

## **NCHELP Webinar on New Regulations – May 15, 2008**

### **Questions and Answers**

[Note: The following answers to audience questions do not constitute legal advice. While staff has attempted to accurately respond to each question, definitive guidance must be obtained from the U.S. Department of Education.]

#### **Preferred Lender Lists (PLL)**

**Q1.** I attended a recent U.S. Department of Education (Department) training session and the trainer gave the following example regarding establishing a preferred lender list: A school is developing its PLL and has 5 lenders, 3 of which are unaffiliated and the other 2 are affiliated. The Department trainer indicated that the school can only include 4 of the lenders on its PLL. Is this correct?

**A1.** No. Dear Colleague Letter GEN-08-06 that was published on May 9, 2008, clarified that only 3 lenders on a school's PLL must be unaffiliated. Using the above example, all 5 lenders can be included because at least 3 of those lenders are unaffiliated with each other.

**Q2.** Is a school "required" to have a lender list? If a school does not have a lender list is there any liability for the school for providing "no guidance"?

**A2.** No, a school is not required to have a PLL. Final regulation §682.212(h) allows a school the option to make available a list of recommended or suggested lenders to its students and their families to assist with the selection of a FFEL lender.

**Q3.** What if a student wants to borrow through a lender who has made the decision to discontinue lending to students at a particular school? Why are lenders allowed to make choices to whom they lend FFELP funds if they are still actively participating in the program and originating new loans?

**A3.** Eligible lenders participate in the FFELP on a voluntary basis. Each lender is responsible for developing and applying its own lending criteria, which may include restrictions on items such as area of service, types of loans, minimum loan amounts, or credit standards. A lender may not refuse to make a loan because of the applicant's race, national origin, religion, sex, marital status, age, or handicapped status in accordance with section 421(a)(2) of the Higher Education Act, or solely on the basis of a prior bankruptcy.

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#### **Prohibited Inducements/Permitted Activities**

**Q1.** Are interest rate, origination fee and default fee benefits subject to the "at least one payment" rule?

**A1.** No. These particular benefits are expressly allowed by statute and there are no restrictions on them.

**Q2.** Is it considered an inducement when a guarantor offers to pay the default fee for some lenders but not all?

**A2.** We are unaware of any official Departmental guidance that addresses this specific issue.

**Q3.** Are there particular procedures that a guaranty agency should follow during the claim or guaranty review process to make a determination that a lender has provided an improper inducement?

**A3.** Specific procedures or requirements have not been developed at this point. The Preamble to the Final Regulations clarifies that as a general matter a guarantor will not be expected to deny a claim payment to a lender unless the Secretary has notified the guarantor that the lender has provided an improper inducement. However, the Secretary expects the guarantor to include improper inducements as a subject in their oversight of lenders and to deny claims if the agency determines that the lender has provided improper inducements. In regard to the guarantor review, the Department of Education published a Dear Guaranty Agency Director letter on May 21, 2008, reminding guarantors that effective January 1, 2008, the review of prohibited inducements has been added to the scope of the comprehensive lender reviews that are performed under the Common Review Initiative (CRI) process. In addition, the Department requested that guarantors add procedures for ensuring that lenders are not engaging in improper inducement practices to the scope of non-CRI comprehensive reviews.

**Q4.** Would a video of a lender employee providing entrance or exit counseling that does not promote the lender's products be prohibited?

**A4.** This is a business decision to be made by the lender and school.

**Q5.** Our agency offers a number of cost-reducing benefits other than timely payment and service-related forgiveness. Are we now required to get that suite of benefits approved by the Secretary?

**A5.** Section 682.401(e)(2)(x) of the regulations provides that loan forgiveness programs for public service and other targeted purposes approved by the Secretary are allowable, provided the programs are not marketed to secure loan applications or loan guarantees. NCHELP and EFC have recommended that the Secretary consider offering a general set of loan forgiveness programs that are permitted without the need for additional approval from the Secretary.

**Q6.** As a non-profit lender, my division provides free college planning to high school students/parents/counselors. We do NOT promote our loans but our name is on our materials. If we are providing information on a college campus to high school students, can we still use our material, provide door prizes, etc. We also partner with colleges inviting college admission and financial aid administrators to be on panels at some of our high school presentations and counselor training. Are these partnerships permissible?

**A6.** These would be acceptable activities as they fall under the realm of supporting and participating in student aid and financial literacy-related outreach activities.

**Q7.** We have institutions asking us to send a lender representative for a set time during their orientations to assist their parents and students with completing loan applications and to answer questions they may have. Is this acceptable?

**A7.** This is a business decision to be made by the lender. The lender needs to look at exactly what they will be doing during this time and determine if it meets the permitted activities. A suggested question to always ask is, “Is this in support of and participation in a school’s or a guaranty agency’s student aid and financial literacy outreach activities”?

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### **Electronically Signed Promissory Notes (E-Sign)**

*(Recent guidance from the Department concerning mandatory assignment of e-signed notes appears to be inconsistent with the new regulations and the Department’s E-sign Safe Harbor guidance. NCHELP has identified areas of concern and has asked for the opportunity for additional discussion with the Department regarding the June 9<sup>th</sup> guidance.)*

**Q1.** Within the Default Aversion and Claim Standardization subcommittee (DACS) proposal that will support the exchange of e-sign information, what is the value of the 'CAM Claim ID' field within the supplemental excel file? There is a large percentage of claim submitters that do not use CAM. For those submitters, would the field just be left blank by the guarantor?

**A1.** The CAM Claim ID was included under the assumption that if the claim was filed electronically, it would assist the lender in the retrieval of the requested information. This is a "provided if available" field. The field would be left blank if the claim was not filed electronically and/or if the guarantor does not retain this information as part of their records.

**Q2.** Within the DACS e-sign proposal, why is the 'e-sign Indicator' field needed? If the 'E-sign Indicator' field is populated, then logically the loan was e-signed and the value of the indicator would be 'Y'. If there is no E-sign Indicator, then the loan was not e-signed so why is the field left “blank”?

**A2.** The two fields support the current standards in place today for the loan origination process, which are to populate the field with a “Y” if the promissory note is e-signed and left blank if it was not. This is also consistent with the proposal sent to the Department as an alternative to the Department’s original proposal to support the inclusion of this additional information. The Department has since confirmed that new fields are being added to the FFEL assignment format which will require a guaranty agency to indicate (with a ‘Y’ or ‘N’) if the note was e-signed, and if “yes”, the agency must provide a “valid six-digit identification number of [the] lender that originated the electronically signed promissory note or MPN, followed by two zeroes.” This field is space-filled if the note was not e-signed. The DACS e-sign proposal also supports the industry standard for exchange of e-sign information and is part of our efforts to have consistent treatment of this information throughout the "life of the loan".

**Q3.** Is there an expectation that guarantors would need to go back and capture e-sign information from lenders for loans already assigned to the Department? The preamble to the November 1 Final Rules effectively dismissed the community's desire that the Department establish a "start date" for assignments moving forward prospectively.

**A3.** The Department has been rejecting e-signed promissory notes at the time of assignment, so there should not be any e-signed loans currently held by the Department. Recent guidance from the Department states that guaranty agencies may begin assigning e-signed notes to the Department as of July 1, 2008, and must "provide the name and address of the lender that originated the promissory note/MPN" until the new FFEL assignment formats (referenced in A2 above) are implemented.

**Q4.** When will mandatory assignment guidelines and file layouts be made available to guaranty agencies (specifically for required disbursement fields, e-signed notes and Original Issue Discount (OID) information)?

**A4.** The Department's Default Resolutions Group distributed guidance to all guaranty agency mandatory assignment coordinators on June 9, 2008. This guidance can be found in the NCHELP E-Library.

**Q5.** Regarding "e-signed MPN screen shots as appeared to the borrower"; does this mean that **any** and **all** edits from previous enhancements to the e-sign process need to be backtracked for documentation purposes?

**A5.** Yes. Since this regulation is applicable to all e-signed notes as of July 1, 2008, those signed both before and after this date would mean that **any** and **all** edits from previous enhancements will need to be backtracked for documentation purposes. The holder will need to know what their process was on any given day and be able to provide the documentation supporting that process.

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## **Identity Theft**

**Q1.** If a loan is not eligible for identity theft discharge but is otherwise deemed unenforceable by the lender against the victim, the regulations state that the lender must notify the credit bureau and stop billing for interest benefits and special allowance. What is meant by the terminology "otherwise deemed unenforceable?"

**A1.** Basically, this means that although the borrower does not meet the requirements of the identity theft discharge under §682.402(e) the lender has determined that the loan is unenforceable under common law or state forgery law. As a result, the lender cannot pursue the victim of the identity theft for repayment of the unenforceable debt. However, should a court verdict be rendered and name a perpetrator within 3 years of the date the lender receives a valid identity theft report, the lender may submit a claim and bill the Department for the interest and special allowance that would have accrued.

**Q2.** Who is responsible for the collection of a loan that is eligible for identity theft discharge – the guarantor or the Department?

**A2.** The regulations in §682.402(e)(9)(ii)(D) require the guarantor to demand payment in full from the perpetrator and if not received, pursue collection against the perpetrator.

**Q3.** What does a borrower have to do to establish that his/her loan is unenforceable, if it is not dischargeable due to identity theft?

**A3.** To establish that a loan is unenforceable, the borrower claiming identity theft needs to work with the lender. It is up to the lender to determine whether the loan is unenforceable. Lender policies may differ slightly, but in general the borrower alleging identity theft will have to certify that he/she did not sign the promissory note. This can be accomplished by the borrower completing a Federal Trade Commission (FTC) affidavit or providing the lender with a police report submitted under penalty of perjury. In the case of a wet-signed promissory note, the borrower might also have to provide signature samples on dated documents showing the borrower's signature over time. For an e-signed promissory note, the lender should determine whether another means of identification was used to obtain the loan without the borrower's authorization. In addition, the lender in its investigation should work with the school to determine if the alleged victim received or benefited from the proceeds of the loan.

**Q4.** If a lender determines that a loan was obtained as a result of identity theft, and the perpetrator is not identified, must the lender rebate any interest and/or special allowance payments received from the Department or any payments received from the borrower?

**A4.** No. The lender must cease billing for interest benefits and special allowance as of the date the lender makes the determination that the loan is unenforceable, but there is not a requirement to return or rebate payments received prior to that determination date. If within three years of the date the lender received the identity theft report, a court verdict or judgment is received that conclusively determines that the individual named as the borrower was a victim of a crime of identity theft and a perpetrator is named, the lender is able to submit a claim and bill the Department for the interest and special allowance that would have accrued on the loan from the date the lender ceased billing.

In terms of returning borrower payments received, if a borrower has made payments on a loan that he/she is claiming was received as the result of identity theft, the validity of that claim should be questioned as the receipt of a payment would seem to constitute an affirmation of the existence of the debt.

**Q5.** What is the borrower to do during the identify theft investigation? Is the borrower eligible for new loans?

**A5.** Unless the loan in question is in default, the borrower is eligible to receive a new FFELP Loan. However, before receiving a new loan, the lender and/or guarantor may require that the borrower sign a notarized statement that the new loan is, indeed, his/her loan so he/she cannot make the same identity theft claim on the new loan in the future.

**Q6.** Does all interest and special allowance payments going back to the date of disbursement need to be returned or just from the point the lender determines the loan is unenforceable?

**A6.** According to §682.300(b)(2)(ix) and §682.302(d)(1)(viii), the lender must cease billing for federal interest benefits and special allowance as of the date the lender determines the loan to be legally unenforceable, but there is not a requirement to return or rebate interest benefit or special allowance payments received prior to that determination date.

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### **Total and Permanent Disability (TPD)**

**Q1.** The new regulations require a borrower to submit the total and permanent disability (TPD) application to the lender within 90 days after the physician certifies the application. Does the industry standard 5-day mail allowance apply?

**A1.** Yes. The 5-day mail time allowance is acceptable. However, the Receipt Date must be clearly indicated in the appropriate field on the application or on an attachment, so that the Department can determine whether or not to process the application under the new regulations.

**Q2.** If a TPD application is completed and certified by the physician prior to July 1, 2008, using the current discharge application, but submitted by the borrower to the lender after July 1, 2008, what eligibility criteria must be used when the lender, guarantor, and the Department review the application?

**A2.** The lender/guarantor/Department may use the current TPD form (pre-July 1, 2008), but the eligibility determination will be based on the new post-July 1, 2008, rules.

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### **Deferments**

**Q1.** Under the simplified deferment process, can a lender grant a deferment for a borrower based on a Perkins loan deferment that has been granted by the school?

**A1.** The deferment criteria for Perkins loan are slightly different from the FFEL requirements, with the exception of the economic hardship deferment. The November, 1, 2007, Final Rule specifically states that FFELP lenders are not permitted to grant deferments based on a borrower receiving a deferment on his/her Perkins Loan; however, the criteria that makes a borrower eligible for the economic hardship deferment based on receiving an economic hardship deferment under the Perkins loan program (or Direct Loan program) has not changed.

**Q2.** Can a borrower's representative request that a lender grant a qualified borrower a military service deferment through the deferment simplification process?

**A2.** Yes. The Department has indicated that they interpret the simplified procedures as applicable to the military service deferment whether the request comes from the borrower or the borrower's representative.

**Q3.** Will a separate deferment form be developed for borrowers to request the post-active duty student deferment?

**A3.** Indications from the Department are that this deferment type will be added to the existing military deferment (MIL) form. The FFELP community has already provided a revised MIL form to accommodate for this deferment type and the Department is considering it.

**Q4.** Does a borrower have to receive the military service deferment in §682.210(t) in order to subsequently qualify for the additional 13 months of a post-active duty student deferment provided in §682.210(u)?

**A4.** No. First, unlike the military service deferment, a borrower can qualify for the post-active duty student deferment based on being called to State duty or for federal duty that is not in relation to a war or other military operation or national emergency. Second, a borrower that is called to active duty in connection with a war or other military operation may be in school or in grace, so the borrower's loan may not be in repayment when the borrower is called to active duty. Therefore, no military service deferment would be applied to the loan while the borrower is serving on active duty, but the borrower would be eligible for the 13-month post-active duty student deferment upon returning from active duty and conversion to repayment.

**Q5.** With the simplification of deferment processing, is there any liability of the accepting lender if the lender who originally granted the deferment did so incorrectly?

**A5.** No. The language in §682.210(s)(iv) provides the lender using the deferment of another lender with the appropriate safeguards. Specifically, the regulation states “A lender may rely in good faith on the information it receives under paragraph (s)(1)(iii) of this section when determining a borrower’s eligibility for a deferment...” However, if the lender has information indicating that the borrower does not qualify for the deferment, the lender must resolve the discrepant information before granting the deferment.

**Q6.** With regard to economic hardship, how is family size determined?

**A6.** Based on consensus reached during the 2008 negotiated rulemaking session on loan issues, the proposed definition of family size is the number that is determined by counting the borrower, the borrower’s spouse, and the borrower’s children, if the children receive more than half their support from the borrower. A borrower’s family size may include other individuals if, at the time the borrower requests the economic hardship deferment, the other individual resides with the borrower and receives more than half of his or her support from the borrower and will continue to receive that support from the borrower. The kinds of support provided by the borrower to the individual may include money, gifts, loans, housing, food, clothes, car, medical and dental care, and payment of college costs.

**Q7.** Do military deferments apply to both non-defaulted and defaulted loans that are held by a guarantor?

**A7.** If the condition that entitled the borrower to the deferment existed before the date of default **and** the borrower provides the necessary documentation establishing his eligibility, the lender must grant a deferment and recall the default claim from the guarantor. If the loan has already been purchased as a default, the lender may be required to repurchase the loan from the guarantor.

If, however, the condition that entitled the borrower to the deferment did **not** exist before the date of default, the borrower is not eligible for the deferment unless he/she has made payment arrangements acceptable to the lender prior to the payment of the default claim by the guarantor.

**Q8.** What is the effective date for granting a military deferment for one year without documentation?

**A8.** This change is part of the changes proposed during the 2008 negotiated rulemaking session. As such, the proposed change will be outlined in a Notice of Proposed Rulemaking that is anticipated to be published in June. The effective date will follow the Master Calendar provisions outlined in statute, which call for any Final Rule changes published prior to November 1<sup>st</sup> to be effective the following July 1<sup>st</sup>. However, we do anticipate that this change will be one that the Department will allow impacted parties to implement early.

**Q9.** For the post-active duty student deferment, the regulations state the student must have been “enrolled”. Isn’t an in-school deferment considered enrolled, not just in a school or grace status?

**A9.** Yes. Borrowers who are enrolled in school on at least a half-time basis when called to active duty, or who were enrolled in school on at least a half-time basis within six months of being called to active duty, are eligible for the post-active duty student deferment. This would include any borrower who may be, or was, using an in-school deferment.

**Q10.** Can a lender still grant an economic hardship deferment based on an economic hardship deferment granted under the Perkins Loan Program since the deferment simplification process does not allow for deferments granted under the Perkins Loan Program?

**A10.** Yes, based upon a borrower’s request. Under current regulation §682.210(s)(6)(i), an eligible borrower is entitled to an economic hardship deferment based on the granting of an economic hardship deferment under either the Direct Loan or Federal Perkins Loan Programs for the period of time for which the borrower has requested an economic hardship deferment for his or her FFEL Loan.

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## **Income-Based Repayment (IBR)**

**Q1.** We have heard there are three new terms associated with IBR; standard-standard, permanent-standard and expedited-standard. What do these terms mean?

**A1.** These are new terms you will not see in the regulations but were created during the negotiated rulemaking process to help identify certain payment types as a borrower moves through the IBR process. A lender/servicer will need to track payment amounts established at certain points in time as the borrower moves through the IBR plan.

- Standard-standard = The payment amount calculated when the borrower initially enters repayment based on a 10-year term. This is the payment amount all other payments are measured against when determining if payments made outside of the IBR umbrella are eligible to count toward the 25 years (300 payments) for forgiveness.
- Permanent-standard = The payment amount calculated immediately preceding entering IBR, based on a new 10-year term. This is the maximum payment amount the borrower will ever be required to make, unless the borrower requests to leave the IBR plan.
- Expedited-standard = The payment amount calculated once a borrower voluntarily requests to leave the IBR plan. This amount is calculated using the remaining term based on a standard repayment plan, based on loan type.

**Q2.** If PLUS Loans are not eligible for IBR, are Consolidation Loans that include underlying PLUS Loans also not eligible for IBR? Or simply the PLUS Loan portion of the Consolidation Loan?

**A2.** If a Consolidation Loan includes a parent PLUS Loan, the entire Consolidation Loan would not be eligible for IBR.

**Q3.** Why would there be collection costs under IBR?

**A3.** There may not be collection costs. The regulations are simply accounting for the possibility of such costs.

**Q4.** Is IBR only available for loans in repayment with a lender or also loans in default with a guarantor?

**A4.** The statute includes language that allows a borrower to elect IBR “whether or not the borrower’s loan has been submitted to a guaranty agency for default aversion or is already in default.” NCHelp supports a House-passed technical correction that would remove the IBR option for defaulted borrowers and will make a similar recommendation on this issue when commenting on the draft regulations stemming from the recent negotiated rulemaking session.

**Q5.** For a borrower who is in repayment for several years before entering IBR, what kind of payments count toward the 25 years for forgiveness? Would only standard-standard payments count, or would payments in other plans like graduated and income-sensitive count?

**A5.** Only payments made on or after July 1, 2009, may be considered for eligibility toward the required number of payments for forgiveness (300 payments). Payments made under any type of repayment plan would be counted as eligible as long as they are not less than the standard-standard payment amount (i.e., the initial calculated payment based on a 10-year payment amount). Although the borrower may request a graduated or income-sensitive repayment plan when they initially enter repayment, the lender will still need to calculate a standard-standard payment amount to measure against in the future. Please note that payments made while under the IBR plan are not required to meet the minimum standard-standard payment amount for counting as an eligible payment.

**Q6.** Can you clarify if married couples filing jointly would be affected by the IBR plan?

**A6.** When calculating if a borrower is experiencing a partial financial hardship and therefore eligible for IBR, the incomes for both spouses are required to be considered for married couples filing jointly.

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## **Miscellaneous**

**Q1.** What is DACS?

**A1.** DACS is the acronym for the Default Aversion and Claim Standardization subcommittee. DACS is one of the subcommittees of the NCHELP Program Operation Committee that focuses on loan servicing from the point of entering repayment to claim filing within the “life of the loan” perspective.

**Q2.** Please discuss the new unsubsidized Stafford Loan Limits and clarify if they are for loans disbursed, guaranteed, or originated/certified after July 1, 2008.

**A2.** The Ensuring Continued Access to Student Loans Act of 2008 (P.L. 110-227) increases the annual and aggregate federal loan limits for unsubsidized Stafford Loans for undergraduate student borrowers. The effective date is for loans first disbursed on or after July 1, 2008.

**Q3.** Do the loan increases associated with the Ensuring Continued Access to Student Loans Act (P.L. 110-227) also impact the increased unsubsidized loans for Health Professions?

**A3.** It is our understanding that the Department is currently reviewing the overall aggregate increase for Health Profession students to determine if the amounts need to be adjusted based on this new legislation. Look for an update on this issue in a future edition of the NCHELP Briefing.