ED will base its decisions on the information that is available to it. Absent a response, that information will not include the IHE's answer to any allegations raised in an application.
- Post-notification, ED will conduct a merit-based review process. Applications may be approved if there is evidence of substantial misrepresentation by the educational institution, among other criteria.
- If approved, loans may be discharged and, subsequently, ED may initiate a recoupment procedure to recover costs from the IHE. During this latter phase, IHE have the right to a hearing to dispute the recoupment actions.

ED's statement informed us for the first time that it is pursuing a single batch notification to process claims, which explains why so many IHE received large numbers of notifications within a matter of days. Most IHE received less than 100 applications. A small fraction of IHE with over 500 outstanding claims will receive a tailored communication from ED regarding the scheduling of these notifications. ED aims to complete all initial notifications by April 2024.

The good news here is that if your IHE recently received a batch of claims, it is unlikely that it will receive another batch of outstanding claims in the near future. Of course, students can still file BDR applications, and that process is likely to become easier and more common when/if the 2023 regulations are reinstated after resolution of the [Career Colleges & Schools of Texas v. U.S. Department of Education](#) litigation in the Fifth Circuit. BDR is not new and is here to stay, but the recent volume will decrease following ED's resolution of applications under the [Sweet v. Cardona](#) settlement.

If you are currently working with Bond and/or other legal counsel to respond to recent BDR claim notifications, stay the course. If you receive a batch notification between now and April 2024, work with the Bond attorney with whom you normally work, any attorney in our [higher education practice](#) or other counsel to determine the appropriate response strategy.

Bond will continue to monitor relevant aspects of ED's BDR activity and provide notifications to IHE clients when their interests are impacted.

