

Draft Borrower Defense to Repayment Language 2021 Negotiated Rulemaking

The first two suggested items below came for the negotiators representing State Attorneys General. The third set of language comes from the 2016 borrower defense regulation and the fourth comes from the Consumer Financial Protection Bureau.

Violation of state law. A borrower has a borrower defense under this section if the Department identifies an **act or omission of the school attended by the student that relates to the making of the loan for enrollment at the school or the provision of educational services for which the loan was provided that would give rise to a cause of action against the school under applicable State law.***

- (a) The Department shall consider whether a borrower or group of borrowers has a borrower defense under this paragraph if a violation of state law is specifically alleged in an individual or group borrower defense application and the Department has determined that the borrower or group of borrowers is not approved for full relief under the federal standard for relief specified in [insert x-ref]. The Department may consider the specifically alleged state violation before it considers whether there is a violation under the federal standard for relief specified in [insert X-ref].
- (b) The Department may consider whether a borrower or group of borrowers has a borrower defense under this paragraph if the borrower defense application does not specifically allege a violation of state law.

*The red language is from 685.206(c)(1).

“Aggressive Recruitment” means exerting unreasonable pressure upon a consumer to enroll in an institution. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

- (a) Exploiting a consumer’s fears, anxieties, insecurities, or any specific misfortune or circumstance of such gravity as to impair the consumer’s judgment, to influence the consumer’s decision with regard to the institution;
- (b) Interfering with the ability of a consumer to understand a term or condition of enrollment or a financial product or service related to enrollment;
- (c) Taking unreasonable advantage of someone’s lack of understanding of higher education and financial aid, by reason of socio-economic background, lack of familial experience in higher education, or other reason;
- (d) Taking unreasonable advantage of someone who reasonably relies on the recruiting individual or entity to act in their interests;

Commented [A1]: See The Consumer Protection from Unfair Trading Regulations 2008, United Kingdom, Section 7(2)(c), available at https://www.legislation.gov.uk/uksi/2008/1277/pdfs/uksi_20081277_en.pdf.

Commented [A2]: See 12 U.S.C. § 5531(d)(1).

Commented [A3]: See 12 U.S.C. § 5531(d)(2)(A).

Commented [A4]: See 12 U.S.C. § 5531(d)(2)(C).



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- a. Reasonable reliance shall be presumed if the recruiting individual uses a title that implies they are acting in the best interest of the student including but not limited to “admissions representative,” “guidance counselor,” or “academic advisor”;
- (e) Unsolicited contact with a borrower that has previously requested not to be contacted;
- (f) The use of threatening or abusive language or behavior; and
- (g) Exerting unreasonable or unsubstantiated time pressures upon a consumer.

Commented [A5]: See generally Fair Debt Collection Practices Act, 15 USC § 1692(c)(c).

Commented [A6]: See The Consumer Protection from Unfair Trading Regulations 2008, United Kingdom, Section 7(2)(b), available at https://www.legislation.gov.uk/uksi/2008/1277/pdfs/ukxi_20081277_en.pdf; see also Fair Debt Collection Practices Act, 15 USC § 1692(d)(2).

3. [option for consideration] Aggressive and deceptive recruitment tactics: 2016 Borrower Defense Regulations (with modifications)

Aggressive and deceptive recruitment tactics or conduct include but are not limited to:

- (1) Demanding that the borrower make enrollment or loan-related decisions immediately;
- (2) Placing an unreasonable emphasis on the consequences of delay;
- (3) Discouraging the borrower from consulting an adviser, a family member, or other resource;
- (4) Failing to respond to the borrower's requests for more information, including about the cost of the program and the nature of any financial aid;
- (5) Falsely presenting the number of spots available; or
- (6) Otherwise unreasonably pressuring the borrower or taking advantage of the borrower's distress or lack of knowledge or sophistication.

Commented [A7]: This language had been in the 2016 regulation as a way to show reliance but could be used instead as aggressive recruitment.

4. [option for consideration] Aggressive and deceptive recruitment tactics: CFPB) definition of abusive:

- Materially interfering with someone's ability to understand a product or service
- Taking unreasonable advantage of someone's lack of understanding
- Taking unreasonable advantage of someone who cannot protect themselves, and
- Taking unreasonable advantage of someone who reasonably relies on a company to act in their interests.

Last updated 10/25/2021