



August 27, 2009

Mr. Brian Smith  
U.S. Department of Education  
1990 K Street, NW  
Room 8033  
Washington DC 20006-8502

RE: Docket ID ED-2009-OPE-0003

Dear Mr. Smith:

On behalf of the National Council of Higher Education Loan Programs (NCHELP) and the Student Loan Servicing Alliance (SLSA), we write to express both appreciation for the opportunity to contribute to the negotiated rulemaking process for the “Team II – Loans - School-based Loan Issues” and great satisfaction that negotiators on all sides of the table were able to come together and reach consensus on this important regulatory proposal.

Since reaching consensus on the proposed regulatory package, members of the FFELP community have continued to review and analyze the language as published in the Notice of Proposed Rulemaking (NPRM). Understanding that negotiated rulemaking can be extremely time consuming and at times arduous, members of the FFELP community stand strongly together in our commitment to serve students and to have final regulations that protect students and taxpayers while being workable for all involved.

It is this commitment that led us to further review the topics discussed by the Team II negotiators and to provide the attached responses.

Finally, we extend our appreciation to the Department of Education staff (the Department) that spent countless hours with the negotiators to better understand issues, complete research, hear all sides of issues and develop consensus-building positions. We are grateful for the time and commitment put forth by all involved.

We and our colleagues remain committed to working with the Department in the implementation of these regulations and the development of those to come.

Sincerely,

National Council of Higher Education Loan Programs (NCHELP)  
Student Loan Servicing Alliance (SLSA)

NCHELP and SLSA

Detailed Comments on Proposed Regulations  
Loan Provisions Published July 28, 2009  
Docket ID ED-2009-OPE-0003

**COMMENTS BY TOPIC IN ORDER OF REGULATORY CITE**

**1. Preferred Lender Arrangement**

**Cite: §601.2(b) NPRM (page 37470) Preamble (pages 37435-37437)**

**Comment:** The proposed regulations are based on the premise that only two conditions must be met for a preferred lender arrangement to exist:

- (1) A lender provides or issues education loans to students, or the families of such students, attending a covered institution; and
- (2) The covered institution or an institution-affiliated organization recommends, promotes, or endorses the education loan products of the lender.

As pointed out during negotiated rulemaking, this interpretation does not take into consideration (or renders meaningless) the lead-in phrase for the statutory definition of a “preferred lender arrangement” “(1) An arrangement or agreement between a lender and a covered institution or an institution-affiliated organization of such covered institution ...”

The Federal Reserve Board, looking at the same statutory definition of “preferred lender arrangement”, comes to a different conclusion than the Department of Education. The Board gives meaning to the lead-in phrase “(1) An arrangement or agreement between a lender and a covered institution or an institution-affiliated organization of such covered institution ...” and recognizes that a “preferred lender arrangement” can only occur when there is first some awareness of the arrangement/agreement by the lender and the school. The Board takes the view that an arrangement or agreement is not established merely by the existence of two parties and the occurrence of the activities described in the first paragraph above, but only arises when the two parties are also operating with an awareness of the arrangement/agreement.

The final regulations issued by the Federal Reserve Board on August 14, 2009, explicitly acknowledge that there are situations in which the lender may not know that it is on a school’s preferred lender list and under these circumstances it is not required to provide model forms.

**Supplemental Information (Federal Register Page 41228)**

Comment 48(e)-1 clarifies that a creditor is not required to comply if the creditor is not aware that it is a party to a preferred lender arrangement. For example, if a creditor is placed on a covered educational institution’s preferred lender list without the creditor’s knowledge, the creditor is not required to comply with §226.48(f). (Note that the reference to the comment is incorrect; it should be 48(f)(1).)

Here is the comment from the **Official Staff Commentary (page 41255)**:

Paragraph 48(f)

1. General. Section §226.48(f) does not specify the format in which creditors must provide the required information to the covered educational institution. Creditors may choose to provide only the required information or may provide copies of the form or forms the lender uses to comply with §226.47(a). A creditor is only required to provide the required information **if the creditor is aware that it is a party to a preferred lender arrangement.** (Emphasis added) For example, if a creditor is placed on a covered educational institution's preferred lender list without the creditor's knowledge, the creditor is not required to comply with §226.48(f).

**Recommendation:** For the sake of consistency, we urge the Department to take the same position as the Federal Reserve Board in recognizing that a preferred lender arrangement can only arise when the lender and school are aware of the arrangement and the two other conditions included in the definition are also met.

## 2. Code of Conduct

**Cite: §601.21(c)(5)(i) NPRM (page 37472)**

**Comment:** The proposed code of conduct requirements under §601.21(c) of the proposed regulation contain a prohibition that we believe Congress did not intend in the statute. Specifically, §601.21(c)(5)(i) includes reference to both "FFEL Program loans" and "private education loans". The inclusion of "private education loans" extends beyond the scope of section 487(e)(5)(A)(i) of the HEA, which is limited to FFEL loans (i.e., "loans made, insured, or guaranteed under this title"). The agreement of statutory effect and explanation on this matter, documented on pages 129-130 of the Joint Explanatory Statement of the Committee of Conference report for the HEOA, states that the Conferees were addressing concessions only in regard to FFEL loans. The report states:

The Conferees intend that an institution may request and accept an offer of recourse loans but only if such request and acceptance is not conditioned on the institution providing a lender with a specified number of loans or loan volume, or a preferred lender arrangement for **Title IV loans.** (Emphasis added)

Currently, lenders and schools are able to share the risk of making private education loans to students who would otherwise be unable to obtain financing necessary to complete their academic career. Such lending raises HEA compliance issues only if it is undertaken in exchange for securing FFEL applications. Although we appreciate the Department noting in the preamble that the proposed regulation would not prohibit recourse loans "in all cases", we believe the inclusion of the phrase "or private education loans" will have the unintended consequence of discouraging lawful recourse loan programs. A recourse private education loan always involves the assumption of risk-sharing by the school in exchange for the lender making a private education loan, whether a single loan or a number of loans. The proposed regulation goes beyond the statute by prohibiting such bargained-for exchanges with respect to private education loans. Similarly, the proposed regulation goes beyond the statute in limiting the offering of recourse loans in connection with preferred lender arrangements involving private education loans. The statement of Conferees noted above clearly evidences that Congress'

concern with recourse loans relates solely to FFEL loans and preferred lender arrangements involving FFEL loans. Accordingly, we believe this was missed and encourage the Department to align the final regulation with the statute.

**Recommendation:** Revise section §601.21(c)(5)(i)(A) as follows: “A specified number of FFEL Program loans ~~or private education loans~~;...”

### 3. Cohort Default Rate (CDR) Exceptions

**Cite:** §668.16(m)(2)(ii) and (iii) and §668.14(c)(2)

**NPRM (pages 37475 and 37485) Preamble (pages 37447-37448)**

**Comment #1:** It is our understanding that beginning at the time of publication of fiscal year (FY) 2011 CDRs in 2014, provisional certification will apply to schools that have three-year CDRs that are “...equal to or greater than 30 percent but less than **or equal to** (Emphasis added) 40%,...” for two of the three most recently issued rates. The proposed regulations correctly state this in §668.213(a)(2), but do not correctly describe this in proposed §668.16(m)(2)(ii) and §668.214(c)(2).

**Recommendation:** Revise §668.16(m)(2)(ii) as follows: “ (ii) An institution that fails to meet the standard of administrative capability under paragraph(m)(1)(ii) based on two cohort default rates that are greater than or equal to 30 percent but less than or equal to 40 percent is not placed on provisional certification under paragraph (m)(2)(i) of this section -...”

Revise §668.214(c)(2) as follows: “ (2) Notice of a second cohort default rate that equals or exceeds 30 percent but is less than or equal to 40 percent and that,...”

Because this information also appears to be misstated in some sections of the preamble, we ask the Department to clarify and make consistent the information that is presented in the preamble that will accompany the *Final Rule* for Team II provisions.

**Comment #2:** The language in §668.16(m)(2)(iii) regarding a school’s ability to appeal a loss of eligibility does not appear to belong in a list of options to avoid provisional certification.

**Recommendation:** Delete §668.16(m)(2)(iii), and renumber the following subsection (iv) to (iii) and subsection (v) to (iv). It appears that §668.211 addresses the issue of a school’s ability to appeal a loss of eligibility on the basis of erroneous data.

**Comment #3:** Proposed §668.16(m)(2)(ii) does not state that a school may submit an erroneous data appeal to avoid provisional certification. It appears to be clear in §668.211(a) that an erroneous data appeal can be submitted for this reason.

**Recommendation:** Revise §668.16(m)(2)(ii) to clarify that a school may submit an erroneous data appeal to avoid provisional certification.

#### **4. Cohort Default Rate – Average Rates Appeals: Determination**

**Cite:** §668.196(c) NPRM (page 37477)

**Comment:** We are uncertain as to the circumstances under which the Department would recalculate a school's CDR as a result of an average rates appeal, unless the Department determines that the data used to calculate the CDR were incorrect for some other reason.

**Recommendation:** Please clarify in the preamble the circumstances under which the Department would recalculate a school's published (official) CDR if the Department determines that the school will not lose eligibility due to meeting the requirements for an average rates appeal.

#### **5. Erroneous Data Appeals**

**Cite:** §668.208(f)(4)(ii) NPRM (page 37482)

**Comment:** On the topic of a school's ability to submit an erroneous data appeal to avoid provisional certification, we are also puzzled as to why the proposed §668.208(f)(4)(ii) indicates that in some circumstances a school may be placed on provisional certification **prior to** (Emphasis added) submitting an erroneous data appeal under §668.211. This is confusing, considering the following preamble statement on page 37448 (middle of first column): "The proposed regulations would also allow data appeals to ensure that schools are not provisionally certified based on incorrect data."

**Recommendation:** Please clarify in the preamble the circumstances under which a school would be placed on provisional certification prior to submitting an erroneous data appeal.

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#### **Technical Corrections**

##### **1. Technical Correction - Private Education Loans Self-Certification Form**

**Cite:** §668.14(b)(29) (also see §601.11(d))

**Comment:** The Technical Corrections legislation (H.R. 1777) enacted in June of this year amended Title I of the HEA by striking section 155(a)(4) and replacing that section with new language that eliminated the expected family contribution (EFC) from the list of information the institution is required to provide to a private loan applicant, upon request. The new language in section 155(a)(4) now requires the institution to provide such applicant with the Cost of Attendance (COA), the Estimated Financial Assistance (EFA) - including those amounts used to replace the EFC, and the difference between the COA and the EFA.

**Recommendation:**

Revise §668.14(b)(29) as follows:

(29)(i) It will, upon the request of an enrolled or admitted student who is an applicant for a private education loan (as defined in 34 CFR 601.2(b)), provide to the applicant the self-certification form required under 34 CFR 601.11(d) and the information required to complete the form, to the extent the institution possesses such information, including-

(A) The applicant’s cost of attendance at the institution, as determined by the institution under part F of title IV of the HEA;

~~-(B) The applicant’s expected family contribution for students who have completed the Free Application for Federal Student Aid;~~

~~-(C)(B)~~ The applicant’s estimated financial assistance, including amounts of financial assistance used to replace the expected family contribution, as determined by the institution in accordance with title IV of the HEA, for students who have completed the FAFSA 34 CFR 682.200; and

~~(C)(D)~~ The difference between the amounts under paragraphs (b)(29)(i)(A) and ~~(b)(29)(i)(B)(29)(i)(C)~~ of this section, as applicable; ~~and~~

~~-(E) The sum of the amounts under paragraphs (b)(29)(i)(B) and (v)(29)(i)(D) of this section, as applicable.~~

(ii) It will, upon the request of the applicant, discuss with the applicant the availability of Federal, State, and institutional student financial aid;...

**2. Technical Correction – Cohort Default Rate – Consequences of cohort default rates on your ability to participate in Title IV, HEA programs**

**Cite: §668.187 NPRM (page 37476)**

**Comment:** Due to reformatting of this section, two technical corrections are necessary.

- The language in §668.187(e)(4) should refer to paragraph (f) of that section, rather than to paragraph (g).
- The language in §668.187(f) should refer to paragraph (e)(1) of that section, rather than to paragraph (d)(1).

**Recommendation:**

Revise §668.187(e)(4) as follows:

“(4) To avoid liabilities you might otherwise incur under paragraph ~~(f)(g)~~ of this section, you may choose to suspend your participation in the FFEL and Direct Loan programs during the adjustment or appeal process.”

Revise §668.187(f) as follows:

“(f) Liabilities during the adjustment or appeal process. If you continued to participate in the FFEL or Direct Loan Program under paragraph ~~(e)(d)~~(1) of this section, and we determine that none of your requests for adjustments or appeals qualify you for continued eligibility - ...”

### 3. Technical Correction - Cohort Default Rate – New Data Adjustments: Deadlines

**Cite:** §668.191(b) NPRM (page 37477)

**Comment:** Due to the reformatting of this section, two technical corrections are necessary.

- The language in §668.191(b)(3) refers to itself; it should refer to §668.191(b)(2).
- The language in §668.191(b)(6)(ii) refers to (b)(7)(i) which was deleted; should be §668.191(b)(6)(i)

**Recommendation:**

Revise §668.191(b)(3) as follows:

“(3) Within 15 days after receiving a guaranty agency’s notice that we hold an FFELP loan about which you are inquiring, you must send us your request for a new data adjustment for that loan. We respond to your request as set forth in paragraph (b)(2) under paragraph (b)(3) of this section.”

Revise §668.191(b)(6)(ii) as follows:

“(ii) If you are also filing an erroneous data appeal or a loan servicing appeal, by the latest of the filing dates required in paragraph (b)(~~6~~)(7)(i) of this section or in §668.192(b)(6)(i) or §668.193(c)(10)(i).”

Corresponding reference changes are needed in §§668.192(b)(6)(ii) and 668.193(c)(10)(ii) as follows:

§668.192(b)(6)(ii): “If you are requesting a new data adjustment or filing a loan servicing appeal, by the latest of the filing dates required in paragraph (b)(6)(i) of this section or in §668.191(b)(~~6~~)(7)(i) or §668.193(c)(10)(i).”

§668.193(c)(10)(ii): “ If you are also requesting a new data adjustment or filing an erroneous data appeal, by the latest of the filing dates required in paragraph (c)(10)(i) of this section or in §668.191(b)(~~6~~)(7)(i) or §668.192(b)(6)(i).”

### 4. Technical Correction - Notice of Official Cohort Default Rate

**Cite:** §668.205 NPRM (page 37480)

**Comment #1:** §668.205 entitled “Notice of your official cohort default rate.” actually appears to encompass the delivery of both *draft* rates and *official* rates. Accordingly, the title might need an added reference to draft rates, or a more generic label. If this is amended, then a corresponding change is needed for the title of §668.186.

**Recommendation:** Revise the title of this section as follows:

“Notices of your draft and official cohort default rates.”

**Comment #2:** We also realize that the verbiage in §668.186(a) and §668.205(a) pertaining to the publication of a list of CDRs for all schools refers only to official CDRs, not draft CDRs, and that distinction needs to be maintained if the titles of §668.186 and §668.205 are changed to include references to draft CDRs.

**Recommendation:** Revise §668.205(a) as follows:

“(a) We electronically notify you...After we send our notice to you of your official cohort default rate, we publish a list of cohort default rates for all institutions.”

## 5. Technical Correction - Notice of Official Cohort Default Rate, Loan Record Detail Report

**Cite:** §668.205(d) NPRM (page 37480)

**Comment:** The text regarding deadlines following eCDR notifications in §668.205(d) is not identical to comparable proposed text in §668.186(d). There appears to be an omission of amendatory language in §668.205(d).

**Recommendation:** Instead of stating that timelines “begin on the sixth business day following the announced transmission date”, the text in §668.205(d) should correspond to the language found in §668.186(d).

Revise as follows: “(d) Except as provided in paragraph (e) of this section, timelines for submitting challenges, adjustments, and appeals begin on the sixth business day following the ~~announced~~ transmission date for eCDR notification packages that are posted on the Department’s Web site.”

## 6. Technical Correction – Processing the borrower’s loan proceeds and counseling borrowers.

**Cite:** §682.604(c)(9)

**Comment:** This section refers to §682.604(c)(10) which does not exist.

**Recommendation:** This text should be revised to delete the incorrect cite and replace it with the correct cite, which we believe to be §682.604(c)(8).

Revise §682.604(c)(9) as follows: “A school may deliver loan proceeds in accordance with paragraphs (c)(5) and (c)(~~8~~~~(10)~~) of this section, if the school certified the loan prior to the deadline as provided for in §682.603(h)”

## 7. Technical Correction - Sample Default Prevention Plan

**Cite:** Appendix A to Subpart M of Part 668

**Comment:** In three places, re-designated Appendix A to subpart M refers to requirements in §668.198. However, section §668.198 is removed. NPRM (page 37477)

**Recommendation:** All references to cites in §668.198 in the re-designated Appendix A to subpart M should be removed.

## 8. Technical Correction – Subpart N

**Cite:** Subpart N Cohort Default Rates NPRM (page 37477)

**Comment:** The title for this section is not consistent with the title for subpart M.

**Recommendation:** For improved clarity, it would be helpful to revise the title of new subpart N to read, “*Subpart N – Three-Year Cohort Default Rates*”, in similar fashion to the proposed change of current subpart M to read, “*Subpart M – Two Year Cohort Default Rates*”.

## 9. Technical Correction - Default Prevention Plans

**Cite:** Appendix A to Subpart N of Part 668 Preamble (page 37448)

**Comment:** In Appendix A to subpart N of part 668 (I. Core Default Reduction Strategies, #1), the Department added the language “...and organizations...” in response to a request at the negotiating table that the Department acknowledge that guarantors and others play a valuable role in assisting schools with default management plans. In addition to adding this phrase, the Department indicated that it would provide additional commentary recognizing the role of the guarantor, in particular, with respect to the intent of this new language. We do not find the additional commentary in the preamble.

**Recommendation:** We recommend that the preamble clarify the intent behind the addition of the words “...and organizations...” in this section of the regulations by encouraging schools to consider including guarantors and other third parties with expertise in effective default aversion strategies in their default prevention task force. This will allow schools to better understand the types of organizations they can contact for assistance with developing such plans.

## 10. Technical Correction – Sample Default Prevention Plan

**Cite:** Appendix A to Subpart N of Part 668 NPRM (page 37486)

**Comment:** The introductory paragraph of Appendix A to subpart N refers to “...developing a default prevention plan in accordance with §668.199(a)(1).” However, §668.199 does not exist. It appears that the Department’s intent was to refer to §668.217, entitled “*Default prevention plans.*” The single reference to §668.199(a)(1) should be corrected.

**Recommendation:** Revise Appendix A to subpart N of part 668 – Sample Default Prevention Plan as follows: “This appendix is provided as a sample plan for those institutions developing a default prevention plan in accordance with ~~§668.199(a)(1)~~ §668.217(a).”

## 11. Technical Correction - Delayed Disbursement Waiver for Study Abroad

**Cite:** §685.303(b)(4)(i)(B), (ii) and (iii) NPRM (page 37492)

**Comment:** In proposed §682.604(c)(5)(iii), the text clearly states that a school that is an eligible home institution certifying a loan for a study-abroad student who is enrolled in the first year of an undergraduate program of study and who has not previously received a Stafford, SLS, Direct Subsidized or Direct Unsubsidized loan, may be exempted from the delayed delivery requirement for that student if the school’s official CDR as calculated under either subpart M or subpart N is less than 5 percent for the single most recent fiscal year. NPRM (page 37490)

However, the construction of the corresponding text in §685.303(b)(4)(i)(B) is structured differently, referring to “...a Direct Loan Program cohort rate, FFEL cohort default rate, or weighted average cohort rate of less than 5 percent for the single most recent fiscal year for which data are available;...”, which is followed by amended text in paragraphs (ii) and (iii) of the same section to add “or subpart N” in regard to when components of paragraph (i) apply. **NPRM (page 37492)**

**Recommendation:** We request that the Department review the wording of paragraph §685.303(b)(4)(i)(B), and, if appropriate, clarify the language and align it with §682.604(c)(5)(iii) as follows:

(B) The school is an eligible home institution originating a loan to cover the cost of attendance in a study-abroad program and has a ~~Direct Loan Program cohort rate, FFEL cohort default rate, or weighted average cohort rate~~ cohort default rate, calculated under either subpart M or subpart N of 34 CFR part 668, of less than 5 percent for the single most recent fiscal year for which data are available.

**Other Technical Corrections (Due to integrating NPRM with GPO Compilation Updated July 1, 2008)**

1. The Team II Proposed Rule omitted “CFR” in the phrase “of 34 CFR part 668,” in §685.301(b)(6)(i)(B).
2. The Team II Proposed Rule language includes duplicate “plans”; i.e., “(ii) Review for the student borrower available repayment plan options including the standard repayment, extended repayment, graduated repayment, income contingent repayment **plans**, and income-based repayment **plans**, ...” (Emphasis added) in §685.304(b)(4)(ii).
3. The GPO July 1, 2008, Compilation could not follow the amendatory instruction as directed by two separate negotiated rulemaking teams published in Nov. 1, 2007, 72 FR 62011 and 72 FR 62032. Therefore both versions of §685.301 are included in the Compilation. Please review and revise as needed.